



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

DECISIONS FILED

FEBRUARY 7, 2025

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. NANCY E. SMITH

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

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

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**KA 22-01445**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEENAN LAVALLEY, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered November 1, 2021. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (two counts) and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3], [4]) and endangering the welfare of a child (§ 260.10 [1]), defendant contends that the conviction with respect to the sexual abuse counts, i.e., counts 2 and 4, is not supported by legally sufficient evidence because the People failed to establish the location and time of the crimes as set forth in the indictment and bill of particulars. Defendant failed to preserve his contention with respect to count 2 of the indictment because he did not raise it as a basis for a trial order of dismissal of that count (*see People v Hawkins*, 11 NY3d 484, 492 [2008]; *see also People v Cooley*, 220 AD3d 1189, 1189 [4th Dept 2023], *lv denied* 41 NY3d 964 [2024]). Further, defendant did not preserve it when he raised it for the first time in his CPL 330.30 motion to set aside the verdict (*see People v Lawrence*, 85 NY2d 1002, 1005 [1995]; *People v Green*, 46 AD3d 324, 324 [1st Dept 2007], *lv denied* 10 NY3d 840 [2008]). Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we reject defendant's contention that the evidence is legally insufficient to support the conviction of count 4 of the indictment (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In particular, the victim's testimony established that defendant, during the relevant time frame and while in Erie County, touched the five-year-old victim's vagina under her clothes with his hand. The precise address of where the crime occurred is not an element of the crime of sexual abuse in the first degree (*see People v Slingerland*,

101 AD3d 1265, 1266 [3d Dept 2012], *lv denied* 20 NY3d 1104 [2013])). Thus, where the relevant address is not a "material ingredient" of the crime, the People may prove an address different from that alleged in the indictment as supplemented by the bill of particulars (*People v Reid*, 218 AD3d 1273, 1276 [4th Dept 2023] [internal quotation marks omitted]).

We also reject defendant's contention that the verdict is against the weight of the evidence. " 'Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor' " (*People v Barnes*, 158 AD3d 1072, 1073 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018])). 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, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

As defendant correctly concedes, his contention that count 6, for endangering the welfare of a child, should be dismissed as duplicative of count 4 of the indictment is not preserved for our review (*see People v Hursh*, 191 AD3d 1453, 1454 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*).

We also reject defendant's contention that the sentence is unduly harsh and 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***

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**CAF 23-00526**

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

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IN THE MATTER OF JESSICA L. CROSS,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

BRIAN F. CROSS AND CHAD D. GABRUK, SR.,  
RESPONDENTS-RESPONDENTS.

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

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THOMAS L. PELYCH, HORNELL, FOR PETITIONER-APPELLANT.

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-RESPONDENT BRIAN F.  
CROSS.

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

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Appeals from an order of the Family Court, Lewis County (Daniel R. King, J.), entered March 27, 2023, in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, continued sole legal and physical custody of the subject children with respondent Brian F. Cross.

It is hereby ORDERED that said appeal by the attorney for the children is unanimously dismissed and the order is affirmed without costs.

Memorandum: Petitioner mother commenced this proceeding pursuant to Family Court Act article 6 seeking modification of a prior order, entered more than three years earlier, that, inter alia, maintained custody of the subject children with respondent Brian F. Cross, a nonparent. The children have resided with Cross since 2014. In her petition, the mother seeks custody of the children.

Following a trial, Family Court determined, inter alia, that Cross met his burden of establishing extraordinary circumstances and that it was in the children's best interests to remain with him. The mother and the attorney for the children (AFC) separately appeal, as limited by their briefs, from an order insofar as it maintained custody of the children with Cross. We affirm.

Preliminarily, we note that the notice of appeal filed by the AFC is untimely (see Family Ct Act § 1113; *Matter of Fraser v Fraser*, 185

AD3d 1444, 1444-1445 [4th Dept 2020]; *Matter of Liliana G. [Orena G.]*, 91 AD3d 1325, 1326 [4th Dept 2012]). Therefore, we must dismiss the AFC's appeal (see *Fraser*, 185 AD3d at 1445; *Liliana G.*, 91 AD3d at 1326), and we may not consider the AFC's contentions, except to the extent that they are also raised by the mother (see *Matter of Dinoff v Knechtel*, 224 AD3d 1288, 1291-1292 [4th Dept 2024]).

It is well settled that, "as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . . The nonparent has the burden of proving that extraordinary circumstances exist" (*Matter of Orlowski v Zwack*, 147 AD3d 1445, 1446 [4th Dept 2017] [internal quotation marks omitted]; see *Matter of Bennett v Jeffreys*, 40 NY2d 543, 545-549 [1976]; *Matter of Byler v Byler*, 185 AD3d 1403, 1404 [4th Dept 2020]). Examples of extraordinary circumstances include "prolonged separation, disruption of custody for a prolonged period of time and attachment of the child to the custodian . . . . , sibling separation . . . . , psychological bonding of the child to the custodian and potential harm to the child . . . . , the biological parent's abdication of parental rights and responsibilities . . . . and the child's poor relationship with the biological parent" (*Matter of Byler v Byler*, 207 AD3d 1072, 1073 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022]). No one factor should be viewed in isolation when determining whether extraordinary circumstances exist, but rather the "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*, 219 AD3d 1142, 1144 [4th Dept 2023]; see *Byler*, 207 AD3d at 1074-1075).

In evaluating whether there are extraordinary circumstances, we afford great deference to the determination of the trial court, based on "its superior ability to evaluate the credibility of the testifying witnesses," and its determination will not be disturbed "unless it lacks a sound and substantial basis in the record or is contrary to the weight of the credible evidence" (*Tuttle*, 219 AD3d at 1146).

Here, we conclude, contrary to the mother's sole contention, that Cross met his burden of establishing that extraordinary circumstances existed, based on, among other things, the mother's voluntary relinquishment of physical custody of the children, the prolonged subsequent separation, and the psychological attachment the children had to Cross (see *Byler*, 207 AD3d at 1074-1075; *Orlowski*, 147 AD3d at

1447; *Matter of Iris R. v Jose R.*, 74 AD3d 457, 457 [1st Dept 2010];  
*Matter of Michael G.B. v Angela L.B.*, 219 AD2d 289, 293-294 [4th Dept  
1996]).

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

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**CA 23-01295**

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, NOWAK, AND HANNAH, JJ.

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SHANNON O'CONNOR AND MARLENE O'CONNOR,  
PLAINTIFFS,

V

MEMORANDUM AND ORDER

S&S CONSTRUCTION OF WESTERN NEW YORK, INC.,  
DEFENDANT.

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S&S CONSTRUCTION OF WESTERN NEW YORK, INC.,  
THIRD-PARTY PLAINTIFF-RESPONDENT,

V

H.K. FREY & SONS, INC., THIRD-PARTY  
DEFENDANT-APPELLANT,  
AND ET AL., THIRD-PARTY DEFENDANT.

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KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF  
COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO, KAHANA FELD LLP (ADAM AMIRAULT  
OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered July 14, 2023. The order, among other things, denied the cross-motion of third-party defendant H.K. Frey & Sons, Inc., seeking summary judgment dismissing the second amended third-party complaint.

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

Memorandum: In this Labor Law and common-law negligence action, third-party defendant H.K. Frey & Sons, Inc. (Frey) appeals from an order that, among other things, denied Frey's cross-motion for summary judgment dismissing the second amended third-party complaint and granted in part the cross-motion for summary judgment on the second amended third-party complaint of defendant-third-party plaintiff, S&S Construction of Western New York, Inc. (S&S), by determining that Frey's insurance carrier (insurer) had a duty to defend S&S in the main action. While this appeal was being perfected, the third-party action proceeded to trial, and the jury returned a verdict in Frey's favor, dismissing the second amended third-party complaint. Frey submitted a proposed judgment to the County Clerk, however, it was

"returned for correction" via the NYSCEF system.

Frey's contention that Supreme Court improperly determined that the insurer had a duty to defend S&S against plaintiffs' claims in the main action is not properly before us. Frey has no direct interest in the controversy between the insurer and S&S, and the order to that extent has no binding effect on Frey or its rights. Therefore, Frey is not aggrieved by that part of the order (see generally CPLR 5511; *Carney v Carney*, 160 AD3d 218, 223 [4th Dept 2018]; *Matter of DeLong*, 89 AD2d 368, 370 [4th Dept 1982], lv denied 58 NY2d 606 [1983]).

Frey also contends that the court erred in denying its cross-motion and that the order should be modified to that extent despite the jury verdict, resulting in dismissal of the second amended third-party complaint. It is well settled that "[t]he right to appeal from an intermediate order terminates with the entry of a final judgment" (*Deuser v Precision Constr. & Dev., Inc.*, 149 AD3d 1540, 1540 [4th Dept 2017] [internal quotation marks omitted]; see *Matter of Aho*, 39 NY2d 241, 248 [1976]; see generally CPLR 5501 [a] [1]). Even if the judgment has not yet been entered in this case, we conclude that this appeal is moot. Courts are generally "precluded 'from considering questions which, although once live, have become moot by passage of time or change in circumstances' " (*City of New York v Maul*, 14 NY3d 499, 507 [2010], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). "[A]n appeal is moot unless an adjudication of the merits will result in immediate and practical consequences to the parties" (see *Coleman v Daines*, 19 NY3d 1087, 1090 [2012]; see *Maul*, 14 NY3d at 507; *Hearst Corp.*, 50 NY2d at 714). Here, because the second amended third-party complaint has already been dismissed pursuant to the jury's verdict, our decision will have no immediate or practical consequences to the parties (see *Matter of Sportsmen's Tavern LLC v New York State Liq. Auth.*, 195 AD3d 1557, 1558 [4th Dept 2021]), rendering any decision moot. Based on our determinations, we dismiss the appeal.

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

853

**KA 16-01899**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRYON K. JOHNSON, DEFENDANT-APPELLANT.

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DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 29, 2016. 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: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm.

Defendant's conviction arises from two incidents. Defendant was charged with, and ultimately convicted of, criminal possession of a weapon in the second degree based upon allegations that, on April 4, 2015, he was in possession of a weapon at a tavern. Defendant was also indicted on, and ultimately acquitted of, several charges relating to a shooting incident on April 18, 2015, which resulted in the death of one victim and injuries to another. The proof at trial established that cartridge casings found at the scene of both the April 18, 2015 shooting and the April 4, 2015 incident were discharged from the same firearm.

Defendant contends that Supreme Court erred in denying his renewed motion to sever the count arising from the first incident from the counts arising from the second incident. We reject that contention. " '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]). Here, the identity of the shooter during the August 18 incident was a key issue at trial, and the fact that defendant is alleged to have brandished the exact same handgun two weeks earlier was relevant to the issue of identity (*cf. People v Myers*, 22 NY3d 1010, 1011 [2013]; *see generally People v Brown*, 266 AD2d 863, 863 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999]; *People v Sheriff*, 234 AD2d 894, 895 [4th Dept 1996], *lv denied* 90 NY2d 910 [1997]). Unlike in *Myers*, here, there was proof that the same handgun was used in both offenses, which were committed within a very short time of each other (*see e.g. People v Wells*, 141 AD3d 1013, 1016 [3d Dept 2016], *lv denied* 28 NY3d 1189 [2017]).

As defendant properly concedes, his further contention that the court erred in allowing a law enforcement witness to identify him in surveillance footage and testify that defendant was in possession of a weapon is unpreserved inasmuch as defendant failed to object to the testimony on those grounds (*see generally People v Salone*, 188 AD3d 1742, 1743 [4th Dept 2020]; *People v Capers*, 94 AD3d 1475, 1476 [4th Dept 2012], *lv denied* 19 NY3d 971 [2012]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). Relatedly, defendant contends that he received ineffective assistance of counsel based upon defense counsel's failure to object to the testimony. We reject that contention. To prevail on a claim of ineffective assistance of counsel, "it is incumbent on [a] defendant to demonstrate the absence of strategic or other legitimate explanations for defense counsel's allegedly deficient conduct" (*People v Borcyk*, 184 AD3d 1183, 1184 [4th Dept 2020] [internal quotation marks omitted]; *see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Franklin*, 206 AD3d 1610, 1612 [4th Dept 2022], *lv denied* 38 NY3d 1150 [2022]). Here, defendant failed to demonstrate the absence of a legitimate explanation for defense counsel's failure to object to the allegedly improper testimony (*see People v Basedow*, 207 AD3d 1192, 1193 [4th Dept 2022]).

Defendant further contends that the court abused its discretion in denying defense counsel's request for an adjournment. Defendant's trial was initially scheduled for May 2016. However, upon the assignment of new counsel, defendant requested an adjournment. When the parties appeared in court, defense counsel consented to a new trial date of June 6, 2016. Given that consent, defendant waived his present contention that the court abused its discretion in denying his adjournment request (*see generally People v Howard*, 167 AD3d 1499, 1500 [4th Dept 2018], *lv denied* 32 NY3d 1205 [2019]; *People v Tilley*, 305 AD2d 1041, 1041 [4th Dept 2003], *lv denied* 100 NY2d 588 [2003]; *People v Forshey*, 298 AD2d 962, 963 [4th Dept 2002], *lv denied* 99 NY2d 558 [2002], *reconsideration denied* 100 NY2d 561 [2003]).

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

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

**866.1**

**CA 24-00445**

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

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PAULINE HOFFMAN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ST. BONAVENTURE UNIVERSITY, DEFENDANT-APPELLANT.

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BOND, SCHOENECK & KING, PLLC, BUFFALO (STEPHEN A. SHARKEY OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (LINDY KORN OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Cattaraugus County  
(Ronald D. Ploetz, A.J.), entered December 27, 2023. The order denied  
the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this employment discrimination  
action alleging that defendant did not select her for a position at  
defendant because of her sex and religious beliefs. Defendant appeals  
from an order denying its motion for summary judgment dismissing the  
amended complaint. We reverse.

Defendant submitted evidence that a committee consisting of 10  
members interviewed plaintiff and another candidate, and assessed the  
2 candidates based on a series of questions. The other candidate  
scored objectively higher than plaintiff, received more positive  
comments, and had more relevant experience. Defendant, therefore,  
rebutted plaintiff's prima facie case of discrimination by  
establishing that it had " 'legitimate, independent, and  
nondiscriminatory reasons to support its employment decision' "  
(*Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]; see *Spinello  
v Depository Trust & Clearing Corp.*, 147 AD3d 572, 572 [1st Dept  
2017]; *Layaou v Xerox Corp.*, 298 AD2d 921, 922 [4th Dept 2002]), thus  
shifting the burden to plaintiff to raise an issue of fact whether  
"the legitimate reasons proffered by defendant were merely a pretext  
for discrimination" (*Ferrante*, 90 NY2d at 629-630). We further  
conclude that plaintiff failed to raise a triable issue of fact  
"concerning either the falsity of defendant's proffered basis for the  
[employment decision] or that discrimination was more likely the real  
reason" (*id.* at 631; see *Morse v Wyoming County Community Hosp. &*

*Nursing Facility* [appeal No. 2], 305 AD2d 1028, 1030 [4th Dept 2003];  
*cf. Chiara v Town of New Castle*, 126 AD3d 111, 124 [2d Dept 2015], *lv*  
*dismissed* 26 NY3d 945 [2015]).

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

869

**KA 22-01560**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAYSHAWN BRUMFIELD, DEFENDANT-APPELLANT.

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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.

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Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 30, 2022. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the facts, the indictment is dismissed, and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]), defendant contends, inter alia, that the verdict is against the weight of the evidence. We agree and therefore reverse the judgment and dismiss the indictment.

On the night in question, defendant was sitting in the rear passenger's side seat of a vehicle being operated by another person (driver). Two other people were also present in the vehicle as passengers. Eventually, another vehicle pulled up behind the driver's vehicle and opened fire. Shots also were fired from the driver's vehicle towards the other vehicle. During the shooting, the other person sitting in the rear of the driver's vehicle accidentally shot the front seat passenger in the head, causing her death. After the shooting, when the police responded to the scene, they recovered, inter alia, multiple .22 caliber casings. Testimony at trial established that the .22 caliber casings could have come from either a semiautomatic pistol or rifle. The police never recovered any firearm in connection with the shooting.

A review of the weight of the evidence requires us to first determine whether an acquittal would have been unreasonable (see

*People v Danielson*, 9 NY3d 342, 348 [2007])). If we determine that an acquittal would not have been unreasonable, then we "must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions" (*id.*). We thus " 'serve, in effect, as a second jury' with the power to 'independently assess all of the proof' " (*People v Gonzalez*, 174 AD3d 1542, 1544 [4th Dept 2019], quoting *People v Delamota*, 18 NY3d 107, 116-117 [2011])). In conducting a weight of the evidence review, we view the evidence in light of the elements of the crimes as charged to the jury (see *Danielson*, 9 NY3d at 349).

As relevant here, "[a] person is guilty of criminal possession of a weapon in the second degree when[,] . . . with intent to use the same unlawfully against another, such person . . . possesses a loaded firearm" (Penal Law § 265.03 [1] [b])). Additionally, "[a] person is guilty of criminal possession of a weapon in the second degree when . . . such person possesses any loaded firearm" outside of their "home or place of business" (§ 265.03 [3])). As further relevant here, a " '[f]irearm' means . . . any pistol or revolver[,] or . . . a rifle having one or more barrels less than [16] inches in length" (§ 265.00 [3] [a], [c])). The Penal Law also more generally describes a "firearm" as including "any . . . weapon . . . containing any component that provides housing or a structure designed to hold or integrate any fire control component that is designed to or may readily be converted to expel a projectile by action of explosive" (§ 265.00 [3] [f])).

Here, however, the indictment and jury charge expressly limited the People's theory to allege only that, at the time in question, defendant possessed either a "pistol or revolver"—i.e., the People did not charge defendant on the theory that, at the time in question, he possessed a "rifle" or the more generally-defined type of firearm. Where the prosecution is limited by the indictment and jury charge "to a certain theory or theories, the court must hold the prosecution to such narrower theory or theories" (*People v Faison*, 198 AD3d 1263, 1264 [4th Dept 2021] [internal quotation marks omitted]; see generally *Danielson*, 9 NY3d at 349). We also note that, at trial, the People conceded that there was no evidence that defendant ever possessed a "revolver." Consequently, to find defendant guilty of both counts of criminal possession of a weapon in the second degree, the jury was required to find, beyond a reasonable doubt, that defendant possessed a loaded *pistol*. Evidence that defendant possessed another type of firearm at the time in question would not warrant finding defendant guilty of the crimes as alleged in the indictment and charged to the jury (see *Danielson*, 9 NY3d at 349; *Faison*, 198 AD3d at 1264).

We conclude that an acquittal would not have been unreasonable under the circumstances. Given that no gun was recovered in connection with the underlying events and the absence of any evidence directly establishing that defendant possessed a *pistol* at the relevant time, the jury could have acquitted defendant by crediting the testimony of the driver that she did not see any weapons in the vehicle at the time of the shooting. After performing an independent review of the trial evidence, we also conclude that the jury was not

justified in finding defendant guilty of the charged crimes (see generally *Danielson*, 9 NY3d at 348-349). The evidence at trial established, beyond a reasonable doubt, that defendant was present in the vehicle and possessed some type of firearm at the time of the shooting. With respect to the latter issue, the evidence contained video footage showing muzzle flashes emanating from the part of the vehicle where defendant was sitting and he stated to the victim's mother that "*his bullet* didn't kill" the victim (emphasis added). However, we conclude that the evidence did not establish beyond a reasonable doubt that he possessed a *pistol* at that time.

As noted above, the indictment and the jury charge specifically narrowed the theory of the case to require the People to establish that defendant possessed a loaded *pistol* at the time in question. Here, the evidence permitted, at best, mere speculation that the firearm defendant allegedly possessed was a *pistol*, and not a rifle. Video footage of the shooting shows multiple muzzle flashes indicative of gunfire from the vehicle—it does not directly depict the firearm that is firing the shots. Moreover, the angle of the video does not permit an observer to make any reasonable inferences about what type of firearm is being fired at the relevant time. Nothing in the video establishes that the firearm being fired was a *pistol* rather than another type of firearm.

Additionally, the driver's testimony provided no affirmative evidence, either direct or circumstantial, to establish that defendant possessed any loaded firearm at the time in question, let alone that he specifically possessed a *pistol* as opposed to some other type of firearm. Indeed, we note that, at times she testified that she never saw a rifle in the car, at other times the driver testified that she never saw *any weapons* in the car; furthermore at yet other times she testified that she never looked in the back of the car at the relevant time to see what defendant was doing. In short, the driver's testimony was wholly equivocal on what type of firearm, if any, that defendant possessed. Additionally, the ballistics evidence introduced at trial also failed to establish whether defendant possessed a *pistol* beyond a reasonable doubt. That evidence merely established that the .22 caliber casings recovered from the scene could have come from one of many different types of semiautomatic pistols or rifles. It is impossible from that testimony to do anything but speculate that the casings came from a *pistol*, rather than a different type of loaded firearm. The ballistics evidence, even when coupled with the witness testimony and video evidence, was entirely equivocal on the type of firearm that defendant purportedly possessed.

Although we are mindful of our obligation to "give great deference to a jury's credibility determinations," in this case "the jury was not called upon to make credibility determinations" on the critical issue of the type of firearm defendant allegedly possessed (*People v Carter*, 158 AD3d 1105, 1112 [4th Dept 2018]). Indeed, "almost all of the relevant facts adduced at trial [with respect to that issue] were [either] undisputed [or clearly established]. Instead, [on the issue of the type of firearm allegedly possessed by defendant], the jury was asked to make inferences based on the

evidence, a task that we are no less qualified to make" (*id.*). Ultimately, none of the evidence at trial could fairly exclude the possibility that defendant possessed a loaded firearm other than a pistol. Therefore, the jury could not reasonably conclude, beyond a reasonable doubt, that he possessed a pistol. Any inference to that effect would be nothing more than a guess.

In sum, based on our independent review of the evidence, and viewing the evidence in light of the elements of the crimes as charged to the jury (see *Danielson*, 9 NY3d at 349), we conclude that the verdict is against the weight of the evidence and cannot stand (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). In light of our determination, defendant's remaining contentions are academic.

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

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**KA 23-01131**

PRESENT: SMITH, J.P., BANNISTER, MONTOR, GREENWOOD, AND KEANE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DANIEL BOLDORFF, DEFENDANT-APPELLANT.

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NATHANIEL L. BARONE, II, PUBLIC DEFENDER, MAYVILLE (HEATHER BURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (AMBER L. PAYNE OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Chautauqua County Court (David W. Foley, J.), entered June 29, 2023. The order, insofar as appealed from, designated defendant a sexually violent offender pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the designation of defendant as a sexually violent offender is vacated and the matter is remitted to Chautauqua County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order insofar as it designated him a sexually violent offender under the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Due to the designation, which is based on a felony conviction in Pennsylvania requiring defendant to register as a sex offender in that state, defendant is subject to lifetime registration as a sex offender in New York. The designation was made pursuant to the second disjunctive clause of Correction Law § 168-a (3) (b), which defines a sexually violent offense as including a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred." Although defendant concedes that he qualifies as a sexually violent offender under that foreign registration clause, he contends that the provision is unconstitutional on its face and as applied to him under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution (US Const, 14th Amend, § 1), inasmuch as his out-of-state felony offenses were nonviolent in nature. Defendant further contends that the foreign registration clause violates the Privileges and Immunities Clause of the Federal Constitution (US Const, art IV, § 2).

In 2003, defendant was convicted in Pennsylvania upon a jury verdict of, *inter alia*, statutory sexual assault (18 Pa Cons Stat former § 3122.1), aggravated indecent assault (former § 3125 [8]), and

involuntary deviate sexual intercourse (former § 3123 [a] [7])). According to the case summary prepared by the Board of Examiners of Sex Offenders (Board) in New York, the factual allegations underlying the Pennsylvania conviction were that defendant, from the summer of 1995 until the spring of 2000, engaged in oral and other sexual conduct with a child.

With respect to defendant's as-applied substantive due process claim, we conclude, based on the reasoning set forth by the plurality in *People v Malloy* (228 AD3d 1284, 1287-1291 [4th Dept 2024]), that there is no rational basis for designating defendant a sexually violent offender solely on the ground of his conviction of the Pennsylvania felony sex offenses requiring him to register as a sex offender in that jurisdiction (see *People v Brightman*, 230 AD3d 1527, 1529-1531 [4th Dept 2024]; *People v Zellefrow*, 229 AD3d 1069, 1070-1071 [4th Dept 2024]; *People v Cromwell*, 229 AD3d 1176, 1177-1178 [4th Dept 2024]; cf. *People v Grzegorzewski*, 232 AD3d 1203, 1204-1205 [4th Dept 2024]). Defendant has therefore met his burden of showing that the imposition of the sexually violent offender designation under the second disjunctive clause of Correction Law § 168-a (3) (b), as applied to him, violates his constitutional right to substantive due process. Consequently, we reverse the order insofar as appealed from and vacate that designation.

However, we note that the issue whether the essential elements of any of the Pennsylvania felonies were the statutory equivalent of a sexually violent offense in New York under the essential elements test set out in the first disjunctive clause of Correction Law § 168-a (3) (b) was never raised before County Court. We decline to consider that alternative basis for affirmance, sua sponte, for the first time on appeal (see generally *Misicki v Caradonna*, 12 NY3d 511, 519 [2009]). We therefore remit to County Court to consider whether any of the Pennsylvania felonies includes all of the essential elements of a sexually violent offense set forth in Correction Law § 168-a (3) (a) (see *People v Weber*, 40 NY3d 206, 211-212 [2023]; *Grzegorzewski*, 232 AD3d at 1206).

We have considered defendant's remaining constitutional challenges to his designation as a sexually violent offender under the foreign registration clause and conclude that they lack merit (see *Malloy*, 228 AD3d at 1291-1292).

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

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**KA 22-01437**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ERRICK GUERRERO, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 27, 2022. The judgment convicted defendant upon a jury verdict of burglary in the first degree (two counts) and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]) and two counts of burglary in the first degree (§ 140.30 [2], [3]), arising out of a home invasion robbery committed when defendant was 17 years old. We affirm.

Defendant contends that County Court (Bogan, A.J.) erred in granting the People's motion pursuant to CPL 722.23 (1) (b) to prevent removal of defendant's case to Family Court. We reject that contention. In 2017, the New York State Legislature enacted the Raise the Age Law, which defines a person who was charged with a felony committed on or after October 1, 2018 when the person was 16 years old, or committed on or after October 1, 2019 when the person was 17 years old, as an " '[a]dolescent offender' " (CPL 1.20 [44]; see Penal Law § 30.00 [1], [3] [a]). The Raise the Age Law created in each county a youth part of the superior court to make appropriate determinations with respect to the cases of, inter alia, adolescent offenders (see CPL 722.10 [1]). Where, as here, an adolescent offender is charged with a violent felony as defined in Penal Law § 70.02, within six calendar days of the adolescent offender's arraignment, the youth part of superior court is required to review the accusatory instrument and determine whether the prosecutor has proven by a preponderance of the evidence that the adolescent offender caused "significant physical injury" to someone other than a

participant in the crime, displayed a "firearm, shotgun, rifle or deadly weapon as defined in the penal law" in furtherance of the crime, or unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact as defined in section 130.00 of the Penal Law (CPL 722.23 [2] [a], [c]). If none of those factors exist, the matter must be transferred to Family Court unless the prosecutor moves to prevent the transfer of the action to Family Court and establishes that extraordinary circumstances exist (see CPL 722.23 [1] [d]). While the term "extraordinary circumstances" is not defined in the statute, the legislative history for CPL 722.23 reveals that, in making an extraordinary circumstances determination, courts should "look at all the circumstances of the case, as well as . . . all of the circumstances of the young person," including both mitigating and aggravating factors (NY Assembly Debate on 2017 NY Assembly Bill A3009C, April 8, 2017 at 39; see *id.* at 40, 65). That approach takes into consideration all of the circumstances, and ensures that "every case is going to be looked at by the judge individually, to determine what kind of factors . . . there are in the case, to determine" whether there are extraordinary circumstances (*id.* at 83-84; see *id.* at 85, 102). The court's determination must be made "in writing or on the record within five days of the conclusion of the hearing or submission by the defense, whichever is later," and must include "findings of fact and to the extent practicable conclusions of law" (CPL 722.23 [1] [e]).

Initially, contrary to defendant's contention, the court's determination granting the prosecutor's motion to prevent the removal of the action complied with the requirements of CPL 722.23 (1) (e) inasmuch as it was made on the record and contained "findings of fact and to the extent practicable conclusions of law."

Contrary to defendant's further contention, we conclude that the court did not abuse its discretion in granting the prosecutor's motion to prevent removal inasmuch as the prosecutor established that there are extraordinary circumstances. As an initial matter, we agree with defendant that defendant's prior adjudications as a juvenile delinquent or any evidence obtained as a result of those proceedings cannot be used in determining whether to grant the People's motion (Family Ct Act § 381.2 [2]; *Green v Montgomery*, 95 NY2d 693, 697 [2001]; see *People v C.J.*, 73 Misc 3d 1233[A], 2021 NY Slip Op 51227[U], \*4-5 [Nassau County Ct 2021]; *People v M.M.*, 64 Misc 3d 259, 269-271 [Nassau County Ct 2019]). Nevertheless, although it is impermissible to raise any issue related to the adjudication or evidence obtained therefrom, it is still permissible to raise " 'the illegal or immoral acts underlying such adjudications' " (*People v Gray*, 84 NY2d 709, 712 [1995]; see generally *People v Coggins*, 198 AD3d 1297, 1300 [4th Dept 2021], *lv denied* 38 NY3d 1032 [2022]; *People v Updyke*, 133 AD3d 1063, 1064 [3d Dept 2015]).

Here, there is no dispute that defendant was charged with participating in a violent crime, i.e., a home invasion robbery involving weapons and resulting in injuries to the victim. Moreover, despite the various services and programs provided to defendant over the last five years while defendant had been involved in the criminal

justice system, defendant has made no appreciable positive response and continues to engage in escalating criminal behavior. Thus, we conclude that, under the totality of the circumstances, and taking into account the mitigating factors and the substantial aggravating factors, the court did not abuse its discretion in determining that extraordinary circumstances exist warranting that this case remain in the youth part (see *People v J.K.*, 78 Misc 3d 1221[A], 2023 NY Slip Op 503212[U], \*2-3 [Youth Part, Erie County 2023]; *People v P.P.*, 78 Misc 3d 1222[A], 2023 NY Slip Op 50324[U], \*3-4 [Youth Part, Erie County 2023]; *People v T.P.*, 73 Misc 3d 1215[A], 2021 NY Slip Op 51048[U], \*3-4 [Nassau County Ct 2021]).

Defendant further contends that the court erred in denying defendant's motion to strike the People's certificate of compliance and dismiss the indictment based on the prosecutor's alleged cumulative errors and omissions that rendered the certificate of compliance invalid. Defendant's contention is unpreserved for our review inasmuch as defendant did not move, in writing, to invalidate the certificate of compliance or for dismissal of the indictment on that ground (see CPL 210.20 [1] [g]; 210.45 [1]; *People v Elmore*, 211 AD3d 1536, 1538 [4th Dept 2022], *lv denied* 42 NY3d 938 [2024]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Defendant's contention that the evidence is legally insufficient to establish his guilt of burglary in the first degree under Penal Law § 140.30 (2) because the victim did not sustain a physical injury is unpreserved for appellate review inasmuch as it was not raised with specificity in his motion for a trial order of dismissal (see CPL 470.05 [2]; *People v Cruz*, 137 AD3d 1158, 1159 [2d Dept 2016], *lv denied* 28 NY3d 970 [2016]; *People v Williams*, 125 AD3d 1300, 1301 [4th Dept 2015], *lv denied* 26 NY3d 937 [2015]). We reject defendant's further contentions that the evidence is legally insufficient to establish his identity as one of the perpetrators and the unlawful entry element of the burglary charges. The unlawful entry into the house was established by the trial testimony that defendant and his accomplices, all wearing masks, entered the victim's home and immediately confronted the victim with weapons and demanded money (see *People v Mosley*, 200 AD3d 1664, 1665-1666 [4th Dept 2021]). Moreover, two of defendant's accomplices testified at trial that they went with defendant and a fourth person to the victim's home to rob the victim and their testimony placed defendant at the scene of the crimes. Additionally, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they do not warrant modification or reversal of the judgment.

All concur except MONTOUR, J., who dissents and votes to reverse in accordance with the following memorandum:

Inasmuch as I conclude that County Court (Bogan, A.J.) abused its discretion as a matter of law in granting the People's motion pursuant to CPL 722.23 (1) (b) to prevent removal of defendant's case to Family Court and would therefore reverse the judgment, deny the People's motion, and remit the matter to County Court for further proceedings in accordance with CPL 722.23, I dissent.

As relevant here, under the Raise the Age Law, in cases involving an "adolescent offender" (AO) (CPL 1.20 [44]; see Penal Law § 30.00 [1], [3] [a]), such as defendant, who is charged with a violent felony as defined in Penal Law § 70.02 (see CPL 722.23 [2] [a]) but where none of the factors set forth in CPL 722.23 (2) (c) are present, "the court shall order the removal of the action to the family court . . . unless, within thirty calendar days of such arraignment, the district attorney makes a motion to prevent the removal of the action" (CPL 722.23 [1] [a]). "The court shall deny the motion to prevent the removal of the action in youth part unless the court makes a determination upon such motion by the district attorney that extraordinary circumstances exist that should prevent the transfer of the action to family court" (CPL 722.23 [1] [d]).

The Legislature did not define the term "extraordinary circumstances." As the Court of Appeals has repeatedly instructed, "[w]hen presented with a question of statutory interpretation, a court's primary consideration is to ascertain and give effect to the intention of the Legislature" (*Matter of Walsh v New York State Comptroller*, 34 NY3d 520, 524 [2019] [internal quotation marks omitted]; see *Nadkos, Inc. v Preferred Contrs. Ins. Co. Risk Retention Group LLC*, 34 NY3d 1, 7 [2019]). The Court has "long held that the statutory text is the clearest indicator of legislative intent, and that a court should construe unambiguous language to give effect to its plain meaning" (*Walsh*, 34 NY3d at 524 [internal quotation marks omitted]). "In the absence of a statutory definition, [the Court of Appeals] construe[s] words of ordinary import with their usual and commonly understood meaning, and in that connection ha[s] regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase" (*id.* [internal quotation marks omitted]; see *People v Williams*, 37 NY3d 314, 317-318 [2021]; *People v Holz*, 35 NY3d 55, 59 [2020]; *Nadkos, Inc.*, 34 NY3d at 7; *Yaniveth R. v LTD Realty Co.*, 27 NY3d 186, 192 [2016]).

Inasmuch as the Raise the Age legislation fails to define what would constitute "extraordinary circumstances"—with good reason, inasmuch as it would be impossible to delineate every scenario in which extraordinary circumstances should or should not be found—here, it makes sense to use the "useful guideposts" of Black's Law Dictionary and the Merriam-Webster Dictionary in defining the relevant term. The term "extraordinary" is defined as "[b]eyond what is usual, customary, regular, or common" (Black's Law Dictionary [12th ed 2024], extraordinary), or "going beyond what is usual, regular, or customary" and "exceptional to a very marked extent" (Merriam-Webster.com Dictionary, extraordinary [<https://www.merriam-webster.com/dictionary/extraordinary>]). The legislative history of the Raise the Age Law, which "is an important aid in understanding the

meaning of its words" (*Matter of Hernandez v Barrios-Paoli*, 93 NY2d 781, 786 [1999]), comports with the commonly understood meaning of the term "extraordinary circumstances." "New York State Assembly members debating the Raise the Age legislation indicated that the extraordinary circumstances requirement was intended to be a 'high standard' for the District Attorney to meet, and denials of transfers to Family Court 'should be extremely rare' " (*People v M.M.*, 83 Misc 3d 1221[A], 2024 NY Slip Op 50776[U], \*2 [Youth Part, Erie County 2024], quoting NY Assembly Debate on 2017 NY Assembly Bill A3009C, Apr. 8, 2017 at 39 [hereafter, Assembly Debate]). "[T]he People would satisfy the 'extraordinary circumstances' standard where 'highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court' " (*People v T.P.*, 73 Misc 3d 1215[A], 2021 NY Slip Op 51048[U], \*3 [Nassau County Ct 2021], quoting Assembly Debate at 39). Although the Raise the Age legislation, which was included in the Fiscal Year 2018 Budget, does not appear to have had an Assembly sponsor (see generally New York State Division of the Budget, The Budget Process, <https://www.budget.ny.gov/citizen/process/index.html> [last accessed Jan. 21, 2025]), during the debate of the budget in the Assembly, questions regarding the Raise the Age legislation were addressed, primarily, to Assemblymember Joseph Lentol. When asked to "share . . . some examples of extraordinary circumstances that might lead to a denial of transfer to family court," the Assemblymember responded: "Yeah, I think it's difficult to give firm examples. Since this a new concept, though, we want to have a - - at least a little bit of an understanding of what might be involved here. Outside of the list involving the most serious felony conduct, all cases will be presumptively transferred. The judge must look at all the circumstances of the case, as well as the circumstances - - all of the circumstances of the young person. And aggravating factors may be proven, but the court must - - court must also consider individual mitigating circumstances, as well" (Assembly Debate at 39-40). According to the Assemblymember, "[a]ggravating factors that may involve extraordinary circumstances might include proof of a series of serious crimes committed by the defendant over the course of many days. Did the defendant act in an especially cruel and heinous manner? Was the defendant the ringleader who threatened and coerced reluctant youths to participate in the crimes? Those are all things that have to be considered in determining whether aggravating factors exist" (*id.* at 40).

Here, the People moved to prevent removal of the action to Family Court pursuant to CPL 722.23 (1) (a), arguing that the dangerous nature of defendant's conduct constituted "extraordinary circumstances" warranting prosecution of the action in County Court. In addition, the People asserted that removal of the action to Family Court would "directly affect the confidence of the public in the criminal justice system," and that defendant—who had eight prior Family Court appearance tickets and two prior adjudications resulting in probation—was not amenable to services that would be available in Family Court. In response, defendant argued that there were no extraordinary circumstances, and asserted that his mental health

diagnoses were a mitigating factor that weighed in favor of removal. The court determined that the People had established the existence of extraordinary circumstances and granted the motion to prevent removal.

I agree with the majority that the court was prohibited from considering defendant's two adjudications as a juvenile delinquent—let alone those instances in which an "appearance ticket" was issued and which did not result in an adjudication at all—in determining whether the extraordinary circumstances threshold has been met (see generally *Green v Montgomery*, 95 NY2d 693, 697 [2001]; *People v Campbell*, 98 AD3d 5, 12 [2d Dept 2012], lv denied 20 NY3d 853 [2012]; *People v J.A.D.*, 70 Misc 3d 1222[A], 2021 NY Slip Op 50189[U], \*5-6 [Nassau County Ct 2021]). The majority goes on to note that the court may, however, consider " 'the illegal or immoral acts underlying such adjudications' " (*People v Gray*, 84 NY2d 709, 712 [1995]; see generally *People v Coggins*, 198 AD3d 1297, 1300 [4th Dept 2021], lv denied 38 NY3d 1032 [2022]; *People v Updyke*, 133 AD3d 1063, 1064 [3d Dept 2015]). Here, however, the People did not present any evidence regarding the nature of the underlying acts that resulted in the adjudications as a juvenile delinquent. Rather, the People presented evidence of defendant's conduct after appearing in Family Court in the juvenile delinquency proceedings, including his success or failure on probation, as well as the services that he received through Family Court. Family Court Act § 381.2 "expressly prohibits the use of the AO's juvenile delinquency history and records" against the AO in any other court (*J.A.D.*, 2021 NY Slip Op 50189[U], \*5). Thus, to the extent that the majority considers defendant's response to the treatment that he received while participating in Family Court after being adjudicated a juvenile delinquent, I submit that such consideration is improper. Even assuming, arguendo, that we may consider defendant's history in Family Court to support the People's assertion that defendant was not amenable to the heightened services available, I conclude that the record does not support that assertion. During the hearing on the People's motion, the People presented evidence that the "last time [defendant] appeared in Youth Part," it was his mother who "declined services"—not defendant.

I further disagree with the majority's conclusion that the nature of the offense—the sole remaining basis upon which the court granted the People's motion—is sufficient to establish extraordinary circumstances. As the majority notes, defendant participated in a violent crime, which is exactly the type of crime the Legislature intended to address in the Raise the Age legislation (see CPL 722.23 [2] [a]). Thus, it cannot be that the violent nature of the crime, standing alone, is an extraordinary circumstance sufficient to warrant denial of removal of the proceeding to Family Court. At the time the court decided the People's motion, defendant was not alleged to have been a ringleader in the crime, to have played a significant non-bystander role in the crime, or to have personally brandished a weapon or caused injury to the victim (see *T.P.*, 2021 NY Slip Op 51048[U], \*3-4; *People v J.P.*, 63 Misc 3d 635, 651 [Sup Ct, Bronx County 2019]; cf. *People v B.H.*, 83 Misc 3d 1286[A], 2024 NY Slip Op 51224[U], \*1-2 [Youth Part, Erie County 2024]; *People v Y.L.*, 64 Misc 3d 664, 666-670 [Monroe County Ct 2019]). Based upon the majority's conclusion that

the facts and circumstances of this case warrant a finding of extraordinary circumstances, one could question what set of facts would need to be presented that would not justify granting a motion to deny removal to Family Court under CPL 722.23 (1).

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

898

**CA 23-01747**

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

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LORI A. ELLIOTT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ROBERT A. ELLIOTT, DEFENDANT-RESPONDENT.

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LAW OFFICE OF FRANK BERETTA, VICTOR (FRANK J. BERETTA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FERN S. ADELSTEIN, OLEAN, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Cattaraugus County (Ronald D. Ploetz, A.J.), entered May 19, 2023. 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.

Memorandum: In this action to rescind a separation agreement that was incorporated but not merged in the parties' judgment of divorce, plaintiff appeals from an order, entered after a fact-finding hearing, that granted defendant's motion for summary judgment dismissing the complaint. We affirm.

Plaintiff contends that Supreme Court erred in granting the motion inasmuch as the separation agreement must be rescinded because defendant violated Domestic Relations Law § 236 (B) (4) by failing to engage in financial disclosure prior to entering into the agreement. We reject that contention. Domestic Relations Law § 236 (B) (4) compels financial disclosure in matrimonial actions only when "alimony, maintenance or support is in issue." Here, plaintiff did not place those matters in issue in the divorce action; indeed, she executed a separation agreement that expressly stated that she was self-supporting and waived any claim to spousal maintenance or support.

Plaintiff further contends that the court erred in granting the motion inasmuch as she was unrepresented and was not provided with a copy of the maintenance guidelines as required by Domestic Relations Law § 236 (B) (6) (g) and, therefore, was unaware of what she was giving up when she signed the separation agreement. With respect to post-divorce maintenance awards, Domestic Relations Law § 236 (B) (6) (g) provides that, "[w]here either or both parties are unrepresented, the court shall not enter a maintenance order or

judgment unless the court informs the unrepresented party or parties of the post-divorce maintenance guideline obligation." Plaintiff's claim is belied by the record. Plaintiff's complaint in the divorce action states that plaintiff was "not seeking maintenance as payee as described in the Notice of Guideline Maintenance" (emphasis added). Further, the court's findings of fact in the divorce action state that the court informed the parties of the maintenance guideline obligation pursuant to section 236 (B) (6), and a copy of the Notice of Guideline Maintenance was included in the clerk's file (see generally *Fontanetta v John Doe 1*, 73 AD3d 78, 84-85 [2d Dept 2010]).

Plaintiff contends that the court erred in granting the motion inasmuch as the separation agreement was manifestly unfair. We reject that contention. "Marital settlement agreements are judicially favored and are not to be easily set aside" (*Simkin v Blank*, 19 NY3d 46, 52 [2012]; see *Christian v Christian*, 42 NY2d 63, 71-72 [1977]). "Although courts may examine the terms of the agreement as well as the surrounding circumstances to ascertain whether there has been overreaching, the general rule is that '[i]f the execution of the agreement . . . be fair, no further inquiry will be made' " (*Levine v Levine*, 56 NY2d 42, 47 [1982], quoting *Christian*, 42 NY2d at 73). Nevertheless, "[a] separation agreement may be vacated if it is manifestly unfair to one party because of the other's overreaching or where its terms are unconscionable, or there exists fraud, collusion, mistake, or accident" (*Tchorzewski v Tchorzewski*, 278 AD2d 869, 870 [4th Dept 2000] [internal quotation marks omitted]).

Here, defendant met his initial burden on the motion by demonstrating that the separation agreement was "not unfair on its face" (*Logiudice v Logiudice*, 67 AD3d 544, 545 [1st Dept 2009]; see *Christian*, 42 NY2d at 71; see generally *McFarland v McFarland*, 70 NY2d 916, 918 [1987]), and plaintiff failed to raise a triable issue of fact in opposition (see generally *Sleiman v Sleiman*, 222 AD3d 1333, 1335 [4th Dept 2023]). Plaintiff contends that she lacked the education and experience necessary to evaluate the terms of the separation agreement. The only evidence in the record of plaintiff's education or experience is her testimony that she was taking college classes but did not finish her course of study. That evidence was insufficient to overcome the presumption that she "read and understood the document which [s]he signed" (*Marine Midland Bank v Idar Gem Distribs.*, 133 AD2d 525, 526 [4th Dept 1987]; see *ABR Wholesalers, Inc. v King*, 172 AD3d 1929, 1931 [4th Dept 2019]). Plaintiff's contention that she did not have an opportunity to review the separation agreement prior to signing is belied by the record. Indeed, the separation agreement contains a handwritten amendment, which plaintiff testified was added to the separation agreement, at her request, after it had been drafted.

Plaintiff further contends that the separation agreement must be set aside because she was not in possession of all material facts at the time it was entered into. However, mere nondisclosure of financial circumstances is not sufficient to justify setting aside an agreement unless there is a showing that the nondisclosure resulted in an inequitable or unfair division of the marital property (see

*Arquette v Arquette*, 177 AD2d 956, 956 [4th Dept 1991]; see also *Dayton v Dayton*, 175 AD2d 427, 428 [3d Dept 1991], lv denied 78 NY2d 863 [1991]; *Martin v Martin*, 74 AD2d 419, 423-424 [4th Dept 1980]). Therefore, it is necessary to "examine the terms of the agreement as well as the surrounding circumstances to ascertain whether there has been overreaching" (*Levine*, 56 NY2d at 47). Here, even assuming, arguendo, that plaintiff raised an issue of fact whether she "was possessed of all material facts" at the time she signed the separation agreement, we conclude that summary judgment was appropriate inasmuch as nondisclosure is but one factor to consider in determining whether the separation agreement was unfair or inequitable (see e.g. *Christian*, 42 NY2d at 72-73; *Tuzzolino v Tuzzolino*, 156 AD3d 1402, 1403 [4th Dept 2017]; *Tchorzewski*, 278 AD2d at 870-871; *Battista v Battista*, 105 AD2d 898, 899 [3d Dept 1984]). To the extent that plaintiff more specifically contends that there was nondisclosure regarding the value of defendant's retirement account, we likewise conclude that the alleged nondisclosure did not render the separation agreement inequitable (see *Arquette v Arquette*, 198 AD2d 858, 858 [4th Dept 1993]). Although plaintiff may have given more than legally required, the separation agreement, considered in its totality, does not shock the conscience (see *Campbell v Campbell*, 208 AD3d 1050, 1052 [4th Dept 2022]; *Lounsbury v Lounsbury*, 300 AD2d 812, 814 [3d Dept 2002]; see generally *Levine*, 56 NY2d at 47).

To the extent that plaintiff contends that the separation agreement is unconscionable because she has relinquished her possessory rights in the marital residence, we likewise conclude that the terms of the agreement regarding the marital real estate are not such that would shock the conscience and confound the judgment of any person of common sense (see *Christian*, 42 NY2d at 71; cf. *Amoia v Amoia*, 222 AD3d 1386, 1388 [4th Dept 2023]). Although the agreement made defendant the "primary resident" of the marital home, it did not give him exclusive possession of the property or even of the marital home itself. Thus, there is no merit to plaintiff's contention that she gave up possessory rights to the residence. Nor is there merit to plaintiff's claim that the marital home could be sold only at defendant's discretion. The separation agreement did not purport to limit the parties' ability to sell the property and, regardless of the type of co-ownership the parties now share, each is capable of bringing a partition action against the other in the event that one wants to sell their portion of the property (see RPAPL 901; *Herrington v Herrington*, 81 AD2d 679, 679 [3d Dept 1981], affd 56 NY2d 580 [1982]; *Bastians v Bastians*, 36 AD2d 1020, 1020 [4th Dept 1971]). Further, the parties agreed that plaintiff would be permitted to access the property on notice to defendant and that defendant would not permit anyone who was not a relative to live in the home without plaintiff's permission. Plaintiff also retained possession and use of the barn on the marital property.

We have considered the remainder of plaintiff's contentions and find them to be unpreserved or without merit.

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

910

**CAF 24-00241**

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

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IN THE MATTER OF JASON T. PILKENTON,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

THEA SOPHIA P. SCIPIONE,  
RESPONDENT-RESPONDENT.

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JEFFREY L. TURNER, ESQ., ATTORNEY FOR  
THE CHILD, APPELLANT.

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JEFFREY L. TURNER, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO  
SE.

THEA SOPHIA P. SCIPIONE, RESPONDENT-RESPONDENT PRO SE.

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Appeal from an order of the Family Court, Monroe County (Julie Anne Gordon, R.), entered July 27, 2023, in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed the modification petition of petitioner.

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, the Attorney for the Child (AFC) appeals from an order that, in relevant part, dismissed petitioner father's petition seeking modification of the parties' custody arrangement. The AFC contends that Family Court erred in determining that the father failed to establish the requisite change in circumstances. The AFC further contends that it is in the child's best interests to award primary residency to the father. Assuming, arguendo, that the AFC has authority to pursue an appeal on behalf of the child under the circumstances of this case (see *Matter of Muriel v Muriel*, 228 AD3d 1345, 1346 [4th Dept 2024]; *Matter of Kessler v Fancher*, 112 AD3d 1323, 1324 [4th Dept 2013]), we reject the AFC's contentions. Assuming, arguendo, that the father demonstrated a change in circumstances sufficient to warrant an inquiry into the best interests of the child, we conclude that the record establishes that "the continuity and stability of the existing custodial arrangement is in

the child[ ]'s best interests" (*Matter of Wilson v Hayward*, 128 AD3d 1475, 1477 [4th Dept 2015], lv denied 26 NY3d 909 [2015] [internal quotation marks omitted]).

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

913

**CA 24-00591**

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

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ANN OTERO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ROCHESTER BROADWAY THEATRE LEAGUE, INC.,  
DEFENDANT-RESPONDENT.

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

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered September 19, 2023. The order and judgment granted defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: In this personal injury action arising from a slip and fall on snow and ice in a parking lot at 875 East Main Street in the City of Rochester, plaintiff appeals from an order and judgment granting defendant's motion for summary judgment dismissing the complaint. We reverse.

In moving for summary judgment, defendant contended that it "had absolutely no involvement with" the parking lot where plaintiff was injured. In support of its motion, defendant submitted the affidavit of its chief operating officer, who averred that defendant did not own, use, occupy, control or maintain the parking lot. Defendant also submitted evidence establishing that the parking lot is owned by a nonparty that holds title to certain property directly adjacent to property owned by defendant. In opposition to the motion, plaintiff submitted a 2004 easement agreement between defendant and the nonparty owner of the adjacent property at that time, which was filed in the Monroe County Clerk's Office. The easement agreement granted defendant, which hosts public events in its theater, a "perpetual easement over and through the exterior parking area" owned by the nonparty owner of 875 East Main Street. Assuming, arguendo, that defendant met its initial burden on its motion, we conclude that the easement agreement was sufficient to raise a triable issue of fact

with respect to defendant's assertion that it had "absolutely no involvement" with the parking lot. As we have recognized, "[a]n easement is more than a personal privilege to use another's land, it is an actual interest in that land" (*Ironwood, L.L.C. v JGB Props., LLC*, 99 AD3d 1192, 1194 [4th Dept 2012] [internal quotation marks omitted]).

In reply, defendant acknowledged the existence and validity of the easement agreement but submitted for the first time a 2004 "Parking Agreement" (parking agreement) between defendant and the nonparty owner of 875 East Main Street, pursuant to which the latter agreed to maintain the parking lot and keep it "reasonably clear of ice and snow." Relying on that parking agreement, defendant contended that it "should not be held liable for maintenance of an area that it did not own, occupy or control and was not otherwise contractually obligated to maintain." Supreme Court agreed with defendant and granted its motion. That was error for two reasons.

First, the court improperly granted the motion based on an argument advanced for the first time in reply. The function of reply papers is "to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion" (*Matter of Dusch v Erie County Med. Ctr.*, 184 AD3d 1168, 1170 [4th Dept 2020] [internal quotation marks omitted]; see *Tanksley v LCO Bldg. LLC*, 196 AD3d 1037, 1040 [4th Dept 2021]; *Sodhi v Dollar Tree Stores, Inc.*, 175 AD3d 914, 917 [4th Dept 2019]). Here, the parking agreement was not further proof in support of defendant's initial argument, i.e., that it had nothing to do with the subject premises. Instead, the parking agreement was proffered in support of defendant's new argument that, although it did have a nonexclusive possessory interest in the parking lot, it had no duty to clear snow and ice therefrom because the nonparty owner of 875 East Main Street had agreed to do so. Defendant's reliance on the parking agreement is a separate and distinct argument unrelated to defendant's initial argument that it did not own, occupy or use the parking lot.

In any event, even if the parking agreement had not been submitted for the first time in reply, the court erred in determining that defendant had no duty to maintain the parking lot and thus owed no duty of care to plaintiff. As the owner of the dominant estate granted by the easement agreement, defendant had a duty to maintain the parking lot in a reasonably safe condition (see *Case v Hazelton Ct. Homeowners Assn., Inc.*, 132 AD3d 1369, 1369-1370 [4th Dept 2015]), and defendant cites no authority for the proposition that a party may delegate to another party the duty it owes to members of the public to keep its property—or property over which it has easement rights—in a reasonably safe condition.

Defendant relies on *Lawrence Wolf, Inc. v Kissing Bridge Corp.* (288 AD2d 935, 936 [4th Dept 2001]), where we held that, "[i]n the absence of an agreement otherwise, the owner of an easement has the duty to maintain it." According to defendant, the parking agreement constitutes an "agreement otherwise." The dispute in *Lawrence Wolf*,

*Inc.*, however, was between the property owner and the owners of the easement with respect to which party was responsible for maintaining the premises. Here, in contrast, the dispute is between the owner of the easement and a third party injured on the premises. In the easement context, *Lawrence Wolf, Inc.* does not hold that a servient owner may agree to relieve the dominant owner of the duty to maintain that it would otherwise owe to third parties.

We agree with the Second Circuit Court of Appeals that the duty of an easement holder "is the same as that owed by a landowner" and is nondelegable (*Sutera v Go Jokir, Inc.*, 86 F3d 298, 308 [2d Cir 1996]; see *Salisbury v Wal-Mart Stores*, 255 AD2d 95, 97 [3d Dept 1999]). We therefore conclude that defendant's "duty to exercise reasonable care toward third parties making use of the parking lot subject to the easement, once established, is not abrogated by a covenant on the part of the servient owner[, i.e., the nonparty owner of 875 East Main Street,] to clear ice and snow from the lot. The general rule that a servient owner may assume duties of maintenance, while undoubtedly relevant as between dominant and servient owners, does not apply when the rights of injured third parties are implicated," as in the case here (*Sutera*, 86 F3d at 308-309). The fact that the nonparty owner of 875 East Main Street may also have had a duty to maintain the parking lot does not serve to insulate defendant from liability to plaintiff.

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

919

**CA 24-00297**

PRESENT: LINDLEY, J.P., OGDEN, DELCONTE, AND HANNAH, JJ.

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

V

MEMORANDUM AND ORDER

CALAMAR CONSTRUCTION MANAGEMENT, INC.,  
DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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HODGSON RUSS LLP, NEW YORK CITY (CARMINE J. CASTELLANO OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

MCCARTER & ENGLISH, LLP, NEW YORK CITY (GREGORY J. MASCITTI OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Edward Pace, J.), entered August 21, 2023. The order and judgment, insofar as appealed from, granted plaintiff's motion for partial summary judgment.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs and the motion is denied.

Memorandum: Plaintiff commenced this action seeking to eject defendant from multiple office suites, as well as for an award of damages, alleging that defendant failed to pay rent due pursuant to two commercial lease agreements executed in 2015. Plaintiff thereafter moved for summary judgment on its fifth and sixth causes of action, for ejectment, and for partial summary judgment as to liability on its first and second causes of action, for breach of contract. In support of the motion, plaintiff attached copies of the 2015 lease agreements and submitted a factual affidavit averring that plaintiff, as the current owner of the underlying real property, was the successor to the original lessor under the 2015 lease agreements and that defendant had failed to pay the rent due under the 2015 lease agreements since March 2022. Defendant opposed the motion, submitting a 2019 lease agreement between it and plaintiff's predecessor in interest that, inter alia, terminated the 2015 lease agreements and created a new, single lease agreement covering the original and additional office space. Defendant also submitted an affidavit from its controller averring that defendant had made all payments under the 2015 lease agreements as well as some "additional rent" payments under the 2019 lease agreement, and that plaintiff had failed to perform its

obligations to provide certain services under the 2019 lease agreement. Supreme Court, although determining that there are triable issues of fact as to which of the lease agreements controls and the amount of unpaid rent owed by defendant, granted plaintiff's motion. The court also ordered, pursuant to CPLR 3212 (g) that certain facts were not in dispute and were deemed established for all purposes in this action. Defendant subsequently moved pursuant to CPLR 5519 (a) (6) to fix an undertaking and automatically stay enforcement of the summary judgment order and judgment (5519 motion), and plaintiff cross-moved to vacate, limit, or modify the stay pursuant to CPLR 5519 (c). The court denied plaintiff's cross-motion and fixed an undertaking. As limited by its brief, defendant now appeals in appeal No. 1 from the order and judgment to the extent that it granted plaintiff's motion. In appeal No. 2, defendant appeals and plaintiff cross-appeals from the order granting the 5519 motion and denying the cross-motion.

With respect to appeal No. 1, we agree with defendant that triable issues of fact preclude the grant of plaintiff's summary judgment motion (see *Matter of Watson*, 8 AD3d 1092, 1094 [4th Dept 2004]; see also *Blagio Rest., Inc. v C.E. Props., Inc.*, 127 AD3d 1006, 1007 [2d Dept 2015]; see generally *Cashion v Bajorek*, 126 AD3d 1354, 1354 [4th Dept 2015]). Specifically, based on the record before us, there are triable issues of fact whether defendant is in default under the 2019 agreement, which is material to elements of plaintiff's causes of action for ejectment (see *City of New York v Anton*, 169 AD3d 999, 1001 [2d Dept 2019], *lv denied* 34 NY3d 906 [2019]) and breach of contract (see *Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). We therefore reverse the order and judgment insofar as appealed from.

Defendant's remaining contention in appeal No. 1 is academic in light of our determination.

With respect to appeal No. 2, the appeal and cross-appeal are dismissed inasmuch as those issues have been rendered moot by our determination in appeal No. 1.

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

920

**CA 24-00298**

PRESENT: LINDLEY, J.P., OGDEN, DELCONTE, AND HANNAH, JJ.

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

V

MEMORANDUM AND ORDER

CALAMAR CONSTRUCTION MANAGEMENT, INC.,  
DEFENDANT-APPELLANT-RESPONDENT.  
(APPEAL NO. 2.)

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HODGSON RUSS LLP, NEW YORK CITY (CARMINE J. CASTELLANO OF COUNSEL),  
FOR DEFENDANT-APPELLANT-RESPONDENT.

MCCARTER & ENGLISH, LLP, NEW YORK CITY (GREGORY J. MASCITTI OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

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Appeal and cross-appeal from an order of the Supreme Court,  
Niagara County (Edward Pace, J.), entered August 31, 2023. The order,  
among other things, granted defendant's motion for, inter alia, a stay  
pending appeal.

It is hereby ORDERED that said appeal and cross-appeal are  
unanimously dismissed without costs.

Same memorandum as in *GSMS 2015-GC34 Commerce Ct., LLC v Calamar  
Constr. Mgt., Inc.* ([appeal No. 1] – AD3d – [Feb. 7, 2025] [4th Dept  
2025]).

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**921**

**CA 23-01890**

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

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MELISA TRABERT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF MENTAL HEALTH, AND  
HUTCHINGS PSYCHIATRIC CENTER,  
DEFENDANTS-APPELLANTS.

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LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BLAIR J. GREENWALD OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

GREGORY L. SILVERMAN, ESQ., PLLC, GENEVA (GREGORY L. SILVERMAN OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County  
(Joseph E. Lamendola, J.), entered September 27, 2023. The order  
denied defendants' motion to dismiss the complaint.

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 first cause of action and as modified the order is  
affirmed without costs.

Memorandum: Plaintiff was employed as a risk manager at  
defendant Hutchings Psychiatric Center (HPC). Following her  
resignation, she commenced this whistleblower action against defendant  
New York State Office of Mental Health and HPC, asserting causes of  
actions under Labor Law §§ 740 and 741 and Civil Service Law § 75-b.  
Defendants moved to dismiss the complaint, contending, inter alia,  
that Supreme Court does not have subject matter jurisdiction over the  
causes of action set forth in the complaint on the ground that only  
the Court of Claims has that jurisdiction. The court denied  
defendants' motion, concluding, inter alia, that it has subject matter  
jurisdiction over the causes of action in the complaint. Defendants  
appeal.

In 2010, the New York State Legislature amended the Court of  
Claims Act to provide that the Court of Claims "shall have  
jurisdiction . . . [t]o hear and determine a claim of any person  
against the state for a retaliatory personnel action by its officers  
or employees pursuant to [Civil Service Law § 75-b] or [Labor Law  
§ 740]" (Court of Claims Act § 9 [13]). Defendants contend that the  
statute provides for exclusive jurisdiction. We reject that  
contention. The legislature, in enacting the amendment, responded to

concerns raised by the Court of Claims that it did not have jurisdiction over claims asserted under whistleblower statutes (see Sponsor's Mem, Bill Jacket, L 2010, ch 316; see also *Keskin v State of New York*, 14 Misc 3d 537, 540 [Ct Cl 2006]; *Taylor v State of New York*, 160 Misc 2d 120, 130 [Ct Cl 1994]). We conclude, based upon the legislative history, including the concern raised to the legislature that the proposed language would encourage forum shopping, that the legislature, in providing the Court of Claims jurisdiction, did not strip the Supreme Court of its jurisdiction to hear these cases (see Div of the Budget Bill Mem, Bill Jacket, L 2010, ch 316 at 8; Mem of Dept of Civ Serv, Bill Jacket, L 2010, ch 316 at 13; Letter from Dept of Labor, Bill Jacket, L 2010, ch 316 at 14; cf. *Ajoku v New York State Off. of Temporary & Disability Assistance*, 198 AD3d 437, 437 [1st Dept 2021], lv denied 38 NY3d 908 [2022]). The court properly determined that it has subject matter jurisdiction over the causes of action asserted in the complaint.

Defendants alternatively contend on appeal that plaintiff's cause of action under Labor Law § 740 should be dismissed because it applies only to private sector employers. Plaintiff does not oppose the dismissal of that cause of action and we therefore modify the order by granting the motion in part and dismissing the first cause of action.

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

926

**TP 23-02026**

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

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IN THE MATTER OF ADAM B. CYR, PETITIONER,

V

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES  
AND MARK J.F. SCHROEDER, AS COMMISSIONER OF  
NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,  
RESPONDENTS.

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PEKAREK LAW GROUP, P.C., WELLSVILLE (EDWARD PEKAREK OF COUNSEL), FOR  
PETITIONER.

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

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered August 30, 2022) to review a determination of respondents. The determination revoked petitioner's driver's license for 180 days.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking his driver's license for 180 days. The determination was based upon the finding that petitioner violated Vehicle and Traffic Law § 1111 by failing to stop at a stop light, resulting in the death of a pedestrian.

Contrary to petitioner's contention, the determination is supported by substantial evidence (*see Matter of Sadallah v New York State Dept. of Motor Vehs.*, 160 AD3d 1482, 1483 [4th Dept 2018]). Initially, we reject petitioner's argument that the Administrative Law Judge (ALJ) improperly relied on hearsay contained within a police accident reconstructionist's report. "Evidence which would not be admissible in a court, *such as hearsay*, is admissible in a departmental hearing" (15 NYCRR 127.6 [b] [emphasis added]) and "if sufficiently relevant and probative may constitute substantial evidence" (*Sadallah*, 160 AD3d at 1483; *see Matter of Gray v Adduci*, 73 NY2d 741, 742-743 [1988]). Here, the testimony of the officer who interviewed eyewitnesses and the report were sufficient to establish that petitioner violated Vehicle and Traffic Law § 1111 by entering

the intersection while the light was red and striking the pedestrian in the far cross-walk approximately four seconds after the traffic control device turned from yellow to red. To the extent that petitioner contends that he was improperly deprived of an opportunity to cross-examine the author of the report, that contention lacks merit; petitioner could have called the author as a witness (see *Gray*, 73 NY2d at 743). We also reject petitioner's argument that it was improper for the ALJ to "draw a negative inference from [petitioner's] failure to testify" (15 NYCRR 127.5 [b]; see *Matter of Schoonmaker v New York State Dept. of Motor Vehs.*, 33 NY3d 926, 928 [2019]).

Additionally, because petitioner failed to argue on administrative appeal that the belated hearing notice deprived the ALJ of jurisdiction to hear the matter, he "failed to exhaust his administrative remedies with respect to that contention" (*Matter of Gorman v New York State Dept. of Motor Vehs.*, 34 AD3d 1361, 1361 [4th Dept 2006]). Contrary to petitioner's contention, a suspension of his license for 180 days is not "so disproportionate to the offense as to be shocking to one's sense of fairness" (*id.* [internal quotation marks omitted]).

Finally, we have reviewed petitioner's remaining contentions and conclude that none warrants annulment of the determination.

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

938

**KA 23-00418**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TREVOR D. HARRELL, DEFENDANT-APPELLANT.

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RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered November 21, 2022. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (three counts), rape in the second degree (eight counts), rape in the third degree (eight counts) and sexual abuse in the first 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 reversing that part convicting defendant of predatory sexual assault against a child under count 3 of the indictment and dismissing that count, and as modified the judgment is affirmed.

Memorandum: In this prosecution arising from allegations that defendant engaged in a years-long sexual relationship with an underage female victim with whose family he often resided, defendant appeals from a judgment convicting him, upon a jury verdict, of three counts of predatory sexual assault against a child (Penal Law former § 130.96), eight counts of rape in the second degree (former § 130.30 [1]), eight counts of rape in the third degree (former § 130.25 [2]), and one count of sexual abuse in the first degree (§ 130.65 [2]).

Defendant failed to preserve for our review his contention that the first and third counts of the indictment, each charging him with predatory sexual assault against a child, were multiplicitous (see CPL 470.05 [2]; *People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]; *People v Box*, 145 AD3d 1510, 1513 [4th Dept 2016], *lv denied* 29 NY3d 1076 [2017]). 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]; *People v Slishevsky*, 97 AD3d 1148, 1151 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]; *People v Brandel*, 306 AD2d 860, 860-861 [4th Dept 2003]).

Defendant further contends that the indictment was defective with respect to the counts charging him with rape in the second and third degrees because it lacked sufficient specificity regarding the time frames of those alleged crimes to enable him to prepare a defense. Defendant failed to preserve that contention for our review (see CPL 470.05 [2]; *People v Angona*, 119 AD3d 1406, 1407 [4th Dept 2014], *lv denied* 25 NY3d 987 [2015]; *People v Erle*, 83 AD3d 1442, 1443 [4th Dept 2011], *lv denied* 17 NY3d 794 [2011]; see generally *People v Soto*, 44 NY2d 683, 684 [1978]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]; *People v Andrews*, 210 AD3d 1429, 1430 [4th Dept 2022]; *People v Aponte*, 89 AD3d 1429, 1430 [4th Dept 2011], *lv denied* 18 NY3d 955 [2012]).

Next, defendant contends that he was denied effective assistance of counsel due to a single alleged error during jury selection, namely, that defense counsel purportedly diminished the People's burden of proof. We reject that contention. Where, as here, the claim is based on one alleged misstep during jury selection, "defendant can prevail on his ineffective assistance claim only by showing that this is one of those very rare cases in which a single error by otherwise competent counsel was so serious that it deprived defendant of his constitutional right" (*People v Thompson*, 21 NY3d 555, 559 [2013]; see *People v Piasta*, 207 AD3d 1054, 1055 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]; *People v Sherman*, 182 AD3d 987, 987-988 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]). The record establishes that, while defense counsel made a fleeting reference during voir dire to his ability to prove defendant's innocence, he immediately thereafter articulated that defendant remained innocent until the People proved his guilt beyond a reasonable doubt, and we thus conclude that "[defense] counsel's mistake, if it was one, was not the sort of 'egregious and prejudicial' error that amounts to a deprivation of the constitutional right to counsel" (*Thompson*, 21 NY3d at 561; see *Sherman*, 182 AD3d at 987-988).

We reject defendant's further contention that County Court erred in admitting in evidence at trial a screenshot of an email sent from defendant's account. Contrary to defendant's assertion, the People laid a proper foundation for the admission of that evidence (see *People v Rodriguez*, 38 NY3d 151, 154-155 [2022]; *People v Byrd*, 214 AD3d 1321, 1323 [4th Dept 2023], *lv denied* 40 NY3d 927 [2023]; *People v Mencil*, 206 AD3d 1550, 1552 [4th Dept 2022], *lv denied* 38 NY3d 1152 [2022]). Moreover, contrary to defendant's assertion, the email was not inadmissible on relevancy grounds. "Evidence is relevant if it has any tendency in reason to prove the existence of any material fact" and, here, the email could reasonably be interpreted as containing admissions by defendant that he had a sexual relationship with the victim (*People v Scarola*, 71 NY2d 769, 777 [1988]). Defendant's additional assertion that the court erred in admitting the email on the ground that its prejudicial effect outweighed its probative value is not preserved for our review inasmuch as that ground differs from those raised before the trial court (see *People v Cullen*, 110 AD3d 1474, 1475 [4th Dept 2013], *affd* 24 NY3d 1014 [2014];

*People v Turner*, 197 AD3d 997, 998-999 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]). In any event, defendant's assertion lacks merit because the probative value of the email was not outweighed by the danger of unfair prejudice to defendant (see *People v Graham*, 174 AD3d 1486, 1488 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; see generally *Scarola*, 71 NY2d at 777).

Defendant also contends, and the People correctly concede, that the evidence is legally insufficient to support the conviction of predatory sexual assault against a child under the third count of the indictment. Although defendant failed to preserve that contention for our review (see CPL 470.05 [2]; *People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Gray*, 86 NY2d 10, 19 [1995]; cf. *People v Prado*, 4 NY3d 725, 726 [2004]), we exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]; *People v Rath*, 192 AD3d 1600, 1602 [4th Dept 2021], *lv denied* 37 NY3d 959 [2021]). As relevant here, a person is guilty of predatory sexual assault against a child "when, being [18] years old or more, he . . . commits the crime of rape in the first degree . . . and the victim is less than [13] years old" (Penal Law § 130.96; see former § 130.35 [4]). Although the victim initially testified in unspecific terms that defendant had sexual intercourse with her on the night before she turned 13 years old, she later admitted that there was no clock in the bedroom where the incident occurred, that she was "not absolutely sure" and did not "know for a fact" whether the sexual intercourse occurred before midnight, and that she was "not positive what time it was" when the sexual intercourse occurred. Given the victim's own doubt about when the subject incident occurred and the lack of any other evidence that the incident occurred within the requisite time frame (see generally *Matter of Ellingham v Morton*, 116 AD2d 1032, 1033 [4th Dept 1986], *lv denied* 67 NY2d 607 [1986]), we conclude that, viewing the evidence in the light most favorable to the People, there is no valid line of reasoning and permissible inferences from which a rational jury could have found that the People proved beyond a reasonable doubt the elements of predatory sexual assault against a child as alleged in the third count of the indictment (see *People v Partridge*, 173 AD3d 1769, 1770-1771 [4th Dept 2019], *lv denied* 34 NY3d 935 [2019]; see generally *People v Danielson*, 9 NY3d 342, 349 [2007]). We thus modify the judgment by reversing the conviction of predatory sexual assault against a child under the third count of the indictment and dismissing that count.

Contrary to defendant's further contention, although "a different verdict would not have been unreasonable inasmuch as this case rests largely on the jury's credibility findings with respect to the testimony of the victim" and the People's other witnesses (*People v Zeitz*, 148 AD3d 1636, 1637 [4th Dept 2017], *lv denied* 29 NY3d 1089 [2017] [internal quotation marks omitted]), we nevertheless conclude that, upon viewing the evidence in light of the elements of the remaining crimes as charged to the jury (see *Danielson*, 9 NY3d at 349), the verdict with respect to those crimes is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490,

495 [1987])). Although the victim and the People's other witnesses did not immediately report the crimes, they "explained the reason[s] for [the] delay at trial, thus presenting 'a credibility issue for the jury to resolve' " (*People v Bieganowski*, 104 AD3d 1276, 1277 [4th Dept 2013], *lv denied* 21 NY3d 1002 [2013]; see *People v Olson*, 110 AD3d 1373, 1373-1375 [3d Dept 2013], *lv denied* 23 NY3d 1023 [2014])). Contrary to defendant's assertion, "[t]he jury was entitled to credit the testimony of the People's witnesses, including that of the victim, over the testimony of defendant[ ]," and we perceive no reason to disturb those credibility determinations (*People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]; see *Olson*, 110 AD3d at 1373-1375; *Bieganowski*, 104 AD3d at 1276-1277).

Finally, we conclude that the sentence imposed on the remaining counts is not unduly harsh or severe.

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

**940**

**KA 23-02003**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHARON M. ANEMAET, DEFENDANT-APPELLANT.

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LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (KERRY A. CONNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, J.), dated October 30, 2023. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that she is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 et seq.). Contrary to defendant's contention, Supreme Court properly assessed 15 points under risk factor 11 for a history of drug or alcohol abuse inasmuch as defendant self-reported heavy alcohol use during her interview for the presentence report (see *People v Kunz*, 150 AD3d 1696, 1696 [4th Dept 2017], lv denied 29 NY3d 916 [2017]; see generally *People v Palmer*, 20 NY3d 373, 377-378 [2013]).

We reject defendant's further contention that the court erred in granting the People's request for an upward departure from her presumptive classification as a level two risk. We conclude that "[t]he court's discretionary upward departure [to a level three risk] was based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument" (*People v Tidd*, 128 AD3d 1537, 1537 [4th Dept 2015], lv denied 25 NY3d 913 [2015]). Indeed, the People established by clear and convincing evidence that defendant had been convicted of criminal contempt based on her violation of an order of protection in favor of complainant after defendant's arrest and prior to her plea in the underlying criminal matter. That conviction provides the basis for an upward departure inasmuch as it is "indicative that the offender poses an increased risk to public safety" (*People v Colsrud*, 155 AD3d 1601,

1602 [4th Dept 2017] [internal quotation marks omitted]; *see People v Molinaro*, 214 AD3d 744, 745 [2d Dept 2023], *lv denied* 39 NY3d 916 [2023]).

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

**943**

**KA 23-00688**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LATEEF ODUSANYA, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 2, 2023. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, robbery in the second degree (two counts) and grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of one count of burglary in the first degree (Penal Law § 140.30 [2]), two counts of robbery in the second degree (§ 160.10 [2] [a], [b]), and one count of grand larceny in the third degree (§ 155.35 [1]). The conviction arises from allegations that defendant, his codefendant brother, and another person committed a home invasion robbery at an apartment during which the victim was struck and sustained, among other things, a broken nose. We affirm.

Defendant contends that County Court abused its discretion in granting the People's motion to consolidate for trial the indictments of defendant and codefendant (see CPL 200.40 [2]). Contrary to the People's assertion, defendant preserved his contention for appellate review by objecting to consolidation on the same ground that he now advances (see CPL 470.05 [2]; *People v Chestnut*, 19 NY3d 606, 611 n 2 [2012]). We nonetheless conclude that defendant's contention lacks merit. Defendant and codefendant were identified as part of a group that committed the home invasion robbery against the victim, and "the evidence against them was virtually identical" (*People v Snyder*, 84 AD3d 1710, 1711 [4th Dept 2011], *lv denied* 17 NY3d 810 [2011]; see generally *People v Mahboubian*, 74 NY2d 174, 183 [1989]). "Although the proof against defendant was not quite as strong as the proof against . . . codefendant, '[t]hat the evidence against one of two or

more jointly tried defendants may be stronger than the evidence against another hardly is unusual and does not afford the latter with an adequate ground' " to demonstrate that the court abused its discretion in consolidating the indictments for trial (*People v Moore*, 223 AD3d 1085, 1093-1094 [3d Dept 2024], *lv denied* 41 NY3d 1003 [2024]; see *People v Peisahkman*, 29 AD3d 352, 353 [1st Dept 2006]; *People v Newton*, 232 AD2d 429, 430 [2d Dept 1996], *lv denied* 89 NY2d 945 [1997]; see generally *Mahboubian*, 74 NY2d at 183).

Defendant's further contention that he was denied his constitutional right to a speedy trial is not preserved for our review inasmuch as he sought to dismiss the indictment on statutory speedy trial grounds only (see *People v McTyere*, 215 AD3d 1274, 1275 [4th Dept 2023], *lv denied* 40 NY3d 935 [2023]; *People v Minwalkulet*, 198 AD3d 1290, 1292-1293 [4th Dept 2021], *lv denied* 37 NY3d 1147 [2021]). In any event, defendant's contention lacks merit. Upon our review of the record in light of the relevant factors (see *People v Taranovich*, 37 NY2d 442, 445 [1975]), we conclude that those factors would have compelled denial of a motion based on defendant's constitutional right to a speedy trial (see *People v Works*, 211 AD3d 1574, 1575 [4th Dept 2022], *lv denied* 39 NY3d 1114 [2023]; *Minwalkulet*, 198 AD3d at 1293).

Defendant next contends that the court erred in refusing to dismiss the indictment on statutory speedy trial grounds (see CPL 30.30). In particular, defendant contends that the People's belated disclosure of the name of a witness purportedly known to have information relevant to the offenses charged (see CPL 245.20 [1] [c]), which was made via a second supplemental certificate of compliance served and filed shortly before trial, rendered their original and first supplemental certificates of compliance improper, and thereby rendered any statement of trial readiness pursuant to CPL 30.30 illusory and insufficient to stop the running of the speedy trial clock. We reject that contention.

"[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' " (*People v Bay*, 41 NY3d 200, 211 [2023], quoting CPL 245.50 [1]; see also CPL 245.20 [2]; 245.50 [3]). "Although the statute nowhere defines 'due diligence,' it is a familiar and flexible standard that requires the People 'to make reasonable efforts' to comply with statutory directives" (*Bay*, 41 NY3d at 211). "Reasonableness, then, is the touchstone" (*id.* at 211-212). "An analysis of whether the People made reasonable efforts sufficient to satisfy CPL article 245 is fundamentally case-specific, as with any question of reasonableness, and will turn on the circumstances presented" (*id.* at 212). Although "[t]here is no rule of 'strict liability' " and thus "the statute does not require or anticipate a 'perfect prosecutor[,]' . . . the plain terms of the statute make clear that while good faith is required, it is not sufficient standing alone and cannot cure a lack of diligence" (*id.*). In assessing due diligence, "courts should generally consider, among other things, the efforts made by the prosecution and the

prosecutor's office to comply with the statutory requirements, the volume of discovery provided and outstanding, the complexity of the case, how obvious any missing material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People's response when apprised of any missing discovery" (*id.*).

Even assuming, arguendo, that the identity of the witness—i.e., an associate at a store in a mall who completed a transaction with defendant and codefendant the day after the offenses—was subject to automatic discovery under CPL 245.20 (1) (c), we conclude, upon our review of the relevant factors, that the People met their burden of establishing that they had "exercise[d] due diligence and made reasonable inquiries prior to filing the [original and first supplemental certificates of compliance] despite a belated or missing disclosure" (*Bay*, 41 NY3d at 213; see *People v Lawrence*, 231 AD3d 1497, 1499-1500 [4th Dept 2024]; *People v Watkins*, 224 AD3d 1342, 1344 [4th Dept 2024], *lv denied* 41 NY3d 986 [2024]). The record establishes that, in this somewhat complex case involving multiple perpetrators and a lengthy investigation, the People made reasonable efforts to comply with the statutory requirements and disclosed to defendant voluminous discovery material (see *Lawrence*, 231 AD3d at 1500). Although a single police report may have mentioned that an officer spoke with an associate at the store during the course of the investigation, the prosecutor adequately explained that the witness's name was not included in any police report, that it appeared from the police reports that the store manager had interacted with defendant and codefendant, and that only upon trial preparation with the manager did the prosecutor learn the name of the associate who had actually handled the transaction, at which point he immediately disclosed that information to defendant (see *Watkins*, 224 AD3d at 1344; see generally *Bay*, 41 NY3d at 212). Given the voluminous discovery actually produced and the content of the police reports, it would not have been particularly obvious to the People that the associate was a witness whose name was missing (see *Lawrence*, 231 AD3d at 1500; *Watkins*, 224 AD3d at 1344). Based on the foregoing, we conclude that the court did not err in refusing to dismiss the indictment pursuant to CPL 30.30 based on the belated disclosure of the associate's name.

Defendant failed to preserve for our review his related contention that the People's second supplemental certificate of compliance failed to comply with CPL 245.50 (1-a) (see CPL 245.50 [4] [a]; 470.05 [2]; *People v Newton*, 221 AD3d 1551, 1553 [4th Dept 2023], *lv denied* 40 NY3d 1093 [2024]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Defendant also contends that he was denied effective assistance of counsel by the purported failure of defense counsel to join the request of codefendant's attorney to preclude the testimony of the witness due to the belated disclosure. We reject that contention. "To prevail on his ineffective assistance of counsel claim on the basis of this single failure to object, defendant must show both that the objection omitted by trial counsel is a winning argument . . . ,

and that the objection was one that no reasonable defense lawyer, in the context of the trial, could have thought to be 'not worth raising' " (*People v Brown*, 17 NY3d 742, 743-744 [2011]; see *People v Bullock*, 213 AD3d 1351, 1355 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023]). Here, even assuming, arguendo, that defense counsel did not join codefendant's request, we conclude that defendant has "failed to meet his burden of demonstrating a lack of strategic or other legitimate reasons for his defense lawyer's failure to object" (*Brown*, 17 NY3d at 744; see *Bullock*, 213 AD3d at 1355).

Next, contrary to defendant's contention, we conclude that the People presented evidence—including the testimony of the victim, the victim's medical records, and photographs of the victim's injuries—that was legally sufficient to establish that the victim suffered the requisite "[p]hysical injury" as defined in Penal Law § 10.00 (9) to support defendant's conviction of burglary in the first degree (Penal Law § 140.30 [2]) and robbery in the second degree (§ 160.10 [2] [a]; see *People v McKoy*, 217 AD3d 1410, 1410 [4th Dept 2023], *lv denied* 40 NY3d 998 [2023]; *People v Vives*, 1 AD3d 1014, 1015 [4th Dept 2003]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). 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 further contention that the verdict is against the weight of the evidence (see *People v Settles*, 192 AD3d 1510, 1511-1512 [4th Dept 2021], *lv denied* 37 NY3d 960 [2021]; see generally *Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that it cannot be said that the jury failed to give the evidence the weight it should be accorded (see *Settles*, 192 AD3d at 1512; 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***

949

**CAF 22-01962**

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

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IN THE MATTER OF ISHAUNA C. SEVILLA,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ROCHELLE TORRES, RESPONDENT-RESPONDENT.

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SCOTT T. GODKIN, WHITESBORO, FOR PETITIONER-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered September 16, 2022, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent sole legal and physical custody of the subject child.

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

Memorandum: Petitioner mother commenced this proceeding pursuant to Family Court Act article 6 seeking modification of a prior order that awarded joint custody of the subject child to her and respondent, the child's maternal grandmother, with primary placement of the child with the grandmother. In her modification petition, the mother seeks sole custody of the child. Following a hearing, Family Court determined that the grandmother established the existence of extraordinary circumstances based upon the domestic violence perpetuated against the mother by her husband, who was not the child's biological father, in the child's presence and, inter alia, granted the grandmother sole custody of the child. We affirm.

Initially, the mother contends that the court erred in summarily denying her motion for the assignment of new counsel. We reject that contention. It is well settled that "an indigent party's right to court-appointed counsel under the Family Court Act is not absolute" (*Matter of Bracken v Bracken*, 225 AD3d 1241, 1241 [4th Dept 2024], lv denied 42 NY3d 901 [2024] [internal quotation marks omitted]). "In order to have substitute counsel appointed, a party must establish that good cause for the release existed necessitating dismissal of assigned counsel" (*id.* [internal quotation marks omitted]). Contrary to the mother's contention, she "failed to show good cause for a substitution" (*Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1361 [4th Dept 2021]). Rather, the mother's "statements regarding counsel were conclusory and reflected only a delaying tactic" (*id.*).

The mother contends that the court erred in finding that the grandmother established extraordinary circumstances. We reject that contention. It is well settled that, "as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*Matter of Johnson v Wellington*, 185 AD3d 1549, 1549 [4th Dept 2020] [internal quotation marks omitted]; see *Matter of Suarez v Williams*, 26 NY3d 440, 446 [2015]). "The extraordinary circumstances analysis must consider the cumulative effect of all issues present in a given case" (*Matter of Tuttle v Worthington* [appeal No. 2], 219 AD3d 1142, 1144 [4th Dept 2023] [internal quotation marks omitted]). "The nonparent has the burden of establishing that extraordinary circumstances exist even where, as here, the prior order granting custody of the child to [the] nonparent[ ] was made upon consent of the parties" (*Matter of McNeil v Deering*, 120 AD3d 1581, 1582 [4th Dept 2014], lv denied 24 NY3d 911 [2014] [internal quotation marks omitted]). Here, the grandmother established that the mother was a victim of domestic violence, that the child had been present during more than one incident between the mother and her husband, that the mother had a pattern of leaving the marital home after an incident and then returning a short time later, that the police had been called to the marital residence on multiple occasions, that the mother called the child a liar after he disclosed the extent of the abuse to the grandmother, and that he had been negatively impacted by the dynamics of the marital home (see generally *Matter of Tennant v Philpot*, 77 AD3d 1086, 1088 [3d Dept 2010]). The court's determination to credit the grandmother's testimony over the mother's in determining the existence of extraordinary circumstances is entitled to great deference, and we see no reason to disturb that credibility determination (see *Johnson*, 185 AD3d at 1549-1550; see also *Matter of Miner v Torres*, 179 AD3d 1490, 1491 [4th Dept 2020]).

In the alternative, the mother contends that the court erred in determining that it was in the child's best interests to deny her modification petition. We reject that contention. Where the grandparent has established the existence of extraordinary circumstances, "the court must make an award of custody based on the best interest of the child" (*Suarez*, 26 NY3d at 446; see *Matter of Roseman v Sierant*, 142 AD3d 1323, 1324 [4th Dept 2016]). Here, the record establishes that, since the child has been living with the grandmother, the mother has only sporadically visited the child, has not communicated with the grandmother about the child or his care, does not provide financial support for the child, and has not stayed informed about the child's health. The evidence also established that the grandmother has provided the child with a safe and stable home. In her testimony, the mother alternated blame for her failure to stay in contact with the child between the child himself and the grandmother, despite conceding that she was welcome at the grandmother's house at any time. The mother refuses to admit that she is a victim of domestic violence, and called the child a liar when the child disclosed the domestic violence to the grandmother. The court's

determination that it is in the child's best interests to grant the grandmother sole custody is supported by a sound and substantial basis (see *Johnson*, 185 AD3d at 1550; *Matter of Komenda v Dininny*, 115 AD3d 1349, 1350 [4th Dept 2014]).

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

**950**

**CAF 23-01015**

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

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IN THE MATTER OF SOFIA M.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHANNON G., RESPONDENT-APPELLANT.

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

GABRIELLE GANNON, BUFFALO, FOR PETITIONER-RESPONDENT.

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

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Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), dated June 2, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had abused 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 that, inter alia, determined she abused the subject child. We affirm.

"Family Court Act § 1046 (a) (ii) provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child which would ordinarily not occur absent an act or omission of [the] respondent[ ], and (2) that [the] respondent[ ] [was] the caretaker[ ] of the child at the time the injury occurred" (*Matter of Grayson R.V. [Jessica D.]* [appeal No. 2], 200 AD3d 1646, 1648 [4th Dept 2021], lv denied 38 NY3d 909 [2022] [internal quotation marks omitted]; see *Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *Matter of Nancy B.*, 207 AD2d 956, 957 [4th Dept 1994]). Contrary to the mother's contention, petitioner established that the subject child's posterior rib fractures "would ordinarily not occur absent an act or omission of respondent[ ]" (*Philip M.*, 82 NY2d at 243). Petitioner's expert in child abuse pediatrics testified that the child's injuries constituted "evidence of non-accidental trauma to a reasonable degree of medical certainty." Petitioner further established that the mother and the child's father were the caretakers of the child at the time the injury occurred (see *Matter of Kevin V. [Sarah L.]*, 229 AD3d 1159, 1160 [4th Dept 2024]). Once petitioner

"established a prima facie case, the burden of going forward shift[ed] to [the mother] to rebut the evidence of . . . culpability" (*Philip M.*, 82 NY2d at 244; see generally *Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]), which she failed to do.

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

953

CA 23-01233

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

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SAHAR SHAHMOHAMAD, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

HOSSEIN SHAHMOHAMAD, DEFENDANT-RESPONDENT.

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RICHARD S. LEVIN, WEBSTER, FOR PLAINTIFF-APPELLANT.

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Appeal from an order of the Supreme Court, Monroe County (Kevin M. Nasca, J.), entered June 5, 2023. The order, among other things, granted that part of defendant's motion seeking one-half of the proceeds from the sale of plaintiff's half interest in certain real property, and denied that part of plaintiff's cross-motion seeking a determination that defendant engaged in frivolous conduct.

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

Memorandum: In this postjudgment matrimonial proceeding, defendant moved for an order, inter alia, directing plaintiff to pay him half of the proceeds from the sale of her half-interest in real property located in a foreign country that had been acquired during their marriage. According to defendant, he was entitled to share equally in the proceeds of the sale pursuant to the terms of the parties' settlement agreement, which was incorporated but not merged into the judgment of divorce. Plaintiff opposed the motion and cross-moved for an order, inter alia, determining that defendant had engaged in frivolous conduct. Plaintiff now appeals from an order that, insofar as appealed from, granted that part of defendant's motion seeking half of the proceeds from the sale of plaintiff's half-interest in the property, ordered plaintiff to pay defendant a certain amount, and denied that part of plaintiff's cross-motion seeking a determination that defendant had engaged in frivolous conduct.

Plaintiff contends that, under the terms of the agreement and the circumstances presented herein, defendant is not entitled to half of the proceeds from the sale of her half-interest in the property. We agree, and we therefore modify the order accordingly.

"[A] separation agreement that is incorporated but not merged into a judgment of divorce 'is a contract subject to the principles of contract construction and interpretation' " (*Anderson v Anderson*, 120

AD3d 1559, 1560 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015], quoting *Matter of Meccico v Meccico*, 76 NY2d 822, 823-824 [1990], *rearg denied* 76 NY2d 889 [1990]). "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent . . . [, and] [t]he best evidence of what [the] parties . . . intend is what they say in their writing" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [internal quotation marks omitted]; see *Colella v Colella*, 129 AD3d 1650, 1651 [4th Dept 2015]). "Where such an agreement is clear and unambiguous on its face, the intent of the parties must be gleaned from the four corners of the instrument and not from extrinsic evidence . . . , and the agreement in that instance must be enforced according to the plain meaning of its terms" (*Roche v Lorenzo-Roche*, 149 AD3d 1513, 1513-1514 [4th Dept 2017] [internal quotation marks omitted]; see *Greenfield*, 98 NY2d at 569; *Meccico*, 76 NY2d at 824; *Matter of Wheeler v Wheeler*, 174 AD3d 1507, 1508-1509 [4th Dept 2019]). "When interpreting a contract . . . , the court should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*Sears v Sears*, 138 AD3d 1401, 1401 [4th Dept 2016] [internal quotation marks omitted]; see *Wheeler*, 174 AD3d at 1509). Furthermore, the court "may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]; see *Wheeler*, 174 AD3d at 1510; *Tallo v Tallo*, 120 AD3d 945, 946 [4th Dept 2014]).

Here, the parties acknowledged in the agreement that they had acquired the property during their marriage and that the property was titled to plaintiff and to their minor son. Importantly, the agreement provided that "[t]he parties agree that said real property shall be sold as soon as practicable and the proceeds shall be spilt evenly between the parties unless otherwise agreed upon by the parties." Although the parties acknowledged that enforcement of the agreement pertaining to the property could be difficult in the foreign country, the agreement nonetheless further provided that "[t]he parties stipulate and agree to be bound by the terms herein and shall cooperate in the sale and signing any and all documents necessary to effectuate the terms of this [a]greement." A separate article of the agreement reiterated each party's obligation to reasonably cooperate to give full force and effect to the provisions of the agreement. Additionally, the agreement provided that it contained the entire understanding of the parties, that failure of either party to insist upon strict performance of any provision would not be deemed a waiver thereof, and that each party would have the right to seek any remedy available in law or equity in the event of a breach of the agreement.

Giving fair meaning to all of the language in the agreement "to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*Sears*, 138 AD3d at 1401 [internal quotation marks omitted]; see *Wheeler*, 174 AD3d at 1509), we conclude that the parties unambiguously agreed, despite the

manner in which the property was titled, to sell the entire property and to divide evenly between them the proceeds from the sale of the whole (see *Kelly v Kelly*, 165 AD3d 771, 771-772 [2d Dept 2018]; *Dimond v Dimond*, 105 AD3d 891, 892 [2d Dept 2013]; *Fuchs v Fuchs*, 134 AD2d 406, 407 [2d Dept 1987]). Indeed, that is the only reasonable interpretation of the agreement inasmuch as the terms thereof invariably referred to the "real property" in its entirety even while recognizing that it was titled in the names of plaintiff and the son, the parties included an estimated value of the whole property, and the parties contemplated an even division of the proceeds from the sale of the property after mutually cooperating to effectuate that sale (see *Kelly*, 165 AD3d at 771-772; *Sears*, 138 AD3d at 1402; *Dimond*, 105 AD3d at 892; *Fuchs*, 134 AD2d at 407).

Plaintiff, however, established through documentary evidence submitted via the affirmation of her counsel that she was prevented, despite her efforts, from effectuating a sale of the entire property in the foreign country. We note that, contrary to the court's determination, "[t]he affidavit or affirmation of an attorney, even if [they have] no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form' " (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; see *Melniker v Melniker*, 170 AD3d 448, 449 [1st Dept 2019]). The record, including defendant's own submissions, further establishes that plaintiff then sold her half-interest in the property and, although the parties dispute whether that sale was directly to the son under defendant's guardianship or to defendant's father before transfer to the son, it is undisputed that plaintiff's half-interest was purchased, at least in part, with defendant's money.

We conclude that, by directing plaintiff to pay defendant half of the proceeds from the sale of her half-interest in the property when defendant or the son over whom he has guardianship retained ownership or control over the property, the court, under the guise of construing and enforcing the agreement, rewrote the agreement in a manner that relieved defendant of his contractual obligations at the expense of plaintiff's contractual rights (see *Sears*, 138 AD3d at 1402). To the extent that defendant claims that he could not perform his contractual obligation under the agreement to effectuate the sale of the entire property by arranging, as the son's guardian, the sale of the other half-interest in the property titled in the son's name, that purported restraint was foreseeable and a specific provision could have been made for its occurrence, but was not (see *Lainez v Orellana*, 174 AD3d 792, 795 [2d Dept 2019]). We thus agree with plaintiff that requiring plaintiff to remit to defendant half of the proceeds from the sale of her half-interest in the property without a concomitant requirement that she receive compensation from a sale of the other half-interest in the property would result in a decidedly unfair transaction that is antithetical to the terms of the agreement (see *Sears*, 138 AD3d at 1402; *Davis v Davis*, 128 AD2d 470, 478 [1st Dept 1987]; see also *Fuchs*, 134 AD2d at 407).

Finally, although the court erred in granting that part of the

motion seeking half of the proceeds from the sale of plaintiff's half-interest in the property, we nonetheless conclude that the court did not abuse its discretion in denying plaintiff's cross-motion insofar as it sought a determination that defendant's actions were frivolous because, contrary to plaintiff's contention, defendant did not engage in frivolous conduct within the meaning of 22 NYCRR 130-1.1 (c) (see *Matter of Fischione v PM Peppermint, Inc.*, 197 AD3d 970, 971 [4th Dept 2021]; *Kimmel v State of New York*, 115 AD3d 1323, 1325 [4th Dept 2014]).

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

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**KA 22-00257**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARCUS BURKE, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered April 5, 2021. The judgment convicted defendant upon a jury verdict 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: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). The charges arose after defendant pointed a gun in the direction of the victim and pursued the victim for a short period of time with his gun drawn. We affirm.

We reject defendant's contention that a Facebook image of defendant depicting him wearing the same clothes as the perpetrator wore at the time of the incident was not properly authenticated. The authenticity of the image was established by the testimony of a witness who had personal knowledge of defendant and who verified that the image "accurately represented the subject matter depicted" (*People v Byrnes*, 33 NY2d 343, 347 [1974]; see *People v Jordan*, 181 AD3d 1248, 1249-1250 [4th Dept 2020], lv denied 35 NY3d 1067 [2020]; see generally *People v Thomas*, 176 AD3d 1639, 1641 [4th Dept 2019], lv denied 34 NY3d 1082 [2019]).

We reject defendant's contention that he was denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147 [1981]). We conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, reveal that defendant received meaningful representation (see *People v Gross*, 26 NY3d 689, 696 [2016]; *Baldi*, 54

NY2d at 147).

Finally, the sentence is not unduly harsh or severe.

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

3

**KA 21-01362**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ISAIAH NESMITH, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 5, 2019. The judgment convicted defendant upon his plea of guilty of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Preliminarily, as defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid. Defendant orally waived his right to appeal and executed a written waiver thereof. The language in the written waiver is inaccurate and misleading insofar as it purports to impose "an absolute bar to the taking of a direct appeal" and to deprive defendant of his "attendant rights to counsel and poor person relief, [as well as] all postconviction relief separate from the direct appeal" (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; *see People v Rumph*, 207 AD3d 1209, 1210 [4th Dept 2022], *lv denied* 39 NY3d 1075 [2023]; *People v Hunter*, 203 AD3d 1686, 1686 [4th Dept 2022], *lv denied* 38 NY3d 1033 [2022]). Although Supreme Court's colloquy "referred to issues that would still be preserved for appeal, including 'constitutional issues' and 'jurisdictional issues,' " the court's verbal statements " 'did nothing to counter the other inaccuracies set forth in the written appeal waiver' " (*Hunter*, 203 AD3d at 1686; *see People v Bouie*, 227 AD3d 1540, 1540-1541 [4th Dept 2024], *lv denied* 42 NY3d 925 [2024]; *Rumph*, 207 AD3d at 1210).

Defendant contends that he was denied effective assistance of counsel because defense counsel did not await a decision on defendant's request for a bill of particulars and did not further

investigate a possible *Brady* violation. Defendant's contention survives his guilty plea only insofar as he demonstrates that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered into the plea because of [his] attorney['s] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]; see *People v Lewis*, 228 AD3d 1247, 1248 [4th Dept 2024], *lv denied* 42 NY3d 1036 [2024]). In addition, to the extent that defendant's contention is based on matters outside the record on appeal, it must be raised by way of motion pursuant to CPL 440.10 (see *People v Dunn*, 229 AD3d 1220, 1223 [4th Dept 2024]; *Lewis*, 228 AD3d at 1248). To the extent that defendant's contention survives his guilty plea and is based on the record before us, we conclude that defendant's contention lacks merit inasmuch as defendant "received an advantageous plea, and 'nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]; see *People v Scott*, 204 AD3d 1448, 1448-1449 [4th Dept 2022], *lv denied* 38 NY3d 1074 [2022]). Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant was afforded meaningful representation (see *People v Penfold*, 229 AD3d 1299, 1300 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]; see generally *People v Baldi*, 54 NY2d 137, 147 [1981]).

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

7

**KA 23-01210**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL C. WHEELER, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered February 3, 2023. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [7]), defendant contends that County Court erred in accepting his *Alford* plea (see *North Carolina v Alford*, 400 US 25 [1970]) because the record lacks the requisite strong evidence of his actual guilt (see generally *Matter of Silmon v Travis*, 95 NY2d 470, 475 [2000]). As defendant correctly concedes, by failing to move to withdraw the plea or to vacate the judgment of conviction on that ground, he failed to preserve his contention for our review (see *People v Crittleton*, 202 AD3d 1488, 1488 [4th Dept 2022], lv denied 39 NY3d 939 [2022]; *People v Wilson*, 197 AD3d 1006, 1006 [4th Dept 2021], lv denied 37 NY3d 1100 [2021]) and this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]; see *People v Johnson*, 167 AD3d 1512, 1514 [4th Dept 2018], lv denied 33 NY3d 949 [2019]). We decline to exercise our power to address it as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).

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

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

8

**CAF 23-01480**

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

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IN THE MATTER OF LAURIE GRAESSER,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ERIE COUNTY CHILDREN'S SERVICES,  
RESPONDENT-RESPONDENT.

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LAURIE GRAESSER, PETITIONER-APPELLANT PRO SE.

JAMES M. CHERNETSKY, BUFFALO, FOR RESPONDENT-RESPONDENT.

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

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Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered July 31, 2023, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: In a prior proceeding pursuant to Social Services Law § 384-b, Family Court terminated the parental rights of the mother with respect to the subject child on the ground of mental illness and placed the child in the custody and guardianship of Erie County Department of Social Services (DSS) (*Matter of Landin F. [Jodi G.]*, 222 AD3d 1405 [4th Dept 2023], *lv denied* 41 NY3d 909 [2024]). Thereafter, petitioner, who is the child's biological maternal grandmother, commenced this proceeding pursuant to Family Court Act article 6 seeking custody of the child. The court dismissed the petition with prejudice, and we now affirm.

Contrary to petitioner's contention, the court properly dismissed the petition without conducting a hearing. Inasmuch as the court terminated parental rights and committed the child's custody and guardianship to DSS thereby freeing the child for adoption, adoption became the sole and exclusive means to gain care and custody of the child, and the court was " 'without authority to entertain custody . . . proceedings commenced by a member of the child's [extended] family' " (*Matter of Amber W. v Erie County Children's Servs.*, 185 AD3d 1445, 1446 [4th Dept 2020]; see Social Services Law § 384-b [10], [11]; *Matter of Mirely M. v Wilbert L.*, 221 AD3d 1227, 1228-1229 [3d Dept 2023]; *Matter of Mu'Min v Mitchell*, 19 AD3d 1116, 1117 [4th Dept 2005]). Petitioner's "recourse was to seek adoption, and not mere

custody, of the . . . child" (*Matter of Boyd v Westchester County Dept. of Social Servs.*, 149 AD3d 1069, 1070 [2d Dept 2017]; see *Amber W.*, 185 AD3d at 1446).

We have considered petitioner's remaining contention and conclude that it is without merit.

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

12

**CAF 23-02177**

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

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IN THE MATTER OF MEA V.

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ORLEANS COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BRANDON V., RESPONDENT-APPELLANT.

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

DANA A. GRABER, ALBION, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered September 28, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child. The child was removed from the father's custody after the child suffered multiple rib fractures on at least three occasions and an injured lung in 2019 and, since the child's removal, no further injuries have occurred. We now affirm.

Contrary to the father's contention, on the record before us, petitioner established that the father "failed to plan appropriately for the child's future" (*Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1551 [4th Dept 2015], lv denied 27 NY3d 903 [2016]) and, despite services rendered by petitioner, "gained no insight into [his] own behavior," which led to the child's removal (*Matter of Nathaniel T.*, 67 NY2d 838, 842 [1986]).

We also reject the father's contention that Family Court abused its discretion by denying his request for a suspended judgment because nothing in this record warrants " 'further prolongation of the [child's] unsettled familial status,' " especially given that the

child has now been almost six years in petitioner's custody (*Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1628 [4th Dept 2017], lv denied 30 NY3d 911 [2018]).

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

**24**

**KA 10-01112**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN HARVEY, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered April 2, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, robbery in the first degree, and attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [3]), robbery in the first degree (§ 160.15 [4]), and attempted robbery in the first degree (§§ 110.00, 160.15 [4]). The charges arose from an incident in which defendant and three other individuals robbed the owner of a barbershop and one of the other individuals fatally shot the owner.

Contrary to defendant's contention, the fact that a witness committed perjury during his grand jury testimony by using his brother's first name as his own does not warrant dismissal of the indictment. Pursuant to CPL 210.20 (1) (c), Supreme Court "may, upon motion of the defendant, dismiss [the] indictment . . . upon the ground that . . . [t]he grand jury proceeding was defective, within the meaning of [CPL 210.35]." A grand jury proceeding is defective, pursuant to CPL 210.20 (1) (c) and 210.35 (5), when the proceeding "fails to conform to the requirements of [CPL article 190] to such degree that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]). Although "[t]he likelihood of prejudice turns on the particular facts of each case" (*People v Huston*, 88 NY2d 400, 409 [1996]), a "defendant need not demonstrate actual prejudice" (*People v Sayavong*, 83 NY2d 702, 709 [1994]). Nonetheless, "dismissal of an indictment under CPL 210.35 (5) must

meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury" (*People v Fisher*, 101 AD3d 1786, 1786 [4th Dept 2012], *lv denied* 20 NY3d 1098 [2013] [internal quotation marks omitted]; see *People v Bubis*, 204 AD3d 1492, 1493 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022]). Here, defendant failed to establish that the witness's perjury impaired the integrity of the grand jury proceeding and potentially prejudiced him, inasmuch as the false testimony was limited to a collateral issue, the indictment was amply supported by other evidence, and the prosecution was not aware that the testimony was false when it was offered (see *People v Sheppard*, 221 AD3d 1513, 1514 [4th Dept 2023], *lv denied* 41 NY3d 985 [2024]; *People v Green*, 178 AD3d 603, 604 [1st Dept 2019], *lv denied* 35 NY3d 970 [2020]; *People v Johnson*, 54 AD3d 636, 636 [1st Dept 2008], *lv denied* 11 NY3d 898 [2008], 12 NY3d 759 [2009]).

Defendant's contention that he did not receive a fair trial because the court permitted the prosecutor a second opportunity to elicit an in-court identification from a witness after the witness failed to identify defendant on the first opportunity is not preserved for our review inasmuch as defendant did not move for a mistrial or to strike the second in-court identification but, rather, chose to use the witness's inconsistent testimony for impeachment purposes (see *People v McCorkle*, 272 AD2d 273, 274 [1st Dept 2000], *lv denied* 95 NY2d 890 [2000], 95 NY2d 936 [2000]; *People v Brown*, 246 AD2d 603, 604 [2d Dept 1998], *lv denied* 91 NY2d 1005 [1998]; see generally *People v Carlson*, 184 AD3d 1139, 1143 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020]). In any event, defendant's contention is without merit. We conclude that the court did not abuse its discretion in allowing the prosecution a second opportunity to elicit an in-court identification from a witness (see generally *People v Perdue*, 41 NY3d 245, 252-253 [2023]).

Contrary to defendant's further contention, his counsel's failure to move for a mistrial or to strike the second in-court identification does not constitute ineffective assistance inasmuch as such a motion would have had little or no chance of success (see *People v Lostumbo*, 182 AD3d 1007, 1009 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]; see generally *People v Caban*, 5 NY3d 143, 152 [2005]). Moreover, defendant failed to " 'demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings' " (*People v Mastin*, 232 AD3d 1268, 1270 [4th Dept 2024], *lv denied* – NY3d – [2024], quoting *People v Honghirun*, 29 NY3d 284, 289 [2017]).

Defendant failed to seek dismissal of a sworn juror on the ground that the juror was grossly unqualified, and thus, as defendant correctly concedes, he failed to preserve for our review his contention that the court erred in refusing to grant that relief (see CPL 470.05 [2]; *People v Black*, 137 AD3d 1679, 1679 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016], *reconsideration denied* 28 NY3d 1026 [2016]; *People v Swank*, 109 AD3d 1089, 1090 [4th Dept 2013], *lv denied* 23 NY3d 968 [2014]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see

CPL 470.15 [6] [a])).

Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**47**

**KA 23-01885**

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TEDURELL A. WILLIAMS, DEFENDANT-APPELLANT.

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ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS, EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Wayne County Court (Arthur B. Williams, J.), rendered October 24, 2023. The judgment convicted defendant upon a jury verdict of burglary in the second degree and criminal contempt in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]) and criminal contempt in the first degree (§ 215.51 [b] [v]), defendant contends that County Court erred in denying his motion to dismiss the indictment on the ground that he was denied his right to testify before the grand jury. We reject that contention. Although “the right to testify before a grand jury is significant and must be scrupulously protected . . . , a prospective defendant has no constitutional right to testify before the [g]rand [j]ury” (*People v Hogan*, 26 NY3d 779, 786 [2016] [internal quotation marks omitted]; see also *People v Gannon*, 174 AD3d 1054, 1055-1056 [3d Dept 2019], lv denied 34 NY3d 980 [2019]). A defendant bears the burden of establishing that their rights pursuant to CPL 190.50 were violated (see *People v Fleming*, 196 AD2d 551, 551 [2d Dept 1993], lv denied 82 NY2d 805 [1993]; see also *People v Welch*, 2 AD3d 1354, 1356 [4th Dept 2003], lv denied 2 NY3d 747 [2004]).

In his motion, defendant acknowledged that a letter in the People’s file indicated both that notice of the grand jury date had been sent to defendant in jail and that a copy of the letter had been sent to defense counsel. Defendant contended, however, that defense counsel could not find the letter in his own file and that the notice was “possibly erroneous” because defendant “may have been” in a

different jail at the time that the letter was sent. That was insufficient to meet defendant's burden (see *Fleming*, 196 AD2d at 551) and, inasmuch as it is undisputed that defendant failed to invoke his right to testify before the grand jury in accordance with the strict requirements of CPL 190.50, the court properly denied his motion (see *People v Kirk*, 96 AD3d 1354, 1358-1359 [4th Dept 2012], *lv denied* 20 NY3d 1012 [2013]; see generally *Gannon*, 174 AD3d at 1056; *People v Caswell*, 56 AD3d 1300, 1302 [4th Dept 2008], *lv denied* 11 NY3d 923 [2009], *reconsideration denied* 12 NY3d 781 [2009], *cert denied* 556 US 1286 [2009]).

We further reject defendant's contention that he was deprived of effective assistance of counsel based on defense counsel's failure to facilitate his appearance before the grand jury. "[A] '[d]efense counsel's failure to timely facilitate defendant's intention to testify before the [g]rand [j]ury does not, per se, amount to a denial of effective assistance of counsel' " (*Hogan*, 26 NY3d at 787; see *People v Robinson*, 193 AD3d 1393, 1393 [4th Dept 2021], *lv denied* 37 NY3d 968 [2021]). Moreover, even assuming, arguendo, that there was no strategic reason for defense counsel's failure, we conclude that defendant did not establish that he was prejudiced by that purported failure or that the outcome would have been different if he had testified (see *Hogan*, 26 NY3d at 787; *Robinson*, 193 AD3d at 1393; *People v Lostumbo*, 182 AD3d 1007, 1009 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]). To the extent that defendant contends that prejudice may be established with evidence outside this record, the contention must be raised pursuant to a CPL 440.10 motion (see generally *People v Streeter*, 118 AD3d 1287, 1289 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014]).

We reject defendant's further contention that the court failed to conduct a sufficient inquiry into his complaints about defense counsel. A court's duty to consider a motion to substitute counsel is invoked only when a defendant makes a "seemingly serious request[ ]" for new counsel (*People v Porto*, 16 NY3d 93, 100 [2010] [internal quotation marks omitted]; see *People v Sides*, 75 NY2d 822, 824 [1990]). Only where a defendant makes "specific factual allegations of serious complaints about counsel" must the court make a "minimal inquiry" into "the nature of the disagreement or its potential for resolution" (*Porto*, 16 NY3d at 100 [internal quotation marks omitted]; see *People v Gibson*, 126 AD3d 1300, 1301-1302 [4th Dept 2015]), and the court is required to substitute counsel only where good cause is shown (see *Porto*, 16 NY3d at 100; *Sides*, 75 NY2d at 824; *Gibson*, 126 AD3d at 1302).

Here, to the extent that defendant made sufficiently specific factual allegations of serious complaints about defense counsel's failure to facilitate his appearance before the grand jury, we conclude that the court conducted the requisite minimal inquiry to determine whether substitution of counsel was warranted (see *People v Fulton*, 210 AD3d 1436, 1438 [4th Dept 2022], *lv denied* 39 NY3d 1154 [2023]). The record establishes that the court "allowed defendant to

air his concerns about defense counsel, and after listening to them reasonably concluded that" defendant's specific complaints "had no merit or substance" (*People v Linares*, 2 NY3d 507, 511 [2004]) and that "defense counsel was reasonably likely to afford . . . defendant effective assistance of counsel" (*Fulton*, 210 AD3d at 1438 [internal quotation marks omitted]).

Defendant failed to preserve for our review his contention that, in sentencing him, the court penalized him for exercising his right to a trial (see *People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Britton*, 213 AD3d 1326, 1328 [4th Dept 2023], *lv denied* 39 NY3d 1140 [2023]; *People v Gilmore*, 202 AD3d 1453, 1454 [4th Dept 2022], *lv denied* 38 NY3d 1008 [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]). Finally, defendant's sentence is not unduly harsh or severe.

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

52

**KA 23-01433**

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RONALD A. AGEE, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 17, 2023. The judgment convicted defendant, upon his plea of guilty, of aggravated family offense.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Cayuga County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of aggravated family offense (Penal Law § 240.75), defendant contends that County Court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (see CPL 30.30). We agree with defendant that the court erred in concluding that the motion failed to contain "sworn allegations that there has been [an] unexcused delay in excess of the statutory maximum" (*People v Santos*, 68 NY2d 859, 861 [1986]). "A defendant seeking a speedy trial dismissal pursuant to CPL 30.30 meets [their] initial burden on the motion simply 'by alleging only that the prosecution failed to declare readiness within the statutorily prescribed time period' " (*People v Goode*, 87 NY2d 1045, 1047 [1996]; see *People v Luperon*, 85 NY2d 71, 77-78 [1995]; *People v Channer*, 209 AD2d 1056, 1056 [4th Dept 1994]). Here, defendant met that burden inasmuch as his motion sufficiently alleged the date on which the criminal action was commenced by the filing of the felony complaints and that the People did not announce their readiness for trial until defendant was indicted 239 days later, a date beyond the statutorily prescribed six-month time period (see CPL 30.30 [1] [a]; *People v Amrhein*, 128 AD3d 1412, 1413 [4th Dept 2015]). Defendant further alleged that the People's certificate of compliance was illusory and insufficient to stop the running of the speedy trial clock. The motion should have been granted unless the People controverted the factual basis for the motion (see *Channer*, 209 AD2d at 1056). We therefore reserve decision and remit the matter to County Court to rule on defendant's statutory speedy trial motion on the merits after consideration of the People's opposition (see *People*

*v Session*, 206 AD3d 1678, 1682 [4th Dept 2022]; *Channer*, 209 AD2d at 1056).

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

53

**KA 22-01647**

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ABRAIN WRIGHT, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered October 9, 2019. The judgment convicted defendant upon a jury verdict of robbery in the second degree and bribing a witness.

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 robbery in the second degree (Penal Law § 160.10 [2] [b]) and bribing a witness (§ 215.00), defendant contends that he was deprived of effective assistance of counsel because defense counsel failed to request that County Court instruct the jury on robbery in the third degree (§ 160.05) as a lesser included offense of robbery in the first degree. We reject that contention. "[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]; see *People v Benevento*, 91 NY2d 708, 712 [1998]). It is well settled, however, that "[t]he determination whether to seek a jury charge on a lesser included offense is a quintessentially tactical determination" (*People v Baez*, 175 AD3d 982, 985 [4th Dept 2019], lv denied 34 NY3d 1015 [2019]). Here, although a request to charge the jury on robbery in the third degree would have been appropriate inasmuch as there was a reasonable view of the evidence that defendant forcibly stole property without displaying what appeared to be a firearm, defendant "has not demonstrated that the failure to request [such a] charge was other than an acceptable all-or-nothing defense strategy" (*People v Rosario*, 157 AD3d 988, 994 [3d Dept 2018], lv denied 31 NY3d 1121 [2018] [internal quotation marks omitted]; see *People v Collins*, 167 AD3d 1493, 1498 [4th Dept 2018], lv denied 32 NY3d 1202 [2019]; *People v McFadden*, 161 AD3d 1570, 1571 [4th Dept 2018], lv denied 31 NY3d 1150

[2018])). Indeed, it would have been a reasonable strategy for defense counsel to decide not to request robbery in the third degree as a lesser included offense because, without that charge, the chances of defendant being acquitted outright with respect to robbery in the first degree were increased (see *Collins*, 167 AD3d at 1498; *McFadden*, 161 AD3d at 1571; see also *Baez*, 175 AD3d at 985).

Finally, even assuming, arguendo, that defense counsel should have requested robbery in the third degree as a lesser included offense, we note that the failure to request a particular lesser included offense "is not the type of 'clear cut and completely dispositive' error that rises to the level of ineffective assistance of counsel" (*People v Harris*, 97 AD3d 1111, 1112 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012], quoting *People v Turner*, 5 NY3d 476, 481 [2005]; see *McFadden*, 161 AD3d at 1571-1572).

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

**54**

**KA 23-01286**

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAMAINE R. WILLIAMS, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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

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

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered April 27, 2023. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]) and, in appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of aggravated family offense (§ 240.75). In each appeal, we reject defendant's contention that the sentence is unduly harsh and severe. With respect to appeal No. 1, we note that the plea proceeding and the sentence reflect defendant's status as a second felony drug offender (§ 70.70 [1] [b]), and the record thus confirms that County Court merely misstated during sentencing that defendant was a second felony offender rather than a second felony drug offender (*see People v Duncan*, 217 AD3d 1579, 1580 [4th Dept 2023], *lv denied* 40 NY3d 950 [2023]; *People v Bradley*, 196 AD3d 1168, 1170-1171 [4th Dept 2021]). The certificate of disposition and the uniform sentence and commitment form incorrectly state that defendant was sentenced as a second felony offender, and they must be amended to reflect that he was actually sentenced as a second felony drug offender (*see People v Cruz*, 182 AD3d 999, 1000 [4th Dept 2020]; *People v Johnson*, 161 AD3d 1529, 1529 [4th Dept 2018]).

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

55

**KA 23-01287**

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAMAINE R. WILLIAMS, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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

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

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Appeal from a judgment of the Cayuga County Court (Thomas G.  
Leone, J.), rendered April 27, 2023. The judgment convicted defendant  
upon his plea of guilty of aggravated family offense.

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

Same memorandum as in *People v Williams* ([appeal No. 1] – AD3d –  
[Feb. 7, 2025] [4th Dept 2025]).

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

59

**CAF 24-00582**

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

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IN THE MATTER OF DAVID J. ABDOCH,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

FONDA D. ABDOCH, RESPONDENT-RESPONDENT.

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ALISON BATES, ESQ., ATTORNEY FOR THE CHILDREN,  
APPELLANT.

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ALISON BATES, VICTOR, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

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Appeal from an order of the Family Court, Monroe County (Deral D. Givens, J.), entered March 19, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parties joint custody of the subject children with designated zones of influence.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, the Attorney for the Children (AFC) appeals from an order that, inter alia, continued joint custody of the subject children but designated certain "zones of influence" for decision-making purposes. Contrary to the contention of the AFC, we find no basis in this record to depart from our prior case law holding that children in a custody matter do not have "full party status" (*Matter of Lawrence v Lawrence*, 151 AD3d 1879, 1879 [4th Dept 2017] [internal quotation marks omitted]; see *Matter of McDermott v Bale*, 94 AD3d 1542, 1543 [4th Dept 2012]). Here, neither parent has perfected an appeal from the subject order, and we conclude on the record before us that entertaining the appeal would force the aggrieved yet nonappellant parents to litigate a petition that they have since abandoned (*cf. Matter of Muriel v Muriel*, 228 AD3d 1345, 1346 [4th Dept 2024]). Under the circumstances of this case, we decline to permit the AFC to chart the course of the litigation, and we conclude that the appeal must be dismissed (see *Lawrence*, 151 AD3d at 1879).

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

61

**TP 24-01163**

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

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IN THE MATTER OF LORCEN BURROUGHS, PETITIONER,

V

MEMORANDUM AND ORDER

SUPERINTENDENT JOSEPH COREY, AUBURN CORRECTIONAL FACILITY, LT. VANTASSELL, CAPTAIN M. GILMORE, ACTING COMMISSIONER DANIEL F. MARTUSCELLO, AND DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS.

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LORCEN BURROUGHS, PETITIONER PRO SE.

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

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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, Cayuga County [Thomas G. Leone, A.J.], entered July 16, 2024) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various incarcerated individual rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II disciplinary hearing, that he violated incarcerated individual rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing direct order]) and 109.12 (7 NYCRR 270.2 [B] [10] [iii] [movement regulation violation]).

Initially, we note that the petition did not raise a substantial evidence issue, and thus Supreme Court erred in transferring the proceeding to this Court (see *Matter of Cendales v Annucci*, 196 AD3d 1069, 1069 [4th Dept 2021]; *Matter of Nova v Annucci*, 194 AD3d 1404, 1405 [4th Dept 2021]). In the interest of judicial economy, we nevertheless address petitioner's contentions (see *Cendales*, 196 AD3d at 1069; *Nova*, 194 AD3d at 1405).

We reject petitioner's contentions that the Hearing Officer improperly denied his request to call certain witnesses to testify at the hearing. "Although an [incarcerated individual] has a 'conditional right' to call witnesses . . . , an [incarcerated individual] is not entitled to call witnesses whose testimony is

immaterial or redundant" (*Matter of Ballard v Kickbush*, 165 AD3d 1587, 1589 [4th Dept 2018], *appeal dismissed* 32 NY3d 1182 [2019]; see 7 NYCRR 253.5 [a]). Here, the proposed testimony of the various witnesses was either irrelevant or redundant (see *Cendales*, 196 AD3d at 1069-1070; *Matter of Jackson v Annucci*, 122 AD3d 1288, 1288-1289 [4th Dept 2014]).

Petitioner's contention that the Hearing Officer improperly denied him the use of the video of the incident is not preserved for our review inasmuch as petitioner did not request any video of the incident at the hearing (see *Matter of Estrada v Annucci*, 199 AD3d 1145, 1146 [3d Dept 2021]; *Matter of Burgess v Annucci*, 178 AD3d 1419, 1420 [4th Dept 2019]). We have reviewed petitioner's remaining contention and conclude that it is without merit.

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

65

**TP 24-01375**

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

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IN THE MATTER OF ISAMAR ALEJO-CRUTCHFIELD,  
PETITIONER,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK OFFICE OF CHILDREN AND  
FAMILY SERVICES AND JEFFERSON COUNTY DEPARTMENT  
OF SOCIAL SERVICES, RESPONDENTS.

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TULLY RINCKEY, PLLC, ROCHESTER (JARED K. COOK OF COUNSEL), FOR  
PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (RACHEL RAIMONDI OF COUNSEL),  
FOR RESPONDENT STATE OF NEW YORK OFFICE OF CHILDREN AND FAMILY  
SERVICES.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Onondaga County [Danielle M. Fogel, J.], dated August 19, 2024) to review a determination of respondent State of New York Office of Children and Family Services. The determination denied petitioner's request that a report maintained in the New York State Central Register of Child Abuse and Maltreatment, indicating petitioner for maltreatment, be amended to unfounded.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination made after a fair hearing that denied her request to amend an indicated report of maltreatment with respect to the subject child to an unfounded report and to seal that report. Contrary to petitioner's contention, we conclude on the record before us that "the determination that [respondent Jefferson County Department of Social Services] established by a fair preponderance of the evidence at the fair hearing that petitioner maltreated the subject child[ ] . . . is supported by substantial evidence" (*Matter of Dawn M. v New York State Cent. Register of Child Abuse & Maltreatment*, 138 AD3d 1492, 1494 [4th Dept 2016]; see *Matter of McShanley v New York State Off. of Children & Family Servs.*, 213 AD3d 1253, 1254 [4th Dept 2023]; *Matter of Kern v New York State Cent. Register of Child Abuse & Maltreatment*, 174 AD3d 1434, 1435-1436 [4th

Dept 2019], *lv denied* 34 NY3d 906 [2019])). We have considered petitioner's remaining contention and conclude that it lacks merit.

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

69

**KA 22-01741**

PRESENT: BANNISTER, J.P., SMITH, OGDEN, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MIKEL AYALA, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. TRESMOND OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered June 22, 2022. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of murder in the second degree (Penal Law § 125.25 [1]). 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 Bailey*, 230 AD3d 1543, 1543-1544 [4th Dept 2024], *lv denied* 42 NY3d 1034 [2024]; *People v Hudson*, 229 AD3d 1354, 1354 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]). Defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]). Defendant's remaining contention is raised for the first time in his reply brief and thus is not properly before us (*see People v Baxtrum*, 170 AD3d 1535, 1536 [4th Dept 2019], *lv denied* 33 NY3d 1102 [2019]).

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

70

**KA 23-01454**

PRESENT: BANNISTER, J.P., SMITH, OGDEN, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS S. VANDUSEN, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (JAMES ECKERT OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered August 14, 2023. The judgment convicted defendant, upon his plea of guilty, of aggravated family offense and assault in the third 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 aggravated family offense (Penal Law § 240.75 [1]) and assault in the third degree (§ 120.00 [1]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty in the same plea proceeding, of robbery in the third degree (§ 160.05). We affirm in both appeals.

Contrary to defendant's contention in each appeal, the record establishes that he knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Williams*, 228 AD3d 1316, 1316 [4th Dept 2024], lv denied 42 NY3d 972 [2024], reconsideration denied 42 NY3d 1055 [2024]; 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's oral colloquy did not, as asserted by defendant, mischaracterize the appeal waiver as "an absolute bar to the taking of a first-tier direct appeal" (*Thomas*, 34 NY3d at 558; see *People v Figueroa*, 230 AD3d 1581, 1582 [4th Dept 2024]). Although the written waiver forms executed by defendant incorrectly portray the waiver as an absolute bar to the taking of an appeal (see generally *Thomas*, 34 NY3d at 564-567), "the oral colloquy, which followed the appropriate model colloquy, cured that defect" (*Williams*, 228 AD3d at 1317 [internal quotation marks omitted]; see generally *Thomas*, 34 NY3d at 563). Defendant's assertion that the

appeal waiver was added to the terms of the plea agreement as an "afterthought" is belied by the record, which establishes that, before defendant pleaded guilty, the court repeatedly mentioned that the waiver would be a condition of the plea agreement (see *People v Love*, 179 AD3d 1541, 1542 [4th Dept 2020], *lv denied* 35 NY3d 994 [2020]; *People v Rohadfox*, 175 AD3d 1813, 1814 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]).

Defendant contends in each appeal that the court erred in proceeding with a suppression hearing without granting his request to substitute assigned counsel or, alternatively, to proceed pro se after an appropriate inquiry. Defendant does not, however, assert that those alleged errors affected the voluntariness of the plea, which he sought during an appearance after the suppression hearing and which he entered following thorough discussions with the court (see *Rohadfox*, 175 AD3d at 1815; *People v Richardson*, 173 AD3d 1859, 1860 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019], *reconsideration denied* 34 NY3d 1081 [2019]). Moreover, any such assertion is not supported by the record (see *Rohadfox*, 175 AD3d at 1815). Thus, our review of defendant's contention is precluded by the valid waiver of the right to appeal (see *id.*; *Richardson*, 173 AD3d at 1860).

Defendant's further contention in each appeal that the court erred in denying his preplea recusal motion is likewise encompassed by the valid waiver of the right to appeal (see *People v Wilson*, 160 AD3d 1469, 1470 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *People v Smith*, 138 AD3d 1415, 1416 [4th Dept 2016]; *People v Thorn*, 298 AD2d 900, 901 [4th Dept 2002], *lv denied* 99 NY2d 540 [2002]).

Finally, inasmuch as the court advised defendant prior to his appeal waiver of the maximum sentence that could be imposed upon a violation of the plea agreement, the appeal waiver encompasses his contention in each appeal that the enhanced sentence is unduly harsh and severe (see *People v Brown*, 229 AD3d 1150, 1151 [4th Dept 2024]; *People v Ney*, 229 AD3d 1251, 1253 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]; *People v May*, 169 AD3d 1365, 1365 [4th Dept 2019]).

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

**74**

**KA 21-01509**

PRESENT: BANNISTER, J.P., SMITH, OGDEN, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JUSTIN T. GLADNEY, ALSO KNOWN AS  
JUSTIN GLADNEY, ALSO KNOWN AS JUSTIN T. GLADNEY, SR.,  
DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered October 12, 2021. The judgment convicted defendant upon a jury verdict of rape 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 rape in the second degree (Penal Law former § 130.30 [1]) and endangering the welfare of a child (§ 260.10 [1]). We affirm.

Defendant contends that the verdict is against the weight of the evidence with respect to the count of rape in the second degree. Viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to that count is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). It is well settled that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010] [internal quotation marks omitted]), and we see no basis for disturbing the jury's credibility determinations in this case (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that County Court erred in refusing to suppress statements that he made to a police detective on the ground that he was in custody at the time and had not been administered

*Miranda* warnings. We reject that contention. As the court properly determined, " 'a reasonable person in defendant's position, innocent of any crime, would not have believed that [they were] in custody, and thus *Miranda* warnings were not required' " (*People v Daniels*, 75 AD3d 1169, 1169 [4th Dept 2010], *lv denied* 15 NY3d 892 [2010]; see *People v Baez*, 175 AD3d 982, 983 [4th Dept 2019], *lv denied* 34 NY3d 1015 [2019])).

We reject defendant's contention that the period of postrelease supervision is unduly harsh and severe. We have considered 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***

75

**KA 23-01491**

PRESENT: BANNISTER, J.P., SMITH, OGDEN, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS S. VANDUSEN, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (JAMES ECKERT OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered August 14, 2023. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree.

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

Same memorandum as in *People v Vandusen* ([appeal No. 1] – AD3d – [Feb. 7, 2025] [4th Dept 2025]).

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

76

**KA 21-01476**

PRESENT: BANNISTER, J.P., SMITH, OGDEN, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TAVION TURNER, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JESSICA STICKL ASBACH OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Chautauqua County Court (David W. Foley, J.), rendered September 22, 2021. 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: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is invalid and thus does not foreclose his challenge to the severity of his sentence. We agree. Here, "there is no basis [in the record] upon which to conclude [County Court] ensured 'that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Jones*, 107 AD3d 1589, 1590 [4th Dept 2013], *lv denied* 21 NY3d 1075 [2013], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]; see *People v Barzee*, 204 AD3d 1422, 1422 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

77

**CAF 23-00784**

PRESENT: BANNISTER, J.P., SMITH, OGDEN, NOWAK, AND HANNAH, JJ.

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IN THE MATTER OF AERIELLE M.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ASHALEY C., RESPONDENT-APPELLANT.  
(APPEAL NO. 1.)

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

TABITHA R. SALONEN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO  
(ROXANNA Q. HERREID OF COUNSEL), ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered April 19, 2023, 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.

Memorandum: In these proceedings pursuant to Social Services Law § 384-b, respondent mother appeals, in appeal Nos. 1 and 2, from respective orders that, among other things, revoked suspended judgments that had previously been entered against her and terminated her parental rights with respect to the subject children. We affirm.

It is well settled that, "[w]here petitioner establishes by a preponderance of the evidence that there has been noncompliance with *any of the terms* of [a] suspended judgment, [Family Court] may revoke the suspended judgment and terminate parental rights" (*Matter of Zackery S. [Christa P.]*, 224 AD3d 1336, 1336-1337 [4th Dept 2024], *lv denied* 41 NY3d 909 [2024] [internal quotation marks omitted]; see Family Ct Act § 633 [f]; *Matter of Ramel H. [Tenese T.]*, 134 AD3d 1590, 1592 [4th Dept 2015]). Here, the record establishes that the mother violated the terms of the suspended judgment by, among other things, failing to provide proof of income as required, failing to attend the children's medical appointments, and failing to attend supervised visits. While the mother disputed many of those facts at trial, we note that "[t]he court is in a unique position to observe the witnesses and determine their credibility and its determinations are entitled to great deference where . . . those determinations are

supported by the record" (*Matter of D'Angel M.-B. [Donell M.-B.]*, 173 AD3d 1764, 1765 [4th Dept 2019], *lv denied* 34 NY3d 911 [2020]).

Contrary to the mother's contention in both appeals, we conclude that the court's determination that the mother violated the terms of the suspended judgments is supported by a sound and substantial basis in the record, and we do not perceive any reason to disturb the court's credibility determinations (see *Matter of Tyasia T.S. [Ruthanne J.]*, 214 AD3d 1342, 1343 [4th Dept 2023], *lv denied* 40 NY3d 910 [2024]). Furthermore, a preponderance of the evidence supports the court's determination that it was in the children's best interests to terminate the mother's parental rights (see *Zackery S.*, 224 AD3d at 1337) and that "any progress that [the mother] made was not sufficient to warrant any further prolongation of the child[ren]'s unsettled familial status" (*Matter of Brendan S.*, 39 AD3d 1189, 1190 [4th Dept 2007] [internal quotation marks omitted]).

We have reviewed the mother's remaining contentions and conclude that none warrants modification or reversal of the orders in these appeals.

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

78

**CAF 23-00785**

PRESENT: BANNISTER, J.P., SMITH, OGDEN, NOWAK, AND HANNAH, JJ.

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IN THE MATTER OF JEZEKIAH G. AND JANALIAH G.  
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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ASHALEY C., RESPONDENT-APPELLANT.  
(APPEAL NO. 2.)

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

TABITHA R. SALONEN, BUFFALO, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILDREN.

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Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered April 19, 2023, 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 children.

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

Same memorandum as in *Matter of Aerielle M. (Ashaley C.)* ([appeal No. 1] – AD3d – [Feb. 7, 2025] [4th Dept 2025]).

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

80

**CAF 23-01634**

PRESENT: BANNISTER, J.P., SMITH, OGDEN, NOWAK, AND HANNAH, JJ.

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IN THE MATTER OF AIDEN R.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BRENDA M.W., RESPONDENT-APPELLANT.  
(APPEAL NO. 1.)

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

AMY R. INZINA, BUFFALO, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 15, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order denied respondent's motion to "reopen [her] default".

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

Memorandum: In appeal No. 1, respondent mother appeals from an order denying her motion to "reopen [her] default" after she failed to appear at the fact-finding hearing on petitioner's petition seeking to terminate her parental rights with respect to the subject child on the ground of abandonment. In appeal No. 2, the mother appeals from an order, entered upon her default, that, inter alia, determined that the subject child had been abandoned and terminated the mother's parental rights with respect to that child.

Addressing first appeal No. 2, we note that the mother failed to appear at the fact-finding hearing and, although her attorney was present at the hearing, the attorney did not participate. Under the circumstances, we conclude that Family Court properly determined that the mother's unexplained failure to appear constituted a default (see *Matter of Malachi S. [Michael W.]*, 195 AD3d 1445, 1446 [4th Dept 2021], lv dismissed 37 NY3d 1081 [2021]; *Matter of Tiara B.* [appeal No. 2], 64 AD3d 1181, 1181-1182 [4th Dept 2009]). We therefore dismiss the appeal from the order in appeal No. 2 (see *Tiara B.*, 64 AD3d at 1182; see also *Matter of Josaph M. [Wanda A.]*, 221 AD3d 1458, 1459 [4th Dept 2023], lv denied 42 NY3d 903 [2024]).

With respect to appeal No. 1, the determination "whether to

relieve a party of a default is within the sound discretion of the [court]" (*Matter of Goldstein v Goldstein*, 190 AD3d 971, 972 [2d Dept 2021]; see *Matter of Shehatou v Louka*, 145 AD3d 1533, 1533-1534 [4th Dept 2016]). In order to succeed on her motion, the mother was required to demonstrate a reasonable excuse for the failure to appear and a potentially meritorious defense to the relief sought in the petition (see *Malachi S.*, 195 AD3d at 1446; *Matter of Alexander G.R. [Kristin G.P.]*, 192 AD3d 1501, 1501-1502 [4th Dept 2021]; *Matter of Strumpf v Avery*, 134 AD3d 1465, 1465-1466 [4th Dept 2015]).

Here, the mother alleged that she missed the hearing because she had shut off her phone and no longer had her calendar, and that she could not find transportation when she learned of the hearing the day before. Contrary to the mother's contention, those allegations do not constitute a reasonable excuse for her default because, inter alia, she had prior written notice of the hearing and failed to provide a credible explanation for her failure to advise the court or petitioner of her unavailability (see *Matter of Kenneth L. [Michelle B.]*, 92 AD3d 1245, 1246-1247 [4th Dept 2012]; see also *Alexander G.R.*, 192 AD3d at 1501-1502). Moreover, even assuming, arguendo, that the mother established a reasonable excuse for her default, we conclude that she failed to demonstrate a meritorious defense to the abandonment petition, which alleged that she had no meaningful contact with the subject child during the six-month period immediately preceding the filing of the petition (see Social Services Law § 384-b [4] [b]). In the affidavit submitted by the mother in support of her motion, she did not dispute that she did not visit or have contact with the child during the relevant time period. We therefore conclude that the court did not abuse its discretion in denying the motion (see *Matter of Marianys I. [Gabrielle I.]*, 187 AD3d 1570, 1571 [4th Dept 2020], lv dismissed 36 NY3d 1036 [2021]; *Matter of Mikia H. [Monique K.]*, 78 AD3d 1575, 1576 [4th Dept 2010], lv dismissed in part & denied in part 16 NY3d 760 [2011]).

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

81

**CAF 23-01635**

PRESENT: BANNISTER, J.P., SMITH, OGDEN, NOWAK, AND HANNAH, JJ.

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IN THE MATTER OF AIDEN R.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BRENDA M.W., RESPONDENT-APPELLANT.  
(APPEAL NO. 2.)

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

AMY R. INZINA, BUFFALO, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered September 13, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights over the subject child to petitioner.

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

Same memorandum as in *Matter of Aiden R. (Brenda M.W.)* ([appeal No. 1] – AD3d – [Feb. 7, 2025] [4th Dept 2025]).

Entered: February 7, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**104**

**CAF 23-01437**

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

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IN THE MATTER OF TREVOR TORRES,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KATRINA A. PFEIFFER, RESPONDENT-APPELLANT.

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NIXON PEABODY LLP, ALBANY (ERIC FERRANTE OF COUNSEL), FOR  
RESPONDENT-APPELLANT.

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

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

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Appeal from an order of the Family Court, Jefferson County  
(Eugene R. Renzi, J.), entered August 1, 2023, in a proceeding  
pursuant to Family Court Act article 6. The order, inter alia,  
granted petitioner sole 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 mother appeals from an order that, inter alia,  
modified a prior custody order by awarding sole custody of the subject  
child to petitioner father and setting forth a schedule for the  
mother's visitation. We reject the mother's threshold contention that  
Family Court erred in determining that the father established that  
there had been a change in circumstances after entry of the prior  
order sufficient to warrant an inquiry into whether modification of  
the existing custody arrangement is in the best interests of the child  
(see *Matter of Chromczak v Salek*, 173 AD3d 1750, 1751 [4th Dept 2019];  
*Matter of Greene v Kranock*, 160 AD3d 1476, 1476 [4th Dept 2018]). A  
sufficient change in circumstances arose from, among other things,  
evidence that, after entry of the prior custody order, the mother had  
repeatedly made false reports to authorities that the father had  
sexually abused the child. Additionally, after entry of the prior  
custody order the mother had been charged with custodial interference  
and criminal contempt for removing the child from school without  
permission and attempting to drive him out of state in violation of an  
order granting temporary custody to the father. The mother later  
pleaded guilty to a lesser offense. There was also credible evidence  
adduced at the hearing establishing that the mother attempted to

alienate the child from the father after entry of the prior custody order.

The mother further contends that, even if a sufficient change of circumstances was established, the court improperly weighed the relevant factors in determining that an award of sole custody to the father is in the best interests of the child. We reject that contention. "The court's determination in a custody matter is entitled to great deference and will not be disturbed where . . . it is based on a careful weighing of appropriate factors" (*Matter of Stanton v Kelso*, 148 AD3d 1809, 1810 [4th Dept 2017] [internal quotation marks omitted]; see generally *Fox v Fox*, 177 AD2d 209, 210-211 [4th Dept 1992]). "Those factors include: (1) the continuity and stability of the existing custodial arrangement, including the relative fitness of the parents and the length of time the present custodial arrangement has continued; (2) the relative quality of each parent's home environment; (3) each parent's ability to provide for the child's emotional and intellectual development; (4) the parents' relative financial status and ability to provide for the child; (5) the child's wishes; and (6) the need of the child to live with siblings" (*Matter of Krier v Krier*, 178 AD3d 1372, 1373 [4th Dept 2019]).

Here, the evidence established that both parents loved the child and both were able to care for the child in a suitable home and nurturing environment. While certain factors favored the mother, others favored the father. For example, the mother was the child's primary caregiver until he was five years old and performed well in that role. By the time the hearing concluded, however, the child had been living primarily with the father and the child's half-siblings pursuant to a temporary custody order for two-and-a-half years, and the evidence established that the child was doing well in the father's home.

Nevertheless, the evidence of the mother's animosity toward the father and attempts to interfere with his contact with the child through false allegations of sexual abuse supports the court's determination to award the father sole custody of the child (see *Matter of Grabowski v Smith*, 182 AD3d 1002, 1003 [4th Dept 2020], 1v denied 35 NY3d 910 [2020]; *Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127-1128 [4th Dept 2004]; *Matter of Turner v Turner*, 260 AD2d 953, 954 [3d Dept 1999]). Thus, after review of all of the relevant factors, we conclude that the court's award of custody to the father with liberal visitation to the mother is supported by a sound and substantial basis in the record (see *Matter of Ridall v Jones*, 230 AD3d 1548, 1549 [4th Dept 2024]; *Matter of Doner v Flora*, 229 AD3d 1158, 1158 [4th Dept 2024]).