



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

DECISIONS FILED

JUNE 27, 2025

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. NANCY E. SMITH

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

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KA 24-00964

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

OPINION AND ORDER

SPENCER MANGANIELLO, DEFENDANT-APPELLANT.

CERIO LAW OFFICES, PLLC, SYRACUSE (SHAUN M. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Armen J. Nazarian, J.), rendered January 8, 2024. The judgment convicted defendant, upon his plea of guilty, of possessing a sexual performance by a child.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of defendant's motion seeking a determination that defendant's Fifth Amendment right against self-incrimination was violated is granted, and the matter is remitted to Oswego County Court for further proceedings in accordance with the following opinion.

Opinion by OGDEN, J.: Defendant appeals from a judgment convicting him, upon a guilty plea, of possessing a sexual performance by a child (Penal Law § 263.16). He contends, inter alia, that the search warrant, the execution of which uncovered over 100 sexually explicit videos involving children on defendant's cell phone, violated his right against self-incrimination under the Fifth Amendment of the United States Constitution because, upon its execution, defendant was compelled to provide his biometric data to unlock the cell phone. Under the circumstances of this case, we agree with defendant that the execution of the search warrant violated his right against self-incrimination under the Fifth Amendment. In light of our conclusion, we reverse the judgment, vacate the plea, grant defendant's motion in part, and remit the matter to County Court for further proceedings.

I

In 2022, the Oswego County Sheriff's Department received tips from Google LLC (Google) that child sexual abuse material had been uploaded to its servers from a Google account accessed from an internet service account located at a specific street address in

Oswego. In response to a search warrant, Google provided investigators with additional information in regard to the Google account, including emails for a Facebook profile with the name "Mango Spenciello" and several "selfie" photos from the account's Google Drive. Through their investigation, the Sheriff's Department eventually concluded that defendant lived, along with two other individuals, at the street address where the Google account had been accessed and matched the person depicted in the Google Drive photos.

In February 2023, investigators with the Sheriff's Department applied for a warrant authorizing the search of defendant and items in his possession, as well as his apartment and any computers and electronic devices that may be located there. Investigators stated, in the search warrant application, that "it will likely be necessary to press the finger(s) of the user(s) of the device(s) found during the search to the biometric sensor, or make the user(s)' face visible to the scanner, in an attempt to unlock the device for the purpose of executing the search." County Court signed the search warrant, which stated, in relevant part, that

"[e]xecuting police officers may, if necessary, press the fingers or capture a facial image of [defendant] or any person located within the premises for the purpose of attempting to unlock any computer or electronic device secured via a biometric lock to search and examine the contents therein as requested by this search warrant application" (emphasis omitted).

The Sheriff's Department executed the search warrant on March 2, 2023. During the execution of the warrant, an investigator informed defendant, inter alia, that all electronic devices were to be secured and directed defendant to hand over his cell phone. When that investigator attempted to grab the cell phone, defendant "pulled away," but the investigator "grabbed [defendant] by the wrist, took the phone and placed his hands behind his back." Defendant was thereafter handcuffed and placed in the back of a police vehicle by another investigator. Defendant was then told that the warrant required him to unlock his cell phone, and defendant unlocked the cell phone by placing the tip of one of his fingers on the phone, which unlocked the device. The Sheriff's Department found over 100 sexually explicit videos involving children on defendant's phone in a folder labeled "child porn" as well as artificial intelligence-generated sexually explicit images of children.

Defendant was thereafter charged by superior court information with four counts of promoting a sexual performance by a child (Penal Law § 263.15) and one count of possessing a sexual performance by a child (§ 263.16). Defendant moved to suppress all evidence recovered pursuant to the search warrant, alleging violations of his Fourth and Fifth Amendment rights. Defendant asserted, as relevant here, that, insofar as the search warrant compelled him to provide his biometric data to unlock his electronic devices—or, alternatively, authorized police officers "to forcefully do the same"—his Fifth Amendment right

against self-incrimination was violated. He specifically contended that the act of using a fingerprint to open a device is testimonial for Fifth Amendment purposes. The People responded that "defendant's act of unlocking the phone using his fingerprint" was not conclusive proof that he owned the phone but was merely "additional evidence" thereof. The People also asserted that defendant voluntarily unlocked the cell phone using his fingerprint.

The court denied defendant's motion, concluding that the search warrant did not violate his rights under the Fourth or Fifth Amendments. Defendant pleaded guilty to one count of possessing a sexual performance by a child and was sentenced to 10 years' probation.

II

The Fifth Amendment provides, in relevant part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against [themselves]" (US Const 5th Amend). For a defendant to invoke the Fifth Amendment privilege, the communication at issue must be: (1) compelled; (2) incriminating; and (3) testimonial (see *United States v Hubbell*, 530 US 27, 34-38 [2000]; *People v Havrish*, 8 NY3d 389, 392 [2007], *cert denied* 552 US 886 [2007]).

Critical to our analysis here, "[t]estimonial communications are those that, 'explicitly or implicitly, relate a factual assertion or disclose information' " (*United States v Payne*, 99 F4th 495, 508 [9th Cir 2024], *cert denied* — US —, 145 S Ct 605 [2024], quoting *Doe v United States*, 487 US 201, 210 [1988]). The court's "inquiry is contextual" (*United States v Brown*, 125 F4th 1186, 1202 [DC Cir 2025]).

Two different lines of cases are implicated in the pertinent Fifth Amendment analysis: (1) the physical trait cases (where compelled physical acts, such as standing in a lineup or providing a handwriting exemplar, are not testimonial); and (2) the act of production doctrine cases (where purely physical acts can be testimonial when the act implicitly communicates the existence, control, or authenticity of evidence) (see *Brown*, 125 F4th at 1202-1203; *Payne*, 99 F4th at 508-510).

Under the physical trait case law, physical acts are not testimonial if they "do not involve the testimonial capacities of the accused and instead only compel an individual to provide law enforcement with access to an immutable physical characteristic" (*Payne*, 99 F4th at 509; see *United States v Wade*, 388 US 218, 222-223 [1967]). Testimonial capacities are not implicated when one acts merely as a donor (see *Schmerber v California*, 384 US 757, 765 [1966]). As an example, "[a] blood draw reveals the blood-alcohol content of an individual *only when chemically analyzed*" (*Brown*, 125 F4th at 1203 [emphasis added]). Indeed, the defendant's "participation, except as a donor, [is] irrelevant to the results of the test" (*Schmerber*, 384 US at 765). However, "[s]ome displays of

physical traits can be testimonial" (*Brown*, 125 F4th at 1202). For example, "lie detector tests 'may actually be directed to eliciting responses which are essentially testimonial' " (*id.*, quoting *Schmerber*, 384 US at 764).

Under the act of production doctrine, "a purely physical act may nonetheless be testimonial because of what it communicates 'wholly aside from the contents' of the thing produced" (*Payne*, 99 F4th at 509, quoting *Fisher v United States*, 425 US 391, 410 [1976]). The physical act of production will be considered to have a testimonial aspect if it relates information about the existence of, control over, or authenticity of the potential evidence (see *Hubbell*, 530 US at 37; *Doe*, 487 US at 215-216; *Payne*, 99 F4th at 510).

Recently, the District of Columbia Circuit concluded in *United States v Brown* that a defendant's compliance with an order to open his cell phone by placing a thumb on the phone was a testimonial communication. After reviewing the physical trait cases and the act of production cases, the *Brown* court concluded that both lines of cases supported that conclusion (see *Brown*, 125 F4th at 1203-1204). With respect to the physical trait cases, the *Brown* court reasoned that the defendant's physical act was distinguishable from submitting a fingerprint and "much closer to responding to a lie detector test or complying with a command to say a password" (*id.* at 1202), inasmuch as the act belonged to the category of "physical actions that require no additional information to communicate an incriminatory message" (*id.* at 1203). With respect to the act of production cases, the *Brown* court reasoned that the defendant's act, inter alia, "disclosed his control over the phone, [and] his knowledge of how to access it" (*id.* at 1204).

In *United States v Payne*, the Ninth Circuit concluded, on the facts presented before it, that "the use of [Payne's] thumb to unlock his phone was not a testimonial act and the Fifth Amendment does not apply" (99 F4th at 513). Notably, in *Payne*, ownership and control over the phone were not in dispute (see *id.* at 512-513). *Payne* had already acknowledged ownership of the phone and where it was located by telling a police officer that it "was in the driver's door panel and was green in color" (*id.* at 500 [internal quotation marks omitted]). Because of *Payne*'s concessions, the Ninth Circuit in reaching its conclusion explained, "[t]he considerations regarding existence, control, and authentication . . . [were] absent or, at a minimum, significantly less compelling" (*id.* at 513).

III

Here, the court tacitly concluded that defendant's act of selecting one of his fingers and unlocking the cell phone with that finger, pursuant to the authority set forth in the search warrant, was not testimonial in nature and thus did not violate his Fifth Amendment right against self-incrimination. On appeal, the People do not dispute that the opening of the cell phone was compelled and incriminating. We are thus tasked with determining whether

defendant's compelled opening of his cell phone, upon the warrant's execution, had a testimonial aspect sufficient to trigger Fifth Amendment protection.

As the courts concluded in *Payne* and *Brown*, we arrive, in this appeal, at the intersection of two lines of existing case law, the physical trait cases and the act of production cases. With respect to the physical trait cases, we conclude that defendant's "act of unlocking the phone represented the thoughts 'I know how to open the phone,' 'I have control over and access to this phone,' and 'the print of this specific finger is the password to this phone' " (*Brown*, 125 F4th at 1202). The biometric data defendant provided "directly announce[d] [defendant's] access to and control over the phone, as well as his mental knowledge of how to unlock the device" (*id.* at 1203 [emphasis added]). The act of production cases also support the conclusion that, upon execution of the warrant, defendant's compelled unlocking of his phone through biometric data was testimonial. We conclude that "in response to the command to unlock the phone, [defendant] opened it, [and] that act disclosed his control over the phone [and] his knowledge of how to access it" (*id.* at 1204; see *In re Application for a Search Warrant*, 236 F Supp 3d 1066, 1073 [ND Ill 2017]; see also *United States v Doe*, 465 US 605, 614 n 13 [1984]; *People v Porter*, 192 AD3d 222, 225 [2d Dept 2020]; cf. *Payne*, 99 F4th at 513). At a minimum, the authentication through biometric data implicitly communicated that the contents contained therein were in defendant's possession or control (see *Hubbell*, 530 US at 36; *Porter*, 192 AD3d at 225).

Here, as in *Brown*, the way in which the warrant was executed effectively required defendant to answer "a series of questions about ownership or control over the phone, including how it could be opened and by whom" (125 F4th at 1204). The facts in *Payne*, however, are distinguishable from the facts before us, because, as noted above, ownership and control over the phone were not in dispute (see 99 F4th at 512-513; see generally *Hubbell*, 530 US at 37). The facts of this case are more akin to *Brown*, where the defendant had not yet conceded the issue of ownership or control at the time of the warrant's execution (see 125 F4th at 1203-1204).

We therefore conclude that the execution of the search warrant violated defendant's right against self-incrimination under the Fifth Amendment. With respect to defendant's Fourth Amendment challenge to the search warrant, we conclude that the search warrant did not lack particularity (see *People v Socciarelli*, 203 AD3d 1556, 1558 [4th Dept 2022], lv denied 38 NY3d 1035 [2022]).

"Because the compelled opening of the cellphone [during the execution of the search warrant] was testimonial, both the message and any evidence obtained from that communication must be suppressed" (*Brown*, 125 F4th at 1204). We therefore remit to County Court to determine the extent to which evidence obtained as a result of defendant's testimonial communication must be suppressed (see *id.*).

In light of our conclusion, as well as the People's concession that defendant "placed his fingertip on the phone and unlocked it without the [i]nvestigator having to physically force him to do so," we do not address whether the express language of the search warrant permitting officers to "press the fingers of . . . [defendant]" on the phone would have violated the Fifth Amendment, and we note that our conclusion is limited to the facts before us. We have no occasion to address whether we would reach the same result as the Ninth Circuit did in *Payne* if we were presented with similar facts nor whether the New York Constitution would afford greater protection than the United States Constitution under those facts.

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

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KA 21-01564

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DERRICK C. MARSH, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered July 26, 2021. The judgment convicted defendant upon a jury verdict of assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, that part of defendant's omnibus motion seeking to suppress defendant's videotaped statements at the police station on January 13, 2020 is granted in its entirety, and a new trial is granted on count 2 of the indictment.

Memorandum: On appeal from a judgment convicting him following a jury verdict of assault in the first degree (Penal Law § 120.10 [1]), defendant contends, inter alia, that the conviction is not based on legally sufficient evidence and that the verdict is against the weight of the evidence. Defendant failed to preserve his challenge to the sufficiency of the evidence inasmuch as his perfunctory motion for a trial order of dismissal was not " 'specifically directed' " at the errors alleged on appeal with respect to the single count for which he was convicted (*People v Gray*, 86 NY2d 10, 19 [1995]; see *People v Elmore*, 175 AD3d 1003, 1004 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]; *People v Lankford*, 162 AD3d 1583, 1584 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018]). In any event, the contention lacks merit.

Viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences that would lead a rational juror to conclude that defendant acted jointly and in concert with another with the intent to cause serious physical injury and caused such injury by means of a dangerous instrument (Penal Law §§ 20.00, 120.10 [1]; see *People v La Belle*, 18 NY2d 405, 412 [1966]; *People v McDonald*, 172 AD3d 1900, 1902-1903 [4th Dept 2019]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant was aware that another person was using a ligature to strangle the victim, and "his 'continued participation in the assault [is] sufficient to support the conclusion that he intentionally aided in the assault with a dangerous instrument' " (*People v Ford*, 148 AD3d 1656, 1657 [4th Dept 2017], *lv denied* 29 NY3d 1079 [2017]). Moreover, viewing the evidence in light of the elements of the crime of assault in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495; *see generally Ford*, 148 AD3d at 1657).

Defendant further contends that County Court erred in refusing to suppress statements he made to a detective at the police station following his arrest. According to defendant, the People failed to meet their burden at the suppression hearing of establishing beyond a reasonable doubt that he was fully advised of his *Miranda* rights and knowingly, intelligently and voluntarily waived such rights before speaking to the detective about the crime. We agree.

As a preliminary matter, we note that, although defendant did not contend below that his statements were involuntary due to the detective's failure to advise him of all the *Miranda* rights, his contention is properly before us because the court, in its suppression decision, expressly decided the issue raised by defendant on this appeal (*see CPL 470.05 [2]; People v Prado*, 4 NY3d 725, 726 [2004], *rearg denied* 4 NY3d 795 [2005]). Specifically, the court determined that defendant was advised of his *Miranda* rights and "knowingly, intelligently, and voluntarily waived them before providing statements" to the detective. The court added that "Miranda's safeguards were satisfied here." Based on our review of the videotaped interrogation, we come to a different conclusion.

"A defendant's waiver of his *Miranda* rights must be knowing, voluntary, and intelligent" (*People v Jin Cheng Lin*, 26 NY3d 701, 725 [2016]), and it is the People's burden to establish "beyond a reasonable doubt that defendant knowingly, voluntarily and intelligently waived his *Miranda* rights before being questioned" (*People v Lee*, 224 AD3d 1372, 1373 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]; *see People v Dunbar*, 104 AD3d 198, 206 [2d Dept 2013], *affd* 24 NY3d 304 [2014], *cert denied* 575 US 1005 [2015]). "In order to meet that burden, it must be shown, inter alia, that the waiver was made with 'a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it' " (*Dunbar*, 104 AD3d at 206, quoting *Moran v Burbine*, 475 US 412, 421 [1986]).

" 'The failure to adequately advise a suspect of [their] rights as required by *Miranda* requires suppression of even voluntary statements' " (*People v Santos*, 112 AD3d 757, 758 [2d Dept 2013], *lv denied* 22 NY3d 1158 [2014]). "[W]hether [a] defendant's waiver was knowing and intelligent is 'essentially a factual issue that must be determined according to the circumstances of each case' . . . The People must establish that the defendant 'grasped that he or she did

not have to speak to the interrogator; that any statement might be used to the subject's disadvantage; and that an attorney's assistance would be provided upon request, at any time, and before questioning is continued' " (*Jin Cheng Lin*, 26 NY3d at 725-726; *see generally Dunbar*, 24 NY3d at 313-314).

Here, defendant's interactions with the detective at the police station are captured on videotape, and the relevant facts are not in dispute. As the People concede, the detective never read the *Miranda* warnings to defendant, who at the time was 30 years old and had no criminal record. Instead, the detective presented defendant with a piece of paper containing *Miranda* warnings and, after ascertaining that defendant could "read okay," he said to defendant "read that first one there for me please." Notably, the detective did not instruct defendant to read all of the warnings, just the first one.

After handing the paper to defendant across the desk, the detective walked away and was momentarily out of the camera's view while defendant looked at the paper. Defendant can be seen and heard on the video reading the first two rights aloud to himself before saying "Ok, I get it." Immediately thereafter, defendant picked up a pen on the desk and signed the waiver form under the signature line. The two lines defendant read aloud contain 17 words ("You have the right to remain silent" and "Anything you say can be used against you in court"). The other three sentences discussing the right to counsel contain 66 words. Additionally, the form includes an 11-word preamble ("Before we ask you any questions, you must understand your rights"), which defendant did not appear to read, and a 64-word paragraph under the heading, Waiver of Rights, which defendant also did not appear to read. Thus, the rights that defendant read aloud before signing the waiver constitute 20.4% of the words in the *Miranda* warnings, and only 11.5% of the total words on the waiver form.

After defendant signed the form, the detective, upon returning to the desk, asked defendant whether he had read all of the rights. "Yes," defendant responded. The detective then asked defendant whether he read the Waiver of Rights portion of the form, which states, among other things, "I do not want a lawyer at this time." Defendant looked at the paper for a few seconds before stating, "I don't need a lawyer, do I?" The detective responded, "No, you - at any time you want, you can stop answering questions and, and, have an attorney, you know, if you want one." Defendant said that he did not think he would need a lawyer and proceeded to answer the detective's questions and to make incriminating statements that were used against him at trial.

As can be seen from the videotape, neither the detective nor defendant read all of the *Miranda* rights out loud and, while they did discuss *Miranda* in general, the focus of the oral interaction was about the waiver of the right to counsel and not the other rights described on the *Miranda* form. There is no indication that defendant actually read all of the warnings or comprehended them. Indeed, the videotape establishes that defendant looked at the form for less than five seconds before he reached for the pen to sign it. Based on our

review of the video, we conclude that it is highly improbable, if not impossible, for defendant to have read to himself all of the *Miranda* warnings during the five seconds the piece of paper was in front of him before he signed. More to the point, the People failed to meet their burden of proving beyond a reasonable doubt that defendant was adequately apprised of his relevant constitutional rights before waiving them.

Although "[t]here is no rule, statutory or otherwise, requiring that *Miranda* warnings be read to a suspect" (*People v Peraza*, 288 AD2d 689, 690 [3d Dept 2001], *lv denied* 97 NY2d 707 [2002]; *see People v Jeremiah*, 147 AD3d 1199, 1201-1202 [3d Dept 2017], *lv denied* 29 NY3d 1033 [2017]; *see generally United States v Sledge*, 546 F2d 1120, 1122 [4th Cir 1977], *cert denied* 430 US 910 [1977]; *People v Warren*, 2 AD3d 1317, 1318 [4th Dept 2003], *lv denied* 1 NY3d 636 [2004]), there is no evidence in this case that defendant was actually "administered" such rights (*Peraza*, 288 AD2d at 690) or that such rights were "verbally outline[d]" to him (*Jeremiah*, 147 AD3d at 1202).

In both *Sledge* and *Warren*, the respective defendants were given a form containing the *Miranda* warnings and the law enforcement officials then "observed" the defendants read the form (*Sledge*, 546 F2d at 1122; *see Warren*, 2 AD3d at 1317). Here, in contrast, the detective did not observe defendant read the form, and defendant did not have the form in front of him long enough to read all of the warnings before he signed it. "We remind the Government . . . that a heavy burden rests upon it to prove that a person in custody did knowingly and intelligently waive [the] privilege against self-incrimination and [the] right to retained or appointed counsel . . . [and] the preferred practice would include both an oral recitation of the required *Miranda* warnings coupled with the delivery of a written explanation thereof to the accused" (*Sledge*, 546 F2d at 1122).

Because there are "no facts from which County Court could have rationally concluded that defendant's waiver of the right to counsel - or any of his other rights - was knowing, voluntary and intelligent" (*People v Teixeira-Ingram*, 199 AD3d 1240, 1242 [3d Dept 2021]), and because defendant was in custody when interrogated at the police station, it follows that his statements must be suppressed. We therefore reverse the judgment, grant that part of the omnibus motion seeking to suppress the statements made by defendant to law enforcement personnel, and grant a new trial.

In light of our determination, defendant's remaining contentions are academic.

All concur except KEANE, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent. I disagree with the majority that County Court erred in determining that the People met their burden of establishing beyond a reasonable doubt that defendant knowingly, voluntarily and intelligently waived his *Miranda* rights before being questioned (*see generally People v Dunbar*, 104 AD3d 198, 206 [2d Dept 2013], *affd* 24 NY3d 304 [2014], *cert denied* 575

US 1005 [2015]; *People v Lee*, 224 AD3d 1372, 1373 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]). In my view, the videotape does not establish that the People failed to meet their burden. Although the detective did not read the *Miranda* warnings to defendant, he nonetheless provided a written copy of them to defendant after defendant assured the detective that he could "read and write okay." Defendant demonstrated that he could read by reading aloud the first two rights set forth in the *Miranda* warnings form. Defendant then advised the detective, "Ok, I get it," before signing the waiver of his own accord. After defendant signed the form, the detective asked him whether he had read all of the rights. Defendant responded that he had. As if that was not enough, the detective pressed defendant further, asking him whether he read the "waiver of rights" at the bottom of the page. Defendant thereafter asked if he needed a lawyer, an appropriate question directly related to the rights set forth in the *Miranda* warnings.

"[W]hether [a] defendant's waiver was knowing and intelligent is 'essentially a factual issue that must be determined according to the circumstances of each case' . . . The People must establish that the defendant 'grasped that [they] did not have to speak to the interrogator; that any statement might be used to the subject's disadvantage; and that an attorney's assistance would be provided upon request, at any time, and before questioning is continued' " (*People v Jin Cheng Lin*, 26 NY3d 701, 725-726 [2016]; *see generally People v Dunbar*, 24 NY3d 304, 313-314 [2014], *cert denied* 575 US 1005 [2015]).

I am concerned that by focusing upon, and drawing conclusions from, the fact that defendant read aloud only the first two rights of the *Miranda* warnings form and then signed it, we are employing an unreliable benchmark to measure his understanding of his rights and whether the waiver thereof was voluntary. That practice may serve to undermine our independent review of the unique facts presented in each case (*see Jin Cheng Lin*, 26 NY3d at 725-726). Without due consideration to defendant's demonstrated ability to read and write, the detective's understated approach to the interview, and defendant's repeated assurances that he read the rights contained in the *Miranda* warnings form, the majority's conclusion might suggest that a waiver of *Miranda* rights is involuntary where a defendant elected not to spend more time reading the form or the officer did not spend enough time observing a defendant read the form. Although it would have been preferable if the detective had read the form aloud to defendant, there is nothing in this record to suggest that defendant was denied adequate time to read the *Miranda* warnings form or was pressured in any way to sign the waiver. No trickery or coercion of any form occurred (*see generally People v Smalls*, 191 AD3d 1258, 1259 [4th Dept 2021], *lv denied* 36 NY3d 1124 [2021]).

Indeed, the detective was so concerned about whether defendant read all of his rights that he asked defendant twice if he read them all. Here, defendant alone decided how much time he wished to devote to reviewing the *Miranda* warnings form before signing it, and I am not comfortable substituting our judgment for his and deciding what is reasonable or adequate. I have reviewed defendant's remaining

contentions and conclude that none warrants modification or reversal of the judgment. I would therefore affirm.

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-01490

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWN WRIGHT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Rory A. McMahon, J.), rendered January 13, 2023. 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]).

Contrary to defendant's contention, the indictment provided sufficient notice of the crimes charged. "[A]n indictment is jurisdictionally defective only if it does not effectively charge the defendant with the commission of a particular crime" (*People v Iannone*, 45 NY2d 589, 600 [1978]), "such as where it 'fails to allege that a defendant committed acts constituting every material element of the crime charged' or the 'acts it accuses defendant of performing simply do not constitute a crime' " (*People v Saenger*, 39 NY3d 433, 438 [2023]; see *People v Shrubbsall*, 217 AD3d 1532, 1534 [4th Dept 2023], *lv denied* 40 NY3d 1082 [2023]). "[A] mistake with respect to date, time or place is a technical defect rather than a jurisdictional defect vital to the sufficiency of the indictment" (*People v Dudley*, 28 AD3d 1182, 1183 [4th Dept 2006], *lv denied* 7 NY3d 788 [2006] [internal quotation marks omitted]). Here, we conclude that County Court "properly granted the People's motion to amend the indictment to state the correct date of the offenses charged" (*id.*; see CPL 200.70 [1]; *People v Hale* [appeal No. 1], 236 AD2d 807, 807 [4th Dept 1997], *lv denied* 89 NY2d 1036 [1997]).

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]), and according great deference to the factfinder's resolution of credibility issues (see *People v Graham*, 221 AD3d 1439, 1440 [4th Dept 2023], lv denied 41 NY3d 1018 [2024]), we conclude that the verdict is not against the weight of the evidence (see generally *People v Baque*, 43 NY3d 26, 30 [2024]; *People v Bleakley*, 69 NY2d 490, 495 [1987]).

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 generally *People v Gross*, 26 NY3d 689, 696 [2016]; *Baldi*, 54 NY2d at 147).

Defendant further contends that the court erred in adjudicating him a persistent violent felony offender inasmuch as the People failed to comply with the statutory provisions regarding the predicate violent felony statement because the initial statement did not include the dates during which defendant was incarcerated for two prior felony convictions (see CPL 400.15 [2]; 400.16 [2]). Although the People conceded that the initial predicate statements did not include the dates of incarceration (see CPL 400.15 [2]), the record establishes that the People subsequently provided a revised persistent violent felony statement that included the dates of incarceration, and the court gave defendant the opportunity to challenge the calculation of the tolling periods with respect to the dates defendant was incarcerated (see generally Penal Law § 70.04 [1] [b] [v]; CPL 400.15 [2]). We therefore conclude that the People "appris[ed] the court of the prior conviction[s] and provid[ed] defendant with reasonable notice and an opportunity to be heard" with respect to the dates of incarceration (*People v Bouyea*, 64 NY2d 1140, 1142 [1985]; cf. *People v Watkins*, 185 AD3d 1521, 1521-1522 [4th Dept 2020]), and remittal for another persistent violent felony offender hearing "would be futile and pointless" (*Bouyea*, 64 NY2d at 1142).

We conclude that defendant's constitutional challenge to the persistent violent felony offender statute is not preserved for our review (see *People v Hernandez*, — NY3d —, —, 2025 NY Slip Op 00904, *3 [2025]; see generally *People v Cabrera*, 41 NY3d 35, 42 [2023]).

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

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

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KA 22-00407

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTONIO CLARK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered February 15, 2022. The judgment convicted defendant, upon a plea of guilty, of attempted assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [3]), defendant contends that Supreme Court erred in denying his request to substitute counsel.

Initially, we note that defendant's contention would survive his plea and even a valid waiver of the right to appeal to the extent that the contention implicates the voluntariness of his plea (*see generally People v Coleman*, 178 AD3d 1377, 1378 [4th Dept 2019], *lv denied* 35 NY3d 1026 [2020]; *People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]). Nevertheless, we conclude that defendant failed to preserve his contention for our review by failing to move to withdraw his plea or to vacate the judgment of conviction (*see People v Fernandez*, 218 AD3d 1257, 1259-1260 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023]; *see generally* CPL 220.60 [3]; 440.10). Furthermore, we conclude on this record that defendant abandoned his contention. Following the court's denial of defendant's request to substitute counsel, the court proceeded with a *Huntley* and probable cause hearing and, when defendant entered his plea nearly two months later, he "made no statements expressing dissatisfaction with counsel" (*People v Crosby*, 195 AD3d 1602, 1604 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]; *cf. People v Jones*, 173 AD3d 1628, 1630 [4th Dept 2019]). Indeed, defendant indicated that he had sufficient time to discuss the plea offer with his counsel, was pleading guilty of his

own free will, and was satisfied with the representation he received (see *Fernandez*, 218 AD3d at 1260; *People v Turner*, 197 AD3d 997, 1000 [4th Dept 2021], lv denied 37 NY3d 1061 [2021]).

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

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CA 24-01426

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

EDWARD MILLER, II, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

STEPHEN WAMP AND SUZANNE WAMP, DEFENDANTS-APPELLANTS.

MARK D. GORIS, CAZENOVIA, FOR DEFENDANTS-APPELLANTS.

FINKELSTEIN & PARTNERS, LLP, NEWBURGH (JAMES W. SHUTTLEWORTH, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered March 25, 2024. The order denied defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff was walking his two leashed golden retrievers down the main road at a New York State campground when defendants' rottweiler mix, which weighed over a hundred pounds and had been restrained by defendants with a pinch-style collar and a clothesline secured to a tree, broke the clothesline, ran after, and then attacked one of plaintiff's dogs. As plaintiff attempted to separate the dogs, he was knocked over and bitten by defendants' dog. Supreme Court denied defendants' motion for summary judgment dismissing the complaint, reasoning that there is a triable issue of fact whether defendants' dog had vicious propensities and, if so, whether defendants knew or should have known of those propensities. We affirm.

It is well established that "the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities" (*Collier v Zambito*, 1 NY3d 444, 446 [2004]; see *Flanders v Goodfellow*, — NY3d —, —, 2025 NY Slip Op 02261, *1 [2025]; *Modafferi v DiMatteo*, 177 AD3d 1413, 1414 [4th Dept 2019]). Those vicious propensities include " 'the propensity to do any act that might endanger the safety of the persons and property of others in a given situation' " (*Flanders*, — NY3d at —, 2025 NY Slip Op 02261, *1; see *Collier*, 1 NY3d at 446) and, thus, "an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious

propensities" (*Collier*, 1 NY3d at 447; *see Modafferi*, 177 AD3d at 1414; *Long v Hess*, 162 AD3d 1646, 1647 [4th Dept 2018]).

Here, defendants' deposition testimony, which was submitted in support of their motion, raises triable issues of fact that preclude judgment as a matter of law. Specifically, both defendants testified, *inter alia*, that they were aware of their dog's proclivity to strain and pull on his leash in the presence of other dogs—including that they enrolled the dog in at least two specialized training classes to correct this behavior and secured him at their campsite with a pinch-style collar designed to deter pulling—and thus it was " 'foreseeable that if [defendants' dog] attacked another dog, someone would attempt to pull the dogs apart and be injured in the process' " (*Modafferi*, 177 AD3d at 1414; *see Morse v Colombo*, 8 AD3d 808, 809 [3d Dept 2004]; *see also Skoney v Pittner*, 21 AD3d 1422, 1423 [4th Dept 2005]). We therefore conclude that triable issues of fact exist whether defendants' dog had a vicious propensity and whether defendants had knowledge of that propensity (*see Flanders*, — NY3d at —, 2025 NY Slip Op 02261, *1; *Lewis v Lustan*, 72 AD3d 1486, 1487 [4th Dept 2010]; *Pollard v United Parcel Serv.*, 302 AD2d 884, 884-885 [4th Dept 2003]).

We note that the first cause of action, sounding in negligence, remains viable in its entirety inasmuch as plaintiff may now "rely on rules of ordinary negligence and seek to prove that . . . defendant[s] failed to exercise due care under the circumstances that caused [his] injury" (*Flanders*, — NY3d at —, 2025 NY Slip Op 02261, *4).

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

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KA 19-01905

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY DEAN, DEFENDANT-APPELLANT.

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

CHRISTINE CALLANAN, DISTRICT ATTORNEY, LYONS (JOSEPH R. PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered August 2, 2019. The judgment convicted defendant upon a jury verdict of murder in the first degree, murder in the second degree (two counts), criminal possession of a weapon in the second degree (two counts) and conspiracy in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of murder in the second degree under counts 2 and 3 of the indictment and criminal possession of a weapon in the second degree under count 5 of the indictment and dismissing those counts, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]), two counts of murder in the second degree (§ 125.25 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Defendant's conviction arises from a double homicide in which Joshua Niles and his girlfriend, Amber Washburn, were shot and killed. Niles was the father of two children with Charlene Childers, who later married defendant. Defendant, his wife, and a third individual allegedly planned Niles's murder after defendant's wife lost custody of those children to Niles.

We note at the outset that, as the People correctly concede, those parts of the judgment convicting defendant of murder in the second degree under counts 2 and 3 of the indictment must be reversed and those counts dismissed because they are inclusory concurrent counts of the count of murder in the first degree (see CPL 300.40 [3] [b]; *People v Ashline*, 124 AD3d 1258, 1258 [4th Dept 2015], lv denied 27 NY3d 1128 [2016]). We therefore modify the judgment accordingly.

Defendant further contends that the part of the judgment convicting him of criminal possession of a weapon in the second degree under count 5 of the indictment should be reversed on the basis that County Court did not properly charge the jury on that count. We agree. There is no dispute that when the court instructed the jury on count 5 of the indictment—charging defendant with criminal possession of a weapon in the second degree under Penal Law § 265.03 (3)—the court mistakenly read to the jury the elements required to support a conviction of criminal possession of a weapon in the second degree under Penal Law § 265.03 (1) (b). Although defendant did not object to that fundamental error at trial, we conclude that the judgment insofar as it convicted defendant on count 5 must be reversed as a matter of discretion in the interest of justice inasmuch as the court did not convey to the jury the correct standard to be applied in considering count 5 of the indictment (*see People v Saigo*, 150 AD3d 643, 645-646 [1st Dept 2017]; *People v Rose*, 63 AD3d 1184, 1185 [3d Dept 2009]; *see generally People v Keschner*, 25 NY3d 704, 724 [2015]). We therefore further modify the judgment by reversing that part convicting defendant of count 5 of the indictment and, under the circumstances of this case, we dismiss that count (*see CPL 470.20; People v LaSalle*, 95 NY2d 827, 829 [2000]; *People v Von Cseh*, 9 AD2d 660, 661 [1st Dept 1959], *affd* 8 NY2d 993 [1960], *rearg denied* 8 NY2d 1058, 1100 [1960], *cert denied* 365 US 817 [1961]).

Defendant further contends that the court erred in denying his application requesting additional funds beyond the statutory maximum to retain a psychiatric expert to assist in preparing a psychiatric defense. We reject that contention. County Law former § 722-c provides, relevantly, that “[u]pon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant . . . is financially unable to obtain them, the court shall authorize counsel . . . to obtain the services on behalf of the defendant or such other person.” It further provides that “[t]he court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement. Only in extraordinary circumstances may the court provide for compensation in excess of” the statutory cap. A court’s determination under that provision is reviewed for an abuse of discretion (*see People v Walker*, 167 AD3d 1502, 1503 [4th Dept 2018], *lv denied* 33 NY3d 955 [2019]; *People v Gannett*, 159 AD3d 986, 986 [2d Dept 2018], *lv denied* 31 NY3d 1117 [2018]; *People v Koberstein*, 262 AD2d 1032, 1033 [4th Dept 1999], *lv denied* 94 NY2d 798 [1999]). Here, we conclude that, in denying defendant’s request for additional funds, the court did not abuse its discretion in determining that defendant failed to establish the requisite *extraordinary circumstances* to justify the requested additional expenditure (*see County Law former § 722-c; Walker*, 167 AD3d at 1503; *People v Clarke*, 110 AD3d 1341, 1342 [3d Dept 2013], *lv denied* 22 NY3d 1197 [2014]). In particular, the court properly concluded that defendant did not make the requisite showing of extraordinary circumstances to the extent that he failed to set forth any grounds establishing “that the issue of [his] sanity [would] be an important factor at trial” (*People v Vale*, 133 AD2d 297, 300 [1st Dept 1987]; *see generally Ake v Oklahoma*, 470 US 68, 82-83 [1985]).

Defendant also contends that the court abused its discretion in denying his request for additional funds inasmuch as, in making its determination, it erred in considering or assessing the underlying merits of a potential psychiatric defense. Defendant relies primarily on the recent decision of the Court of Appeals in *People v Sidbury* (42 NY3d 497 [2024]), which he asserts precludes any consideration whatsoever by a court determining a County Law former § 722-c application of the merits of a potential psychiatric defense. We reject that contention and conclude that *Sidbury* has no application here. In *Sidbury*, the Court of Appeals concluded that the trial court erred in denying the defendant's motion to file a late notice of intent to offer psychiatric evidence under CPL 250.10 inasmuch as, inter alia, the court "impermissibly based its decision to preclude [the proffered testimony] on its view that the psychiatric defense would have failed" (42 NY3d at 512). Indeed, the Court stated that "we have never held that a court *may refuse to allow* a psychiatric defense because the court believes the defense lacks merit" (*id.* at 513 n 10 [emphasis added]). Here, in contrast, the court was not precluding defendant from offering a psychiatric defense; it merely considered, in an entirely different statutory context with a different governing standard, whether defendant was entitled to additional public funds to substantiate such a defense (*compare* County Law former § 722-c with CPL 250.10). Indeed, quite to the contrary, the court in this case, unlike in *Sidbury*, expressly stated that it was *not* precluding defendant from offering a psychiatric defense at trial. It merely concluded that there were no extraordinary circumstances that justified additional public expenditure.

In short, given that it involved the application of an entirely different statute, we conclude that *Sidbury* does not control whether the court properly ruled on defendant's application for additional funds under County Law former § 722-c. Regardless, consistent with the principles set forth in *Sidbury*, we agree that a court cannot wholly preclude a defense based upon the court's pretrial review of the merits thereof; however, that conclusion does not prevent the court from ensuring that there is some basis for the court to conclude that the expenditure of additional public funds is both necessary and justified by extraordinary circumstances. Such an evaluation must necessarily entail some examination of the underlying facts and circumstances of the case to ensure "that the issue of [a] defendant's sanity will be an important factor at trial" (*Vale*, 133 AD2d at 300; *see Walker*, 167 AD3d at 1503; *People v Herrnkind*, 49 AD3d 555, 555-556 [4th Dept 2008], *lv denied* 10 NY3d 864 [2008]). Consequently, we conclude that *Sidbury* does not preclude a trial court from considering, as a threshold determination, that the circumstances of the case justify the expenditure of additional funds under County Law former § 722-c.

Defendant further contends that the court erred in admitting in evidence certain records pertaining to a license plate reader that placed defendant's vehicle in the vicinity of the murders before and after the shooting. Even assuming, arguendo, that the court erred in admitting those records in evidence on the basis that the People did not establish a proper foundation to admit them as business records

(see CPLR 4518 [a]; CPL 60.10; *People v Switzer*, 55 AD3d 1394, 1394 [4th Dept 2008], *lv denied* 11 NY3d 858 [2008]; *West Val. Fire Dist. No. 1 v Village of Springville*, 294 AD2d 949, 950 [4th Dept 2002]), we conclude that any such error is harmless (see *People v Kello*, 96 NY2d 740, 744 [2001]; see generally *People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

We further conclude that defendant's sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining contention and conclude that it does not warrant reversal or further modification of the judgment.

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

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CA 24-00322

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

RICKY WALLACE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

WILLIAM R.W. KINNEY AND ROCHESTER GAS & ELECTRIC,
DEFENDANTS-RESPONDENTS.

HENRY S. STEWART, ROCHESTER, FOR PLAINTIFF-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (CRAIG D. CHARTIER OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Sam L. Valleriani, J.), entered July 24, 2023. The order, insofar as appealed from, dismissed the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the complaint is reinstated, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when, while standing next to his parked car, he was struck by a van owned by defendant Rochester Gas & Electric and operated by defendant William R.W. Kinney. According to plaintiff, as a result of the accident, he sustained serious injuries within the meaning of Insurance Law § 5102 (d). Just before the trial was to begin, and after the jury was selected, plaintiff stated that he planned to introduce in evidence certified medical records as the sole evidence with respect to the elements of causation and serious injury. Plaintiff further stated that he had not retained any expert witness to testify about those elements or to provide any foundation for the admission of the medical records. Defendants objected to the admission of the certified medical records without any expert testimony to provide a proper foundation. Defendants asserted, among other things, that the medical records could not, standing alone, establish plaintiff's burden of proof on the elements of causation and serious injury. Supreme Court thereafter sua sponte dismissed the complaint, in the interest of judicial economy, on the basis that there was an "anticipated lack of proof on both causation and serious injury" as a result of purported admissions made by plaintiff's counsel with respect to plaintiff's evidence. As limited by his brief, plaintiff appeals from the ensuing order to the extent that it dismissed the complaint. We reverse the order insofar as appealed from.

Initially, plaintiff contends that the court violated 22 NYCRR 202.21 by proceeding to trial before a note of issue had been filed. We reject that contention. As relevant here, 22 NYCRR 202.21 (a) provides that "[n]o action . . . shall be deemed ready for trial . . . unless there is first filed a note of issue accompanied by a certificate of readiness." Nonetheless, "a court, in its discretion, may properly decide to proceed with a trial in the absence of a note of issue and certificate of readiness" (*Petti v Pollifrone*, 170 AD2d 494, 495 [2d Dept 1991]; see 22 NYCRR 202.1 [b]; *Gruber v Anastas*, 100 AD3d 829, 829 [2d Dept 2012]). Here, we conclude that the court did not abuse its discretion in proceeding to trial before the filing of the note of issue. Indeed, the parties were not deprived of the opportunity to conduct or complete discovery, and plaintiff agreed to, and did, proceed to trial. Even assuming, arguendo, that the court erred in proceeding to trial here, we nevertheless also conclude that reversal would not be warranted based on that error inasmuch as there is no showing of prejudice to either party by the court's action (see CPLR 2002).

We agree with plaintiff, however, that the court erred in sua sponte dismissing the complaint in the interest of judicial economy based on the anticipated lack of evidence (see generally *Hurd v Hurd*, 66 AD3d 1492, 1493 [4th Dept 2009]). To the extent defendants assert that the court properly dismissed the complaint based on admissions made by plaintiff's counsel, we reject that contention. CPLR 4401 provides, in relevant part, that "any party may move for judgment with respect to a cause of action or issue upon the ground that *the moving party* is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified" (emphasis added). Here, it is undisputed that there was no motion by defendants requesting dismissal of the complaint. Rather, defendants opposed the request by plaintiff that he be permitted to admit in evidence at trial certain medical records. Inasmuch as there was no motion for dismissal pending before the court—either on the basis that defendants were entitled to judgment as a matter of law or based on plaintiff's admissions—the court lacked authority to dismiss the complaint in the interest of judicial economy (*cf. Hoffman House, N.Y. v Foote*, 172 NY 348, 350 [1902]; *Astrel v Yarborough*, 31 AD3d 356, 356 [2d Dept 2006]; *Komar v Showers*, 227 AD2d 135, 136 [1st Dept 1996]). Indeed, by sua sponte dismissing the complaint before plaintiff presented any evidence, the court deprived plaintiff of an opportunity to oppose dismissal and deprived defendants of an opportunity to state the grounds that supported dismissal (see generally CPLR 4401). Additionally, we can find no legal authority (nor do the parties identify any), that permits a court to, on its own volition, dismiss a complaint on the eve of trial without any request for such relief—absent extraordinary circumstances not present here (see *CitiMortgage, Inc. v Carter*, 140 AD3d 1663, 1663 [4th Dept 2016]; *Hurd*, 66 AD3d at 1493). Although the court determined that plaintiff cannot substantiate his claims, the court nevertheless erred in dismissing the complaint on that basis moments before trial was to

commence without any request for such relief from defendants. Consequently, we reverse the order insofar as appealed from, reinstate the complaint, and remit the matter to Supreme Court for trial, during the course of which the court is free to entertain any proper motions made by the parties—including any motion by defendants seeking judgment as a matter of law dismissing the complaint (see generally CPLR 4401).

Plaintiff also contends that the court should have recused itself because it was biased against him. Plaintiff did not preserve that contention for our review, however, because "he failed to make a motion asking the court to recuse itself" (*Matter of Chromczak v Salek*, 173 AD3d 1750, 1750 [4th Dept 2019] [internal quotation marks omitted]; see *Matter of Melish v Rinne*, 221 AD3d 1560, 1561 [4th Dept 2023]; *Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1756 [4th Dept 2020]). In any event, we conclude that plaintiff's contention lacks merit inasmuch as "[t]he record does not establish that the court was biased or prejudiced against [him]" (*Matter of Mattice v Palmisano*, 159 AD3d 1407, 1409 [4th Dept 2018], lv denied 31 NY3d 909 [2018] [internal quotation marks omitted]).

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

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

250

CA 24-00001

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

MELISSA A. BLATNER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MICHELLE ANN SWEARENGEN, ET AL., DEFENDANTS,
AND MARISSA E. WROBLEWSKI, DEFENDANT-RESPONDENT.

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

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (CANIO J. MARASCO, III,
OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph C. Lorigo, J.), entered December 1, 2023. The judgment dismissed the complaint against defendant Marissa E. Wroblewski upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the posttrial motion is granted in part with respect to the issue of negligence, the verdict is set aside, the complaint is reinstated against defendant Marissa E. Wroblewski, and the matter is remitted to Supreme Court, Erie County, for a trial with respect to Wroblewski on the issue of proximate cause and, if necessary, damages.

Memorandum: Plaintiff commenced this action to recover damages for personal injuries that she sustained in a chain-reaction motor vehicle collision where defendant Marissa E. Wroblewski (defendant)—the rear-most driver in the chain—collided with another vehicle, which in turn collided with plaintiff's vehicle. During the ensuing jury trial, after resting her case, but before defendant presented evidence in her defense, plaintiff moved for a directed verdict against defendant, which Supreme Court denied. Ultimately, the jury returned a verdict finding that defendant was not negligent. Plaintiff moved to set aside the verdict pursuant to CPLR 4404, requesting that the court either direct judgment in her favor on the issue of liability against defendant or, alternatively, that it grant a new trial to that extent. The court denied the posttrial motion. Plaintiff appeals from a judgment entered in favor of defendant in accordance with the jury's verdict.

Initially, plaintiff contends that the court erred in denying her motion for a directed verdict at trial. We reject that contention. CPLR 4401 provides in relevant part that "[a]ny party may move for

judgment . . . after the close of evidence presented by an opposing party" (emphasis added). Here, it is undisputed that plaintiff moved for a directed verdict at the close of her case-in-chief, which was before defendant—i.e., the opposing party—had the opportunity to present any evidence. Plaintiff did not move again for a directed verdict after defendant rested. Consequently, we conclude that plaintiff's motion was properly denied inasmuch as it was premature (see *Veley v Manchester* [appeal No. 2], 191 AD3d 1384, 1385-1386 [4th Dept 2021]; *Griffin v Clinton Green S., LLC*, 98 AD3d 41, 44, 46-47 [1st Dept 2012]).

We nevertheless agree with plaintiff that the court erred in denying that part of her posttrial motion for judgment as a matter of law on the issue of defendant's negligence (see generally CPLR 4404 [a]). A party is entitled to judgment notwithstanding the verdict where there is "no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; see *2006905 Ontario Inc. v Goodrich Aerospace Can., Ltd.*, 222 AD3d 1436, 1439 [4th Dept 2023], *lv denied* 42 NY3d 904 [2024]). As relevant here, "[t]he rearmost driver in a chain-reaction collision bears a presumption of responsibility . . . , and . . . a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, [nonnegligent] explanation for the accident" (*Gustke v Nickerson*, 159 AD3d 1573, 1574-1575 [4th Dept 2018], *lv denied in part & dismissed in part* 32 NY3d 1048 [2018] [internal quotation marks omitted]; see *Senycia v Vosseler*, 217 AD3d 1520, 1521-1522 [4th Dept 2023]; *Zanghi v Doerfler*, 158 AD3d 1275, 1276 [4th Dept 2018]).

Here, the evidence at trial established that, at the time of the collision, plaintiff and defendant were driving in "stop-and-go" traffic during rush hour on a "wet, [d]rizzly" morning. Plaintiff testified that, at the time of the collision, she had come to a stop because the vehicle in front of her had stopped. Defendant testified that the collision occurred when the vehicle in front of her suddenly stopped; she thought the middle vehicle hit plaintiff's vehicle first. Defendant tried to turn her vehicle to avoid the collision, but was unsuccessful and collided with the middle vehicle. The driver of the middle vehicle in the chain testified that plaintiff's vehicle stopped suddenly. He denied initially colliding with plaintiff's vehicle; it was only after he was hit by defendant that his vehicle collided with plaintiff's vehicle.

In short, the undisputed evidence at trial established that defendant was the rear-most driver involved in the chain-reaction collisions and, therefore, is presumed negligent absent the proffering of a nonnegligent explanation for the collision. We conclude that there is no valid line of reasoning and permissible inferences establishing such a nonnegligent explanation based on the trial record here. Specifically, under the circumstances of this case, the

" '[e]vidence that plaintiff's lead vehicle was forced to stop suddenly in [stop-and-go] traffic' " did not constitute a nonnegligent explanation for the collision sufficient to support the jury's verdict inasmuch as " 'it can easily be anticipated that cars up ahead will make frequent stops in [stop-and-go] traffic' " (*Ruzycki v Baker*, 301 AD2d 48, 50 [4th Dept 2002]; see *Sheets v Kilbury*, 196 AD3d 1096, 1098 [4th Dept 2021]; *Shulga v Ashcroft*, 11 AD3d 893, 894 [4th Dept 2004]).

Consequently, we reverse the judgment, grant the posttrial motion in part with respect to the issue of defendant's negligence, set aside the verdict, and reinstate the complaint against defendant (see generally *Misicki v Caradonna*, 12 NY3d 511, 519 [2009]). We remit the matter to Supreme Court for a trial with respect to defendant on the issue of proximate cause and, if necessary, damages.

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

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

277

KA 23-01027

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ESTRELLITA T. HIDALGO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), entered November 4, 2022. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the third degree and criminal possession of a forged instrument in the second degree.

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

Memorandum: In these consolidated appeals, defendant appeals, in appeal No. 1, from a judgment convicting her, upon her plea of guilty, of grand larceny in the third degree (Penal Law § 155.35 [1]) and criminal possession of a forged instrument in the second degree (§ 170.25). In appeal No. 2, defendant appeals from a separate judgment convicting her, upon her plea of guilty, of attempted assault in the second degree (§§ 110.00, 120.05 [2]). The two pleas were entered in separate proceedings.

With respect to appeal No. 1, even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of her challenge to the severity of the sentence (see *People v Mastin*, 232 AD3d 1268, 1272 [4th Dept 2024], lv denied 42 NY3d 1053 [2024]; *People v McDonell*, 219 AD3d 1665, 1665 [4th Dept 2023], lv denied 40 NY3d 1081 [2023]; see generally *People v Thomas*, 34 NY3d 545, 564-566 [2019], cert denied — US —, 140 S Ct 2634 [2020]), we nevertheless reject defendant's contention that her sentence is unduly harsh and severe.

With respect to appeal No. 2, 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 Ayala*, 235 AD3d 1253, 1253-1254 [4th Dept 2025], lv denied 43 NY3d 961

[2025]; *People v Bailey*, 230 AD3d 1543, 1543-1544 [4th Dept 2024], *lv denied* 42 NY3d 1034 [2024]; *see generally Thomas*, 34 NY3d at 559-564), and the valid waiver forecloses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]).

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

278

KA 23-01029

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ESTRELLITA T. HIDALGO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), entered November 4, 2022. The judgment convicted defendant, upon her plea of guilty, of attempted assault in the second degree.

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

Same memorandum as in *People v Hidalgo* ([appeal No. 1] – AD3d – [June 27, 2025] [4th Dept 2025]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

296

CA 24-00539

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

MARY MERTZ, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ERIE AND NIAGARA INSURANCE ASSOCIATION
AND SCHENK & MILES AGENCY, INC.,
DEFENDANTS-APPELLANTS.

JAMES H. COSGRIFF, III, BUFFALO, FOR DEFENDANTS-APPELLANTS.

DUKE HOLZMAN PHOTIADIS & GRESENS LLP, BUFFALO (KRISTINE CELESTE OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County
(Thomas P. Brown, A.J.), entered February 13, 2024. The order, among
other things, granted in part plaintiff's motion for summary judgment
and denied defendants' cross-motion for summary judgment.

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: Plaintiff entered into a purchase contract with
nonparty United Methodist Church (UMC) to purchase a decommissioned
church building (property). Prior to closing, plaintiff and UMC
entered into an agreement whereby plaintiff was permitted to occupy
the property prior to closing. The pre-closing occupancy agreement
required that plaintiff procure property insurance and name UMC as an
additional insured under the policy. Plaintiff ultimately procured
coverage from defendant Erie and Niagara Insurance Association (ENIA)
via defendant Schenk & Miles Agency, Inc. (Schenk). Shortly
thereafter, the property was severely damaged in a fire, resulting in
a total loss. The purchase contract was ultimately rendered null and
void, the transaction was never completed, and plaintiff's earnest
money deposit and the remainder of the purchase price were returned to
her. Approximately one month after the loss, ENIA cancelled the
policy. Plaintiff commenced this action asserting, inter alia, a
cause of action against ENIA for breach of contract. Plaintiff
thereafter moved for, among other things, summary judgment on
liability, and defendants cross-moved for summary judgment dismissing
the amended complaint. Supreme Court granted that part of the motion
seeking summary judgment on liability with respect to the breach of
contract cause of action and denied defendants' cross-motion.
Defendants appeal.

Even assuming, arguendo, that plaintiff had an insurable interest in the property as of the date of the loss, we agree with defendants that the court erred in granting the motion with respect to liability on the breach of contract cause of action. We therefore modify the order accordingly. "Proof of damages is an essential element of a claim for breach of contract under New York law" (*iGo Mktg. & Entertainment, LLC v Hartbeat Prods., LLC*, 217 AD3d 753, 754-755 [2d Dept 2023]; see also *Pearl St. Parking Assoc. LLC v County of Erie*, 207 AD3d 1029, 1031 [4th Dept 2022]). Here, plaintiff did not meet her burden on the motion of establishing damages inasmuch as she was fully reimbursed her earnest money deposit and the remainder of the purchase price, and the purchase was never completed (see *Eichler v Town of Cortlandt*, 39 AD3d 464, 465 [2d Dept 2007]; see generally *Pearl St. Parking Assoc. LLC*, 207 AD3d at 1031-1032).

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

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

298

KA 22-00125

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

VAUGHN SANDERS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CASEY S. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered December 23, 2021. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, criminal possession of a weapon in the second degree (two counts) and tampering with physical evidence.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him following a jury trial of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), tampering with physical evidence (§ 215.40 [2]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]). The charges arose from defendant's alleged involvement in a shootout in Syracuse during which a codefendant fired 12 rounds of ammunition from a 9-millimeter firearm at a police officer, intending to cause the officer's death. The codefendant who fired at the police officer and another codefendant entered guilty pleas, but defendant rejected plea offers and went to trial, resulting in a guilty verdict on all counts of the indictment against him.

Defendant contends that County Court erred in allowing a police detective to offer his opinion at trial that defendant was the person depicted in two surveillance videos. According to defendant, the detective was no more qualified than the jurors to determine whether defendant was the person depicted in the videos (*see People v Mosley*, 41 NY3d 640, 649 [2024]). Defendant did not, however, object to the detective's opinion testimony; instead, he merely asked the court for a limiting instruction, which the court agreed to give, and which the court provided on multiple occasions. Because defendant requested no further relief after the limiting instructions were read to the jury, defendant failed to preserve his *Mosley* contention for our review (*see*

generally *People v Feliciano*, 196 AD3d 1030, 1031 [4th Dept 2021], *lv denied* 37 NY3d 1059 [2021]; *People v Lewis*, 11 AD3d 954, 955-956 [4th Dept 2004], *lv denied* 3 NY3d 758 [2004]), and we decline to exercise our power to address that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

To the extent that defendant contends that the detective should have been precluded from offering identification testimony at trial because the People failed to provide notice of their intent to do so pursuant to CPL 710.30, we conclude that notice was not required because the detective did not identify defendant in a pretrial identification procedure (see *People v Jackson*, 94 AD3d 1559, 1560 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012]). CPL 710.30 applies to "in-court identifications predicated on earlier police-arranged confrontations between a defendant and an eyewitness, typically involving the use of lineups, showups or photographs, for the purpose of establishing the identity of the criminal actor" (*People v Gissendanner*, 48 NY2d 543, 552 [1979]), none of which occurred here.

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

Defendant further contends that the court erred in denying his motion to dismiss the indictment on speedy trial grounds based on the People's failure to disclose police disciplinary records as required by CPL 245.20 (1). According to defendant, reversal is required because, as in *People v Sumler* (228 AD3d 1350, 1354 [4th Dept 2024]) and *People v Rojas-Aponte* (224 AD3d 1264, 1266 [4th Dept 2024]), the People used a screening panel of senior prosecutors to determine which police disciplinary records were related to the subject matter of the case, i.e., subject to discovery as impeachment material under CPL 245.20 (1) (k), and which police disciplinary matters did not relate to the subject matter of the case and thus not subject to automatic discovery. Although the People's use of a screening panel in this case is not permitted under our prior case law, we do not agree with defendant that he is necessarily entitled to dismissal under CPL 30.30.

Instead, we hold the case, reserve decision, and remit the matter to County Court for the court to determine whether the People withheld any police disciplinary records that relate to the subject matter of the case. If the court determines that there were disciplinary records subject to disclosure that were not turned over to the defense in a timely manner, then the court must determine whether the People exercised due diligence in locating and disclosing those records (see *Sumler*, 228 AD3d at 1354-1355; *Rojas-Aponte*, 224 AD3d at 1266; see also *People v Bay*, 41 NY3d 200, 213 [2023]). If, based on a finding of no due diligence, the court determines that the certificate of compliance is invalid and the People's statement of readiness is illusory, then the court must determine whether the time chargeable to the People under CPL 30.30 exceeds six months, which would require dismissal of the indictment on speedy trial grounds (see *People v Mitchell*, 228 AD3d 1250, 1257-1258 [4th Dept 2024]).

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

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

300

KA 22-01394

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FREDERICK BROUGHTON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Meredith A. Vacca, J.), rendered August 16, 2022. The judgment convicted defendant, upon a plea of guilty, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [1]), defendant contends that County Court erred in denying that part of his omnibus motion seeking to dismiss the indictment on statutory speedy trial grounds (see CPL 30.30). We reject that contention.

Where, as here, a "misdemeanor information . . . [is] superseded by a felony indictment, . . . the People [are] required to be ready for trial within six months of the action's commencement" (*People v Piquet*, 46 AD3d 1438, 1438 [4th Dept 2007], lv denied 10 NY3d 770 [2008]; see CPL 30.30 [1] [a]). "The statutory period is calculated by 'computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for an exclusion' " (*People v Barnett*, 158 AD3d 1279, 1280 [4th Dept 2018], lv denied 31 NY3d 1078 [2018]).

Defendant met his initial burden on the motion by submitting evidence that more than six months chargeable to the People elapsed between July 30, 2021, the date he was charged with assault in the third degree by misdemeanor complaint, and April 15, 2022, the date of his omnibus motion. Specifically, defendant alleged that 242 days were chargeable to the People for the time between July 30, 2021

through October 5, 2021 and October 22, 2021 through April 15, 2022, and defendant further alleged that the People had not provided a certificate of compliance (COC) or statement of readiness (see generally *People v Berkowitz*, 50 NY2d 333, 349 [1980]). In response to defendant's motion, the People asserted that they had produced a valid COC and statement of readiness in City Court with respect to the charged misdemeanor, and the record establishes that the COC and statement of readiness were provided on November 3, 2021.

We conclude that the People are charged with the period of time between July 30, 2021 through November 3, 2021, except for the period between October 5, 2021 through October 22, 2021, which was waived by defendant. The People remained ready from November 3, 2021 until January 28, 2022, when defendant was charged by felony indictment with assault in the second degree (see generally *People v Cortes*, 80 NY2d 201, 214-215 [1992]; *Piquet*, 46 AD3d at 1439). The period from January 28, 2022 through April 15, 2022, the date of defendant's omnibus motion seeking, among other things, dismissal of the indictment pursuant to CPL 30.30 is chargeable to the People. Thus, the total time chargeable to the People did not exceed the statutory six-month period (see CPL 30.30 [1] [a]).

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

308

CA 24-01329

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

IN THE MATTER OF THOMAS WISNOWSKI,
CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO AND 4TH GENERATION CONSTRUCTION,
RESPONDENTS-RESPONDENTS.

CAMPBELL & ASSOCIATES, HAMBURG (JOHN T. RYAN OF COUNSEL), FOR
CLAIMANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR
RESPONDENT-RESPONDENT CITY OF BUFFALO.

PILLINGER MILLER TARALLO, LLP, SYRACUSE (MARIA MASTRIANO OF COUNSEL),
FOR RESPONDENT-RESPONDENT 4TH GENERATION CONSTRUCTION.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered July 31, 2024. The order denied the application of claimant for leave to serve a late notice of claim and to compel respondents to submit to pre-action discovery.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the application is granted in part, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Claimant appeals from an order that denied his application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5) and to compel respondents to submit to pre-action discovery.

In determining whether to grant an application for leave to serve a late notice of claim, "the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality" (*Matter of Friend v Town of W. Seneca*, 71 AD3d 1406, 1407 [4th Dept 2010]; see *Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]). " 'While the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is whether the [municipality] received actual knowledge of the facts constituting the claim in a timely manner' " (*Turlington*, 143 AD3d at 1248; see *Matter of Ficek v Akron Cent. Sch. Dist.*, 144 AD3d 1601,

1603 [4th Dept 2016])).

Claimant allegedly sustained injuries while working as a laborer for respondent 4th Generation Construction at a construction site owned by respondent City of Buffalo (City). In support of his application, claimant sought, inter alia, any incident reports concerning the accident and any correspondence between respondents concerning the accident. Claimant alleged that he told his employer about the incident five days after it occurred and believed that his employer notified the City of the accident at that time.

We agree with claimant that Supreme Court abused its discretion in denying that part of his application seeking pre-action discovery (see CPLR 3102 [c]). Under the circumstances of this case, claimant demonstrated that pre-suit discovery is needed in support of his application for leave to serve a late notice of claim for the purpose of establishing when the City had actual knowledge of the facts constituting the claim (see generally *Matter of Szymkowiak v New York Power Auth.*, 162 AD3d 1652, 1654-1655 [4th Dept 2018]). We therefore reverse the order and grant the application to that extent, and we remit the matter to Supreme Court to determine the extent of the pre-action discovery that is warranted and, after such discovery, to determine de novo that part of claimant's application seeking leave to serve a late notice of claim.

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

309

CA 23-02155

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

BRYAN WHEELER, PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

BRANDSAFWAY INDUSTRIES, LLC, NEW YORK POWER
AUTHORITY, MAID OF THE MIST CORPORATION,
MAID OF THE MIST ENTERPRISES, INC., AND
MAID OF THE MIST HOSPITALITY, LLC,
DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (ETHAN W. COLLINS OF
COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (NORMAN B. VITI, JR., OF
COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT BRANDSAFWAY INDUSTRIES,
LLC.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS-APPELLANTS NEW YORK POWER AUTHORITY, MAID OF
THE MIST CORPORATION, MAID OF THE MIST ENTERPRISES, INC., AND
MAID OF THE MIST HOSPITALITY, LLC.

Appeal and cross-appeals from an order of the Supreme Court,
Niagara County (Edward Pace, J.), entered November 27, 2023. The
order denied the motion of plaintiff for partial summary judgment and
denied in part the motion and cross-motion of defendants for summary
judgment.

Now, upon reading and filing the stipulation of partial
discontinuance signed by the attorneys for defendants-respondents-
appellants on June 25, 2025,

It is hereby ORDERED that said cross-appeals are unanimously
dismissed insofar as they challenge those parts of the order related
to the cross-claims and the order is modified on the law by denying
that part of the motion of defendants New York Power Authority, Maid
of the Mist Corporation, Maid of the Mist Enterprises, Inc., and Maid
of the Mist Hospitality, LLC seeking summary judgment dismissing the
Labor Law § 240 (1) claim against them, reinstating that claim against
those defendants, and granting that part of the cross-motion of
defendant Brandsafway Industries, LLC seeking summary judgment
dismissing the Labor Law § 241 (6) claim against it and as modified
the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking to recover damages for injuries that he sustained when he fell from a scaffold ladder while working as an employee of a nonparty on a project to construct two boats to be used for tours of Niagara Falls. Defendant New York Power Authority (NYPA) owned the property on which the boats were being constructed, and NYPA granted a license and permit to defendants Maid of the Mist Corporation, Maid of the Mist Enterprises, Inc. and Maid of the Mist Hospitality, LLC (collectively, MOTM defendants) to use its property. The MOTM defendants hired plaintiff's employer to serve as the general contractor on the project, and plaintiff's employer then contracted with defendant Brandsafway Industries, LLC (Brandsafway) to erect the scaffolds on the site so that workers could access the top of the boats as they were being constructed. At the time of the accident, plaintiff was attempting to climb the scaffold ladder while carrying a box of wire that weighed 25-30 pounds. No stair towers, ramps or runways had been constructed before plaintiff's accident.

Following discovery, plaintiff moved for partial summary judgment on the issue of liability against all defendants on his Labor Law § 240 (1) and § 241 (6) claims. Despite reliance on several alleged Industrial Code violations in the bills of particulars, on his motion and on appeal plaintiff narrows his claim to an alleged violation of 12 NYCRR 23-1.7 (f). Defendants NYPA and the MOTM defendants (collectively, codefendants) moved for summary judgment dismissing the complaint against them and for summary judgment on the MOTM defendants' cross-claims against Brandsafway for contractual and common-law indemnification. Brandsafway cross-moved for summary judgment dismissing the complaint against it and seeking an order denying plaintiff's motion for partial summary judgment. In a separate submission, Brandsafway opposed that part of codefendants' motion for summary judgment with respect to contractual and common-law indemnification.

In appeal No. 1, plaintiff appeals and defendants cross-appeal from an order of Supreme Court (Pace, J.) denying plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) and § 241 (6) claims, denying that part of codefendants' motion seeking summary judgment on the Labor Law § 241 (6) claim against them, granting that part of codefendants' motion seeking summary judgment on the Labor Law § 240 (1), § 200 and common-law negligence claims against them, denying that part of codefendants' motion seeking summary judgment on the MOTM defendants' cross-claims for contractual and common-law indemnification, denying that part of Brandsafway's cross-motion seeking summary judgment dismissing the Labor Law § 241 (6) claim against it, and granting that part of Brandsafway's cross-motion seeking summary judgment dismissing the Labor Law § 240 (1), § 200 and common-law negligence claims against it. Although the court, in its order, stated that it was denying Brandsafway's "motion . . . for an [o]rder granting Brandsafway [s]ummary [j]udgment denying [codefendants'] motion for contractual and common-law indemnification from Brandsafway," the record establishes that Brandsafway merely opposed codefendants' motion and did not seek affirmative summary judgment relief for dismissal of those claims against it. Plaintiff

thereafter moved, inter alia, to strike the note of issue and to permit discovery with respect to certain video evidence. In appeal No. 2, plaintiff appeals from an order of the court (Sedita, III, J.) that, among other things, granted an evidentiary hearing with respect to codefendants' alleged discovery violations with respect to certain video evidence. On this appeal, plaintiff does not raise any specific challenges to the order in appeal No. 2 and, as a result, we dismiss appeal No. 2 as abandoned (see *May v Buffalo MRI Partners, L.P.* [appeal No. 2], 151 AD3d 1657, 1658 [4th Dept 2017]; *Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]; see generally *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

In appeal No. 3, plaintiff appeals and codefendants cross-appeal from an order of the court (Sedita, III, J.), issued following the evidentiary hearing ordered in appeal No. 2. In the order in appeal No. 3, the court, inter alia, denied plaintiff's request to strike the answer of the MOTM defendants as a sanction for discovery violations, directed codefendants' law firm to pay plaintiff's law firm \$10,000 as a sanction for discovery violations, and denied plaintiff's motion for leave to renew his motion for partial summary judgment.

We conclude that the court erred in granting that part of codefendants' motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against them, in denying that part of Brandsafway's cross-motion for summary judgment dismissing the Labor Law § 241 (6) claim against it, and in directing codefendant's law firm to pay \$10,000 in sanctions to plaintiff's law firm. We otherwise affirm.

Addressing first the appeal and cross-appeal in appeal No. 3, we reject plaintiff's contention that the court erred in denying his request to strike the MOTM defendants' answer as a sanction for failure to preserve video recordings of the incident. "Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" (*Helm v Sung-Hoon Yang*, 169 AD3d 1458, 1458 [4th Dept 2019] [internal quotation marks omitted]). The party seeking such sanctions must show that: (1) the alleged spoliator was obligated to preserve the evidence "at the time of its destruction"; (2) it "was destroyed with a culpable state of mind"; and (3) it "was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] [internal quotation marks omitted]). "Generally, striking a pleading is reserved for instances of willful or contumacious conduct" (*Giambrone v Niagara Mohawk Power Corp.*, 175 AD3d 1808, 1809 [4th Dept 2019] [internal quotation marks omitted]; see *Pezzino v Wedgewood Health Care Ctr., LLC*, 175 AD3d 840, 841 [4th Dept 2019]), and striking a pleading for negligent spoliation is a "drastic sanction that is appropriate only where the missing evidence deprive[s] the moving party of the ability to establish his or her defense or case" (*Tomasello v 64 Franklin, Inc.*, 45 AD3d 1287, 1288 [4th Dept 2007] [internal quotation marks omitted]; see *Buffalo Biodiesel, Inc. v Blue Bridge Fin., LLC*, 228 AD3d 1274, 1275 [4th Dept 2024]; *Mahiques v*

County of Niagara, 137 AD3d 1649, 1651 [4th Dept 2016]; *Simet v Coleman Co., Inc.*, 42 AD3d 925, 926 [4th Dept 2007]).

Here, the evidence at the evidentiary hearing did not establish that the MOTM defendants engaged in willful, contumacious or negligent conduct when they failed to preserve certain video recordings from surveillance cameras at other parts of the construction site. The MOTM defendants preserved video that captured plaintiff's fall from the scaffold ladder (see *De Abreu v Syed Rests. Enters., Inc.*, 231 AD3d 1116, 1118 [2d Dept 2024]), and had no reason to know at that time that video recordings of other parts of the construction site may be relevant to future litigation. Thus, the video footage that did not depict the accident was erased during the course of normal business procedures (see *Dziadaszek v Legacy Stratford, LLC*, 177 AD3d 1276, 1278 [4th Dept 2019]). In the absence of a request for other video footage, the MOTM defendants were "not on notice that such footage might be needed for future litigation" (*Sarris v Fairway Group Plainview, LLC*, 169 AD3d 734, 736 [2d Dept 2019]), and we conclude that the failure to preserve the other video footage does not prevent plaintiff from establishing his case (see *De Abreu*, 231 AD3d at 1118; *Sanders v 210 N. 12th St., LLC*, 171 AD3d 966, 968 [2d Dept 2019]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 841 [2d Dept 2008]).

We further reject plaintiff's contention in appeal No. 3 that, because additional video footage of the accident was disclosed the day before the evidentiary hearing directed by the order in appeal No. 2, additional discovery is necessary. The additional footage depicts the incident from a slightly wider angle than in the footage that was appropriately provided during discovery, and we conclude that additional discovery proceedings are not necessary "to prevent substantial prejudice" (22 NYCRR 202.21 [d]; see *Lopez v Barrett T.B. Inc.*, 38 AD3d 1308, 1310 [4th Dept 2007]; *Kephart v Burke*, 306 AD2d 924, 925 [4th Dept 2003]). Based on our determination with respect to discovery, we reject plaintiff's contention that the court erred in denying his motion for leave to renew his motion for partial summary judgment.

We agree with codefendants in appeal No. 3 that the court's award of monetary sanctions against the attorney for codefendants is not warranted, and we therefore modify the order in appeal No. 3 accordingly. The court imposed a \$10,000 sanction pursuant to CPLR 3126 based on counsel's failure to disclose video recordings of the accident that were on the cell phone of an employee of the MOTM defendants. The undisclosed recordings were similar to the video of the accident that was disclosed to plaintiff, and there is no evidence that codefendants' counsel knew that the employee had the additional videos. A sanction cannot be imposed under CPLR 3126 unless a party or attorney "refuses to obey an order for discovery or *willfully* fails to disclose information which the court finds ought to have been disclosed" (emphasis added). Here, there is no evidence that counsel for codefendants willfully failed to disclose the subject video recordings, and the court made no finding of an intentional discovery violation. Under the circumstances, we conclude that the court erred in sanctioning counsel. Moreover, although the court stated that the

monetary sanction was intended to compensate plaintiff for being "forced to engage in needless litigation because of such nondisclosure" of the videos from codefendants, we note that the litigation referred to by the court was the spoliation hearing, which was based on the MOTM defendants' failure to preserve other video evidence and that hearing would have been held regardless of the alleged discovery violation by counsel for codefendants with respect to the cell phone videos of the accident.

With respect to appeal No. 1, all parties dispute whether Brandsafway constituted an agent under the Labor Law. We agree with Brandsafway that it was not a statutory agent and that the court therefore properly granted those parts of Brandsafway's cross-motion for summary judgment dismissing the Labor Law §§ 200 and 240 (1) claims against it, and that the court should have granted that part of Brandsafway's cross-motion for summary judgment dismissing the Labor Law § 241 (6) claim against it. When work that creates duties under Labor Law §§ 240 and 241 "has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). Subcontractors "qualify as statutory agents only with regard to injuries 'sustained in those areas and activities within the scope of the work delegated to [them]' " (*Burns v Lecesce Constr. Servs. LLC*, 130 AD3d 1429, 1432 [4th Dept 2015]; see *Smith v MDA Consulting Engrs., PLLC*, 210 AD3d 1448, 1449 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023]; *Tanksley v LCO Bldg. LLC*, 201 AD3d 1323, 1325 [4th Dept 2022]). Here, although a subcontractor is deemed a statutory agent whenever it controls the injury-producing work or the work site (see *Krajnik v Forbes Homes, Inc.*, 120 AD3d 902, 904 [4th Dept 2014]; *Rast v Wachs Rome Dev., LLC*, 94 AD3d 1471, 1472 [4th Dept 2012]), plaintiff and codefendants concede that Brandsafway had no authority to supervise or control plaintiff or his work. Although plaintiff and codefendants contend that Brandsafway had control over the work site, i.e., the scaffold, they rely exclusively on section 9 of the subcontract, entitled "SAFETY LAWS," which merely requires Brandsafway to comply with "all applicable safety laws, rules and regulations." There is no language in section 9 of the subcontract that delegates to Brandsafway the authority to supervise or control any part of the work site.

We thus conclude that Brandsafway met its burden of establishing that it was not a statutory agent of the owner or general contractor with respect to the injury-producing work or work site (see *Krajnik*, 120 AD3d at 904; *Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1427-1428 [4th Dept 2011]; *Bateman v Walbridge Aldinger Co.*, 299 AD2d 834, 835 [4th Dept 2002], *lv denied* 100 NY2d 502 [2003]), and neither plaintiff nor codefendants raised triable issues of fact on the issue of agency. As a result, we conclude that the court erred in denying that part of Brandsafway's cross-motion for summary judgment dismissing the Labor Law § 241 (6) claim against it (see *Miller v Savarino Constr. Corp.*, 103 AD3d 1137, 1140 [4th Dept 2013]), and we therefore modify the order in appeal No. 1 accordingly. We further conclude that the court properly granted Brandsafway's cross-motion

insofar as it sought summary judgment dismissing the Labor Law § 240 (1) and § 200 claims against it (see generally *Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]).

We reject the contentions of plaintiff and codefendants that the court erred in granting Brandsafway's cross-motion with respect to plaintiff's common-law negligence claim against it. Although a subcontractor that is not a statutory agent of the owner or general contractor "may still be liable in common-law negligence for dangerous or defective conditions that it fails to remedy despite having actual notice of those conditions" (*Pimentel v DE Frgt. LLC*, 205 AD3d 591, 593 [1st Dept 2022]), we conclude that Brandsafway established its entitlement to judgment as a matter of law with respect to that claim, and neither plaintiff nor codefendants raised a triable issue of fact to defeat that part of Brandsafway's cross-motion (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

With respect to plaintiff's claim that codefendants are liable under Labor Law § 241 (6), we conclude that the court properly denied the motions of plaintiff and codefendants for summary judgment on that claim. Contrary to codefendants' contention, Industrial Code section 23-1.7 (f) is applicable to this case. That section provides that "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided" (12 NYCRR 23-1.7 [f]). Codefendants contend that 12 NYCRR 23-5.3 (f) is the section that should apply, even though plaintiff has not cited that section in support of his motion or on appeal. Section 23-5.3 (f) provides that "[l]adders, stairs or ramps shall be provided for access to and egress from the platform levels of metal scaffolds which are located more than two feet above or below the ground, grade, floor or other equivalent level." At the time of his accident, plaintiff was using a metal scaffold ladder to access an above-ground platform, which was his working level. Contrary to codefendants' contention, those two provisions are not mutually exclusive (see e.g. *Harris v Hueber-Breuer Constr. Co., Inc.*, 67 AD3d 1351, 1352 [4th Dept 2009]; *Sopha v Combustion Eng'g*, 261 AD2d 911, 912 [4th Dept 1999]), and both are sufficiently specific to support a Labor Law § 241 (6) claim (see *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607 [2d Dept 2013]; *Baker v City of Buffalo*, 90 AD3d 1684, 1685 [4th Dept 2011]).

Contrary to their contentions, neither plaintiff nor codefendants established entitlement to judgment as a matter of law with respect to the Labor Law § 241 (6) claim based on the alleged violation of 12 NYCRR 23-1.7 (f). Although the scaffold did not have any stairways, ramps or runways available for plaintiff to access his elevated work site location, neither plaintiff nor codefendants established as a matter of law whether the nature or the progress of the work prevented installation of stairs on the day of plaintiff's accident (see *Baker*, 90 AD3d at 1685; cf. *Ward v Corning Painted Post Area Sch. Dist.*, 192 AD3d 1563, 1564-1565 [4th Dept 2021]; *Melchor v Singh*, 90 AD3d 866, 871 [2d Dept 2011]). Contrary to the additional contentions of

plaintiff and codefendants, triable issues of fact exist "whether the failure to provide such [vertical] passage was a proximate cause of the accident" (*Davis v Trustees of Columbia Univ. in the City of N.Y.*, 199 AD3d 481, 482 [1st Dept 2021]; see *Baker*, 90 AD3d at 1685; cf. *Ward*, 192 AD3d at 1564-1565; *Melchor*, 90 AD3d at 871).

We agree with plaintiff that the court erred in granting that part of codefendants' motion for summary judgment dismissing his claim under Labor Law § 240 (1) against them. Labor Law § 240 (1) requires that "protective devices" be used where the work in constructing a structure poses an elevation-related hazard (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; see *Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139 [2011]). To begin with, inasmuch as the court properly determined that issues of fact exist whether codefendants violated Labor Law § 241 (6) by failing to add stairs to the scaffold used by plaintiff to access his work area, it necessarily follows that issues of fact exist as to whether plaintiff's alleged negligence in failing to maintain three points of contact while climbing the scaffold ladder was the sole proximate cause of his injuries.

Labor Law § 240 (1) "imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure" (*Jock v Fien*, 80 NY2d 965, 967-968 [1992]). Moreover, the duty is not merely to provide protective devices but also to ensure that the worker "knew both that they were available and that [the worker] was expected to use them" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). Nevertheless, "[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

The absolute liability imposed by the statute "is necessarily contingent on a violation of" the statute, and "if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289-290 [2003] [emphasis added]). It is thus "conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury" (*Noor v City of New York*, 130 AD3d 536, 542 [1st Dept 2015], *lv dismissed* 27 NY3d 975 [2016]).

Here, we agree with plaintiff that the court erred in granting that part of codefendants' motion seeking summary judgment dismissing his Labor Law § 240 (1) claim against them, and we therefore further modify the order in appeal No. 1 accordingly. According to plaintiff, the statute was violated because he was not provided any enumerated safety devices for use while climbing the scaffold ladder and such violation was a proximate cause of his accident. Moreover, based on plaintiff's deposition testimony that there was no reasonable alternative to carrying by hand the box of wire up the scaffold ladder, a jury could find that "the ladder did not provide proper

protection to plaintiff by itself, without the use of additional [or alternative] precautionary devices or measures" (*Smith v Fayetteville-Manlius Cent. School Dist.*, 32 AD3d 1253, 1254 [4th Dept 2006]; see *Milligan v Tutor Perini Corp.*, 191 AD3d 437, 437-438 [1st Dept 2021]; *Smith v Picone Constr. Corp.*, 63 AD3d 1716, 1717 [4th Dept 2009]; *Carino v Webster Place Assoc., LP*, 45 AD3d 351, 351-352 [1st Dept 2007]), and plaintiff's conduct in failing to maintain three points of contact with the scaffold ladder while carrying the box was "at most comparative negligence, which is not a defense to a Labor Law § 240 (1) claim" (*Sanchez v MC 19 E. Houston LLC*, 216 AD3d 443, 444 [1st Dept 2023]).

On the other hand, we reject plaintiff's contention that he is entitled to summary judgment with respect to liability on his section 240 (1) claim against codefendants. A jury could reasonably find on this record that the scaffold ladder itself "was suitable and appropriate for plaintiff's proper protection without the use of additional [or alternative] devices or measures" (*Garhartt v Niagara Mohawk Power Corp.*, 192 AD2d 1027, 1029 [3d Dept 1993]), i.e., that plaintiff should have known from his training, prior practice, and common sense to use a rope to hoist the box up to the work site rather than carrying it, and his choice to carry it was the sole proximate cause of his injuries (see *Ward*, 192 AD3d at 1564). Under the circumstances, we conclude that whether the scaffold ladder provided proper protection to plaintiff and whether plaintiff's alleged negligence was the sole proximate cause of his injuries are issues for the jury to resolve at trial.

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

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CA 24-01226

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

BRYAN WHEELER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BRANDSAFWAY INDUSTRIES, LLC, NEW YORK
POWER AUTHORITY, MAID OF THE MIST CORPORATION,
MAID OF THE MIST ENTERPRISES, INC., AND
MAID OF THE MIST HOSPITALITY, LLC,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (ETHAN W. COLLINS OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (NORMAN B. VITI, JR., OF
COUNSEL), FOR DEFENDANT-RESPONDENT BRANDSAFWAY INDUSTRIES, LLC.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS NEW YORK POWER AUTHORITY, MAID OF THE MIST
CORPORATION, MAID OF THE MIST ENTERPRISES, INC., AND MAID OF THE MIST
HOSPITALITY, LLC.

Appeal from an order of the Supreme Court, Niagara County (Frank
A. Sedita, III, J.), entered May 23, 2024. The order, inter alia,
granted an evidentiary hearing.

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

Same memorandum as in *Wheeler v Brandsafway Indus., LLC* ([appeal
No. 1] – AD3d – [June 27, 2025] [4th Dept 2025]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

311

CA 24-01227

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

BRYAN WHEELER, PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

BRANDSAFWAY INDUSTRIES, LLC, DEFENDANT-RESPONDENT,
NEW YORK POWER AUTHORITY, MAID OF THE MIST
CORPORATION, MAID OF THE MIST ENTERPRISES, INC.,
AND MAID OF THE MIST HOSPITALITY, LLC,
DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 3.)

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (ETHAN W. COLLINS OF
COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (NORMAN B. VITI, JR., OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross-appeal from an order of the Supreme Court,
Niagara County (Frank A. Sedita, III, J.), entered July 24, 2024. The
order, inter alia, directed the payment of \$10,000 to plaintiff's
counsel.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by vacating that part granting
sanctions and as modified the order is affirmed without costs.

Same memorandum as in *Wheeler v Brandsafway Indus., LLC* ([appeal
No. 1] – AD3d – [June 27, 2025] [4th Dept 2025]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

325

KA 23-01334

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMEL CUNNINGHAM, ALSO KNOWN AS JOSHUA CUNNINGHAM,
DEFENDANT-APPELLANT.

NICHOLAS T. TEXIDO, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered July 26, 2023. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to suppress two guns that were found in the glove box of the vehicle he had been driving because the guns were recovered during an unlawful inventory search. We agree.

"An inventory search is exactly what its name suggests, a search designed to properly catalogue the contents of the item searched" (*People v Johnson*, 1 NY3d 252, 256 [2003]). The objectives of an inventory search are to protect the property of the defendant, to protect the police against any claim of lost property, and to protect police personnel and others from any dangerous instruments (*see id.*; *see also Florida v Wells*, 495 US 1, 4 [1990]). An inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence (*see Wells*, 495 US at 4; *Johnson*, 1 NY3d at 256), and an inventory search will be constitutionally invalid where the search was merely a pretext to search for evidence of a crime (*see Johnson*, 1 NY3d at 257; *see also People v Lewis*, 217 AD2d 591, 592-593 [2d Dept 1995]). Thus, an inventory search should be conducted pursuant to "an established procedure clearly limiting the conduct of

individual officers that assures that the searches are carried out consistently and reasonably" (*People v Galak*, 80 NY2d 715, 719 [1993]). "While incriminating evidence may be a consequence of an inventory search, it should not be its purpose" (*Johnson*, 1 NY3d at 256; see *People v Williams*, 214 AD3d 1395, 1396 [4th Dept 2023], lv denied 40 NY3d 931 [2023]).

Here, the record reveals that the purported inventory search was actually a pretext to search for contraband. At the suppression hearing, the testimony and body-worn camera footage established that one of the officers who stopped defendant's vehicle identified him and testified that defendant had, earlier that day, been identified as someone likely to be in possession of a weapon. Following the traffic stop and while defendant was being detained pursuant to an outstanding arrest warrant, two other officers arrived on the scene. One of the arriving officers identified the vehicle defendant was driving as one that the police thought defendant would be using and would be keeping a weapon in. The other arriving officer promptly began searching the front passenger area of the vehicle; he opened the glove box and found a weapon, prompting a police officer to observe "oh, there it is." At that point, another officer said "let's check for the second one," and shortly thereafter a second weapon was found in the same spot, precisely as predicted by that officer.

As one of the police officers who testified at the suppression hearing admitted, the police essentially conducted two searches of defendant's vehicle following the traffic stop and detention. The first search resulted in the discovery of the weapons, whereas the second search was conducted to inventory the contents and damage to the vehicle. In our view, based on the evidence at the hearing, the first search was clearly a ruse to find weapons possessed by defendant and was not a proper inventory search. Our conclusion is not based merely on the fact that, in conducting the first search, the "officers knew that contraband might be recovered" from the vehicle (*People v Lee*, 29 NY3d 1119, 1120 [2017]). Rather, the evidence at the suppression hearing demonstrated that the officers' purpose in conducting the first search was to find specific weapons in a specific vehicle possessed by a specific person, i.e., defendant. We also note that the officers did not begin the second search until about ten minutes after the weapons were discovered, and it was only at that time that an officer began filling out an inventory search form. The facts that the inventory search form was not made contemporaneously with the first search, as required by Buffalo Police Department policy, and that it was incomplete to the extent it failed to note, as required, obvious damage to the vehicle, merely underscores and corroborates our conclusion that the first search of the vehicle was pretextual. Thus, the People failed to meet their burden of establishing a valid inventory search (see *id.*; *Johnson*, 1 NY3d at 256; *People v Espinoza*, 174 AD3d 1062, 1063 [3d Dept 2019]; *People v Elpenord*, 24 AD3d 465, 467 [2d Dept 2005]).

Inasmuch as the People failed to meet their burden at the suppression hearing, the court erred in refusing to suppress the guns found in the vehicle. We therefore reverse the judgment, vacate the

plea, grant that part of defendant's omnibus motion seeking to suppress physical evidence, and dismiss the indictment against him. In view of the foregoing, we need not address defendant's remaining contention.

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

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KA 22-00722

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANDREA PHILLIPS, DEFENDANT-APPELLANT.

LARKIN INGRASSIA, PLLC, NEWBURGH (DEREK S. ANDREWS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered December 17, 2021. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her following a jury trial of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Defendant was tried jointly with her codefendant son, and all of the issues raised by defendant were raised by the codefendant on his appeal (*People v Phillips [Clifton]*, – AD3d – [June 27, 2025] [4th Dept 2025] [decided herewith]). We affirm for reasons stated in our decision therein.

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

343

KA 22-01389

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMIL KNOX, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Karen Bailey Turner, J.), rendered August 4, 2022. The judgment convicted defendant, upon a nonjury verdict, of manslaughter in the first degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Brooks*, 139 AD3d 1391, 1392-1393 [4th Dept 2016], *lv denied* 28 NY3d 1026 [2016]; *People v Nichols*, 89 AD3d 1503, 1504 [4th Dept 2011]). Nevertheless, "we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Desmond*, 224 AD3d 1303, 1304 [4th Dept 2024], *lv denied* 41 NY3d 964 [2024] [internal quotation marks omitted]; *see People v Danielson*, 9 NY3d 342, 349-350 [2007]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see Danielson*, 9 NY3d at 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that Penal Law § 265.03 is unconstitutional in light of the United States Supreme Court's

decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). Inasmuch as defendant failed to raise a constitutional challenge to the statute before County Court, any such contention is not preserved for our review (see *People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], lv denied 39 NY3d 1111 [2023]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], lv denied 27 NY3d 1074 [2016], cert denied 580 US 969 [2016]), and we decline to exercise our power to review defendant's unpreserved contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

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

344

KA 22-00720

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CLIFTON PHILLIPS, JR., DEFENDANT-APPELLANT.

LARKIN INGRASSIA, PLLC, NEWBURGH (DEREK S. ANDREWS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered December 17, 2021. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We now affirm.

This prosecution arises from an investigation conducted by a police task force regarding illegal drug activity. The task force obtained information to support a search warrant for the residence of defendant's mother (codefendant). Police officers executed that warrant and, after observing defendant and the codefendant sleeping in different rooms of the residence, recovered contraband, drug-related paraphernalia, and a significant amount of money. Following that search (first search), officers received information that they had missed a larger amount of drugs stored somewhere else in the residence. Two days after the first search, officers conducted a second search of the residence and recovered a large amount of contraband from the attic. Initially, the People filed an indictment against the residents of the premises, i.e., defendant and the codefendant, with respect to evidence recovered from both searches, but, thereafter, the People obtained a superseding indictment with higher charges related only to the contraband recovered during the second search.

On the first day of trial on the superseding indictment, any and all remaining charges related to the first indictment were dismissed. Ultimately, the jury convicted defendant and the codefendant of both charges contained in the superseding indictment.

Defendant contends that the People's *Molineux* application was untimely, and that County Court abused its discretion in its *Molineux* ruling when it allowed the People to introduce testimony regarding the first search in evidence at trial. Defendant's contention that the *Molineux* application was untimely is not preserved for our review inasmuch as defendant failed to challenge its timeliness before the trial court (see CPL 470.05 [2]; see generally *People v Brandl*, 231 AD2d 895, 895 [4th Dept 1996]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

With respect to the court's *Molineux* ruling, we conclude that, even assuming, arguendo, that the evidence in question concerning the first search was *Molineux* evidence (see *People v Frumusa*, 29 NY3d 364, 369-370 [2017], *rearg denied* 29 NY3d 1110 [2017]), the court did not err in admitting it. Such evidence was relevant to establish defendant's constructive possession of the contraband found in the residence two days later (see *People v Campbell*, 229 AD3d 1296, 1297 [4th Dept 2024]; *People v Crowley*, 188 AD3d 1665, 1666 [4th Dept 2020], *lv denied* 36 NY3d 1056 [2021]; *People v Harris*, 147 AD3d 1328, 1329 [4th Dept 2017]), and to establish defendant's "intent to sell" the significant amount of the controlled substances found in the attic during the second search (*People v Hayward*, 213 AD3d 989, 992 [3d Dept 2023], *affd* 42 NY3d 753 [2024]; see *People v Robinson*, 142 AD3d 1302, 1303-1304 [4th Dept 2016], *lv denied* 28 NY3d 1126 [2016]; see also *People v Diaz*, 100 AD3d 446, 447 [1st Dept 2012], *affd* 24 NY3d 1187 [2015]; see generally *People v Satiro*, 72 NY2d 821, 822 [1988]). We further conclude that the court did not abuse its discretion in determining that the probative value of the evidence concerning the first search outweighed its potential for undue prejudice (see e.g. *People v Gaiter*, 224 AD3d 1384, 1385 [4th Dept 2024], *lv denied* 41 NY3d 1018 [2024], *reconsideration denied* 42 NY3d 970 [2024]; *People v Hall*, 182 AD3d 1023, 1024 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020]; see generally *People v Weinstein*, 42 NY3d 439, 458 [2024]).

Defendant further contends that discovery violations require reversal of the judgment of conviction. Despite defendant's numerous contentions related to discovery, we conclude that the only contention preserved for our review is his contention that the People failed to timely disclose a fingerprint report. When that report was belatedly disclosed, defendant sought dismissal on the grounds that the People violated their *Brady* obligations and had not actually been ready for trial based on noncompliance with the new CPL article 245. The remaining claims of incomplete disclosure were never raised in the trial court and thus are unpreserved (see CPL 470.05 [2]; *People v Dunn*, 229 AD3d 1220, 1222 [4th Dept 2024]; *People v Perkins*, 229 AD3d 1223, 1224 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]). We decline to exercise our power to review those contentions as a matter

of discretion in the interest of justice (see CPL 470.15 [6] [a]).

With respect to the fingerprint report, the People announced readiness before the effective date of CPL article 245. As a result, their readiness was not vitiated by the new statutory scheme (see *People v King*, 42 NY3d 424, 428 [2024]). To the extent that defendant made the appropriate discovery demands under either CPL former article 240 or the newly enacted article 245, the People were required to provide the fingerprint report (see CPL 245.20 [1] [j]; former 240.20 [1] [c]). Their failure to timely do so was subject to a wide range of potential sanctions (see CPL 245.80 [2]; former 240.70 [1]), but no sanction was required inasmuch as there was no showing of prejudice (see *People v Heverly*, 224 AD3d 1243, 1247 [4th Dept 2024]; *People v Ramjattan*, 219 AD3d 1348, 1351 [2d Dept 2023], *lv denied* 40 NY3d 1040 [2023]; *People v Gaillard*, 215 AD3d 459, 460-461 [1st Dept 2023], *lv denied* 40 NY3d 934 [2023]). Moreover, we reject defendant's contention that the delayed disclosure of the fingerprint analysis constitutes a reversible *Brady* violation. The "failure of the police to find latent fingerprints on one of the plastic bags . . . was not exculpatory" (*People v Howard*, 261 AD2d 841, 841 [4th Dept 1999], *lv denied* 93 NY2d 1020 [1999]; see *People v Woodrich*, 212 AD2d 998, 998 [4th Dept 1995], *lv denied* 85 NY2d 945 [1995]; cf. *People v Dombrowski*, 163 AD2d 873, 874 [4th Dept 1990]).

Defendant contends that the court erred in denying his request for new counsel without inquiring into his complaints against counsel. Once defendant and the codefendant informed the court that they wanted new defense counsel, the court gave them a full opportunity to air their grievances (see *People v Kirkey*, 233 AD3d 1510, 1513-1514 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; *People v Hubbert*, 227 AD3d 1547, 1548 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]). We conclude that the court properly determined that defendant's request for a new attorney was "not serious" and that his complaints "did not indicate that there was a serious possibility of good cause for substitution" (*People v Pottinger*, 229 AD3d 1053, 1054 [4th Dept 2024], *lv denied* 42 NY3d 1081 [2025]).

Contrary to defendant's contention, we conclude that the court did not abuse its discretion with respect to its *Sandoval* ruling inasmuch as the "ruling reflects an appropriate balance between the probative value of . . . defendant's prior crimes on the issue of his credibility and the risk of possible prejudice" (*People v Farley*, 199 AD3d 1463, 1464 [4th Dept 2021], *lv denied* 37 NY3d 1145 [2021] [internal quotation marks omitted]).

Finally, upon viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we

conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

351

CAF 24-00274

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

IN THE MATTER OF CORINNE BEAVERS, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN BEAVERS, RESPONDENT-APPELLANT.
(PROCEEDING NO. 1.)

IN THE MATTER OF KEVIN BEAVERS, PETITIONER-APPELLANT,

V

CORINNE BEAVERS, RESPONDENT-RESPONDENT.
(PROCEEDING NO. 2.)

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

JEFFREY R. PARRY, FAYETTEVILLE, FOR PETITIONER-RESPONDENT AND
RESPONDENT-RESPONDENT.

CHRISTINA CAGNINA, SYRACUSE, ATTORNEY FOR THE CHILD.

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

Appeal from an order of the Family Court, Onondaga County
(Lourdes P. Rosario, R.), entered August 3, 2023, in proceedings
pursuant to Family Court Act article 6. The order, inter alia,
granted sole legal and physical custody of the subject children to
petitioner-respondent.

It is hereby ORDERED that said appeal from the order insofar as
it concerns the parties' youngest child and third youngest child is
unanimously dismissed and the order is affirmed without costs.

Memorandum: In these proceedings pursuant to Family Court Act
article 6, respondent-petitioner father appeals from an order entered
after a hearing that, inter alia, awarded petitioner-respondent mother
sole legal and physical custody of the parties' three youngest
children and terminated the father's parenting time with the second
youngest child. Initially, we dismiss as moot the appeal from the
order insofar as it concerns the third youngest child, i.e., the
oldest of the three children addressed in the order, because that
child has reached the age of majority (see *Matter of Osmundson v*
Held-Cummings, 20 AD3d 922, 923 [4th Dept 2005], lv denied 5 NY3d 711

[2005])). We further dismiss the appeal insofar as it concerns the youngest child because a subsequent order has been entered rendering the father's challenge with respect to that child moot (see *Matter of Kirkpatrick v Kirkpatrick*, 117 AD3d 1575, 1576 [4th Dept 2014])). Inasmuch as the subsequent order does not mention the second youngest child, however, the order on appeal is still operative with respect to that child (see *Matter of Daila W. [Danielle W.-Daniel P.]*, 133 AD3d 1353, 1354 [4th Dept 2015]; *Matter of Karen PP. v Clyde QQ.*, 197 AD2d 753, 754 [3d Dept 1993]; cf. *Matter of Andrews v Applegate*, 201 AD3d 1332, 1332 [4th Dept 2022])).

With respect to the second youngest child, we note that the parties do not dispute that there is a sufficient change in circumstances to warrant an inquiry into whether modification of the existing custody arrangement would be in that child's best interests (see *Matter of Ridall v Jones*, 230 AD3d 1548, 1549 [4th Dept 2024]; *Matter of Nordee v Nordee*, 170 AD3d 1636, 1636-1637 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019]; *Matter of Schimmel v Schimmel*, 262 AD2d 990, 991 [4th Dept 1999], *lv denied* 93 NY2d 817 [1999])).

Contrary to the father's contention, Family Court did not err in awarding the mother sole legal and physical custody of the second youngest child or in terminating the father's parenting time with that child. In determining whether a requested custody modification is in the best interests of a child, "the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of each [party] to provide for the child's emotional and intellectual development and the wishes of the child" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]; see *Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]; *Matter of Pritty-Pitcher v Hargis*, 221 AD3d 1546, 1547 [4th Dept 2023], *lv dismissed in part & denied in part* 41 NY3d 974 [2024], *cert denied* – US –, 145 S Ct 290 [2024])). It is well settled that "a court's determination regarding custody [and visitation issues], based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of DeVore v O'Harra-Gardner*, 177 AD3d 1264, 1266 [4th Dept 2019] [internal quotation marks omitted]; see *Matter of Thayer v Thayer*, 67 AD3d 1358, 1359 [4th Dept 2009])). We perceive no basis to disturb the court's determination with respect to the second youngest child inasmuch as it is supported by a sound and substantial basis in the record (see *Matter of Kakwaya v Twinamatsiko*, 159 AD3d 1590, 1591 [4th Dept 2018], *lv denied* 31 NY3d 911 [2018]; *Farina v Farina*, 82 AD3d 1517, 1518-1519 [3d Dept 2011])). We note that, although the express wishes of a child are not controlling, they are entitled to great weight where, as here, the child's age and maturity "render [their] input particularly meaningful" (*Matter of Frederick v Snyder*, 219 AD3d 1708, 1708 [4th Dept 2023]; see generally *Matter of Papineau v*

Sanford, 189 AD3d 2147, 2147-2148 [4th Dept 2020], *lv denied* 36 NY3d 911 [2021]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

353

KA 24-00441

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

INDIA M. BARR BLOUNT, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Meredith A. Vacca, J.), rendered March 5, 2024. The judgment convicted defendant upon her plea of guilty of 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 her upon her plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]). We affirm.

Contrary to defendant's contention, the record establishes that she knowingly, voluntarily, and intelligently waived her 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]).

Defendant's contention that she was denied effective assistance of counsel does not survive her plea or the valid waiver of the right to appeal inasmuch as she "failed to demonstrate that the plea bargaining process was infected by the allegedly ineffective assistance or that [she] entered the plea because of defense counsel's allegedly poor performance" (*People v Alsaifullah*, 162 AD3d 1483, 1485-1486 [4th Dept 2018], *lv denied* 32 NY3d 1062 [2018]; *see People v Smith*, 122 AD3d 1300, 1301 [4th Dept 2014], *lv denied* 25 NY3d 1172 [2015]). Defendant's remaining contentions are encompassed by the valid waiver of the right to appeal (*see generally Lopez*, 6 NY3d at 255-256; *People v Allen*, 174 AD3d 1456, 1457-1458 [4th Dept 2019], *lv*

denied 34 NY3d 978 [2019]; *People v Wilson*, 160 AD3d 1469, 1470 [4th
Dept 2018], *lv denied* 31 NY3d 1154 [2018])).

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

356

CA 24-00476

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

KIMBERLY J. SALTER, INDIVIDUALLY AND AS
EXECUTOR OF THE ESTATE OF AARON W. SALTER, JR.,
DECEASED, ET AL., PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

META PLATFORMS, INC., FORMERLY KNOWN AS
FACEBOOK, INC., ET AL., DEFENDANTS,
BLAKE WALDROP AND CORY CLARK, DEFENDANTS-RESPONDENTS.

CONNORS LLP, BUFFALO (TERRENCE M. CONNORS OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, BUFFALO (MITCHELL J. BANAS, JR., OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered February 9, 2024. The order granted the motion of defendants Blake Waldrop and Cory Clark to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendants Blake Waldrop and Cory Clark.

Memorandum: In May 2022, an 18-year-old man (shooter) committed a racially motivated mass shooting at a grocery store in Buffalo, resulting in the death of 10 people and injuries to many others. Plaintiffs commenced this action against, among other parties, defendant RMA Armament, Inc., doing business as RMA (RMA), which sold to the shooter body armor that he wore during the attack, and Blake Waldrop and Cory Clark (individual defendants). According to the complaint, Waldrop, during the relevant time period, was the chief executive officer and majority owner of RMA, and Clark was a social media spokesperson and customer service representative for RMA. Clark allegedly communicated directly with the shooter to effectuate the sale of body armor.

The complaint alleges that the RMA body armor protected the shooter from a security guard's gunfire, thereby allowing the shooter to kill the security guard and shoot more people inside and outside of the store. Plaintiffs seek to hold the individual defendants personally liable for their respective roles in providing the body

armor to the shooter, asserting jurisdiction over the individual defendants under CPLR 302 (a) (1) and (3).

The individual defendants moved to dismiss the complaint against them for lack of personal jurisdiction (see CPLR 3211 [a] [8]). Supreme Court granted the motion, concluding that plaintiffs failed to "satisfy the elements for long arm jurisdiction" over either of the individual defendants. Although the court added that it fully expected that both individual defendants would likely "be deposed during the course of discovery regarding RMA's liability," it denied plaintiffs' alternative request for permission to engage in jurisdictional discovery. Plaintiffs now appeal from an order granting the motion, and we conclude that plaintiffs are entitled to jurisdictional discovery before it can be determined whether dismissal is warranted (see *Williams v Beemiller, Inc.*, 100 AD3d 143, 152 [4th Dept 2012], amended on rearg 103 AD3d 1191 [4th Dept 2013]).

New York's long-arm statute confers personal jurisdiction over "any non-domiciliary . . . who in person or through an agent" either "transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302 [a] [1]). Jurisdiction attaches under that provision "so long as the defendant's activities [in New York] were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007] [internal quotation marks omitted]; see *McGowan v Smith*, 52 NY2d 268, 272-273 [1981]). Alternatively, a New York court can obtain jurisdiction over a nondomiciliary who "commits a tortious act without the state causing injury to person or property within the state . . . if [the nondomiciliary] (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce" (CPLR 302 [a] [3]; see *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]).

If it is determined that a defendant's relationship with New York falls within the scope of the long-arm statute, then the court must further consider whether exercising jurisdiction over that defendant would comport with principles of due process (see *Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019]; *LaMarca*, 95 NY2d at 214). "Due process requires that a nondomiciliary have certain minimum contacts with the forum and that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" (*Williams*, 33 NY3d at 528 [internal quotation marks omitted]; see *International Shoe Co. v Washington*, 326 US 310, 316 [1945]).

"As the parties seeking to assert personal jurisdiction, plaintiffs bear the burden of proof on that issue" (*Williams*, 100 AD3d at 152-153; see *Fischbarg*, 9 NY3d at 381 n 5). Nevertheless, as we have held, "[i]n order to defeat a motion to dismiss based upon lack of personal jurisdiction, a plaintiff need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant[s]"

(*Tucker v Sanders*, 75 AD3d 1096, 1096 [4th Dept 2010] [emphasis added & internal quotation marks omitted]; see *Best v Guthrie Med. Group, P.C.*, 175 AD3d 1048, 1050-1051 [4th Dept 2019]; *Williams*, 100 AD3d at 153). We agree with plaintiffs that they have set forth a "sufficient start" (*Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]) to show that their position is not " 'frivolous' " (*Williams*, 100 AD3d at 153; see *Peterson*, 33 NY2d at 467).

The issue here concerns the court's jurisdiction over one of RMA's principals and one of its employees, regardless of the court's jurisdiction over RMA. With respect to Waldrop, plaintiffs allege that he was intimately involved in the daily operations of RMA, was involved in developing the body armor used by the shooter, and was directly involved in the marketing and sales of that body armor. They also allege that he chose to allow the sale of body armor to civilians, i.e., non-military and non-law enforcement personnel, or was "deliberately indifferent" to such sales, and that he knew RMA body armor was being marketed to and sold in New York. We conclude that those allegations are sufficient to warrant discovery on the matter of personal jurisdiction vis-à-vis Waldrop (see *Williams*, 100 AD3d at 153-154; cf. *Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 487 [1st Dept 2017]; see generally *Penguin Group [USA] Inc. v American Buddha*, 16 NY3d 295, 302 [2011]).

With respect to Clark, plaintiffs allege that he, personally, marketed the body armor to, and communicated directly with, the shooter, encouraging him to purchase the body armor, either knowing or having reason to know that the shooter was a civilian. Plaintiffs further allege that, as a result of that individual conduct, Clark knew that RMA's body armor was being sold to civilians in New York, presenting grave risks to New York residents. We thus likewise conclude that plaintiffs' allegations are sufficient to warrant discovery on the matter of personal jurisdiction vis-à-vis Clark (see *Williams*, 100 AD3d at 153-154; cf. *Coast to Coast Energy, Inc.*, 149 AD3d at 487; see generally *Penguin Group [USA] Inc.*, 16 NY3d at 302).

Inasmuch as we conclude that plaintiffs "are entitled to conduct discovery on essential facts pertaining to jurisdiction" (*Sovik v Healing Network*, 244 AD2d 985, 987 [4th Dept 1997], amended on rearg 679 NYS2d 858 [4th Dept 1998]), we reverse the order, deny the individual defendants' motion and reinstate the complaint against them.

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

357

CA 24-00236

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

CLAUDE MAYO CONSTRUCTION CO., INC.,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BARCLAY DAMON LLP, DEFENDANT-RESPONDENT.

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

HAGERTY & BRADY, BUFFALO (MICHAEL A. BRADY OF COUNSEL), AND BARCLAY
DAMON LLP, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered January 16, 2024. The order granted the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action against defendant asserting three causes of action, for legal malpractice, violation of Judiciary Law § 487, and fraudulent concealment, respectively. Defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). Supreme Court granted defendant's motion. Plaintiff appeals, and we affirm.

We initially note that plaintiff has not raised any contentions in its brief concerning its third cause of action, for fraudulent concealment, and we conclude that plaintiff has therefore abandoned any contentions concerning its dismissal (*see Cassatt v Zimmer, Inc.*, 161 AD3d 1549, 1550 [4th Dept 2018]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

When considering a motion to dismiss the complaint pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994], citing CPLR 3026). The court must give "every possible favorable inference" to a plaintiff and accept the allegations contained in the complaint as true (*id.*). In evaluating whether a complaint should be dismissed pursuant to CPLR 3211 (a) (7) in a case where the court has considered evidentiary material in support of or in opposition to the motion, "the criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one" (*Leon*, 84 NY2d at 88 [internal

quotation marks omitted])). "[B]are legal conclusions and factual claims [that] are flatly contradicted by the evidence [proffered by the moving party] are not presumed to be true on a motion to dismiss for failure to state a cause of action" (*Matter of Niagara County v Power Auth. of State of N.Y.*, 82 AD3d 1597, 1599 [4th Dept 2011], *lv dismissed in part & denied in part* 17 NY3d 838 [2011] [internal quotation marks omitted]; see generally *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976])).

" '[T]o recover damages for legal malpractice, a [client] must prove (1) that the [law firm] failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the [client] would have been successful in the underlying action had the [law firm] exercised due care' " (*Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP v Wilson*, 136 AD3d 1326, 1327 [4th Dept 2016], *lv dismissed* 28 NY3d 942 [2016]; see *Harvey v Handelman, Witkowicz & Levitsky, LLP*, 130 AD3d 1439, 1441 [4th Dept 2015])). The fact that an action results in a settlement "does not, per se, preclude a legal malpractice action" (*Chamberlain*, 136 AD3d at 1328). Where there is a settlement, however, "the focus becomes whether settlement of the action was effectively compelled by the mistakes of counsel" (*Carbone v Brenizer*, 148 AD3d 1806, 1806 [4th Dept 2017] [internal quotation marks omitted]).

We conclude that defendant's evidentiary submissions on its motion conclusively established that plaintiff has no cause of action for legal malpractice (see generally *Rovello*, 40 NY2d at 636). Defendant submitted evidence of a favorable settlement in the underlying suit, and that evidence "flatly contradicts" plaintiff's conclusory allegations to the effect that the settlement was compelled by the mistakes of counsel (*Olszewski v Waters of Orchard Park*, 303 AD2d 995, 995 [4th Dept 2003] [internal quotation marks omitted]; see generally *Niagara County*, 82 AD3d at 1599).

Finally, even assuming, arguendo, that Judiciary Law § 487 is applicable where, as here, the alleged misconduct takes place in connection with an action in federal court (*cf. Delaney v HC2, Inc.*, 761 F Supp 3d 641, 664 [SD NY 2025]; *SGM Holdings LLC v Andrews*, 743 F Supp 3d 545, 584 [SD NY 2024]), we conclude that the complaint lacks the particularity required for a Judiciary Law § 487 cause of action inasmuch as it contains no facts to support plaintiff's conclusory allegations that defendant willfully delayed the proceedings or engaged in a chronic pattern of deceptive conduct (see *Pieroni v Phillips Lytle LLP*, 140 AD3d 1707, 1710 [4th Dept 2016], *lv denied* 28 NY3d 901 [2016]; *cf. Joseph v Fensterman*, 204 AD3d 766, 767 [2d Dept 2022])).

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

358

CA 23-00042

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

NORA ALMONTASER, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF SELLAH
ALMONTASER, DECEASED, CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

ROSWELL PARK CANCER INSTITUTE CORPORATION,
DOING BUSINESS AS ROSWELL PARK CANCER INSTITUTE,
DEFENDANT-RESPONDENT.
(CLAIM NO. 123266.)
(APPEAL NO. 1.)

PAUL WILLIAM BELTZ, LLC, BUFFALO (ANNE BELTZ-RIMMLER OF COUNSEL), FOR
CLAIMANT-APPELLANT.

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

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered December 8, 2022. The order granted the motion of defendant to dismiss the claim and dismissed the claim.

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

Memorandum: In this medical malpractice action, claimant appeals from an order granting defendant's motion to dismiss the claim pursuant to CPLR 3126. We affirm. "The nature and degree of a sanction to be imposed on a motion pursuant to CPLR 3126 is within the discretion of the court, and the striking of a pleading is appropriate only upon a clear showing that a party's failure to comply with a discovery demand or order is willful, contumacious or in bad faith" (*Mosey v County of Erie*, 117 AD3d 1381, 1384 [4th Dept 2014]). In support of its motion, defendant established that, for the nearly 10 years that the claim was pending, claimant failed repeatedly to respond to discovery demands and disregarded orders regarding discovery, and her failure to comply was willful, contumacious or in bad faith (see *Peterson v New York Cent. Mut. Fire Ins. Co.*, 174 AD3d 1386, 1388 [4th Dept 2019]). The burden thus shifted to claimant to establish a reasonable excuse for her conduct (see *WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1619 [4th Dept 2011]), and she failed to meet that burden (see *Peterson*, 174 AD3d at 1388). We

therefore conclude that the Court of Claims did not abuse its discretion in granting the motion and dismissing the claim.

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

359

CA 23-01009

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

NORA ALMONTASER, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF SELLAH
ALMONTASER, DECEASED, CLAIMANT-APPELLANT,

V

ORDER

ROSWELL PARK CANCER INSTITUTE CORPORATION,
DOING BUSINESS AS ROSWELL PARK CANCER INSTITUTE,
DEFENDANT-RESPONDENT.
(CLAIM NO. 123266.)
(APPEAL NO. 2.)

PAUL WILLIAM BELTZ, LLC, BUFFALO (ANNE BELTZ-RIMMLER OF COUNSEL), FOR
CLAIMANT-APPELLANT.

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

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered May 12, 2023. The order denied the motion of claimant seeking leave to reargue or renew her opposition to the motion of defendant to dismiss the claim.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]) and the order is affirmed without costs.

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

360

CA 24-00671

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

IN THE MATTER OF CYRUS ARDALAN, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

AZITA SAFAIE, RESPONDENT-RESPONDENT.

PHILLIPS LYTTLE LLP, BUFFALO (JOSHUA GLASGOW OF COUNSEL), FOR
PETITIONER-APPELLANT.

GEFFREY GISMONDI, LLC, WILLIAMSVILLE (JEFFREY B. NOVAK OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered April 12, 2024. The order, insofar as appealed from, granted that part of respondent's motion seeking to dismiss the amended petition.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety and the amended petition is reinstated.

Memorandum: Petitioner commenced this special proceeding pursuant to General Obligations Law § 5-1510 and thereafter filed an amended petition asserting causes of action for an accounting and for breach of fiduciary duty. Petitioner alleged that respondent, his sister, abused her power of attorney when she acted on his behalf in the sale of certain property that the parties jointly owned in Iran. Specifically, he alleged that respondent deprived him of the total proceeds from the sale of that jointly held property when she failed to inform him that part of the compensation for the sale of the property included an apartment in Iran that significantly depreciated in value between the time of the sale of the jointly held property and the time that the apartment was ultimately sold. Although petitioner conceded that he received a portion of the proceeds of the sale of the jointly held property when it was initially sold, i.e., his share of the amount of cash that was paid for the jointly held property, and that he received his share of the value of the apartment when it was ultimately sold years later, he alleged, inter alia, that respondent should have informed him that part of the compensation for the sale of the jointly held property included title to the apartment. He further alleged that, as a result of respondent's failure to impart that information to him, he was deprived of the ability to sell his interest in the apartment before it significantly depreciated in value.

Respondent filed a pre-answer motion seeking to dismiss the amended petition pursuant to CPLR 3211 (a) (1), (5) and (7), and seeking sanctions pursuant to 22 NYCRR 130-1.1. Supreme Court granted the motion, in part, by dismissing the amended petition, but did not impose any sanctions. Petitioner now appeals from the resulting order to the extent that it granted the motion, and, insofar as appealed from, we reverse the order.

"A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the [petitioner's] claims" (*Baumann Realtors, Inc. v First Columbia Century-30, LLC*, 113 AD3d 1091, 1092 [4th Dept 2014] [internal quotation marks omitted]; see *Eccles v Shamrock Capital Advisors, LLC*, 42 NY3d 321, 343 [2024]). "On a motion to dismiss pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the [respondent] has the initial burden of establishing that the limitations period has expired . . . Once [the respondent] meets that initial burden, the burden shifts 'to [the petitioner] to aver evidentiary facts . . . establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies" (*Jackson v Goodfellas Pizzeria, Inc.*, 233 AD3d 1468, 1469 [4th Dept 2024]; see *Paul v Lyons*, 232 AD3d 1212, 1212-1213 [4th Dept 2024]). Furthermore, "[o]n a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), [courts] accept the facts as alleged in the [petition] as true, accord [the petitioner] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks omitted]; see generally *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Matter of Thomas*, 124 AD3d 1235, 1237 [4th Dept 2015]).

Addressing first petitioner's cause of action for an accounting, we recognize that "[a]n equitable accounting involves a remedy designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in [their] possession . . . The elements include a fiduciary or confidential relationship, money entrusted to the [respondent] imposing the burden of an accounting, the absence of a legal remedy, and in some cases a demand and refusal" (*Matter of Lost Lake Holdings LLC v Town of Forestburgh*, 225 AD3d 1020, 1023 [3d Dept 2024]; see *Metropolitan Bank & Trust Co. v Lopez*, 189 AD3d 443, 446 [1st Dept 2020]). "[C]laims for an accounting accrue when there is either an open repudiation of the fiduciary's obligation or a judicial settlement of the fiduciary's account" (*Incorporated Vil. of Muttontown v Ryba*, 121 AD3d 757, 759 [2d Dept 2014]; see *Massey-Hughes v Massey*, 200 AD3d 1684, 1685-1686 [4th Dept 2021]; *Robinson v Day*, 103 AD3d 584, 586 [1st Dept 2013]), and "a mere lapse of time is insufficient without proof of an open repudiation" (*Massey-Hughes*, 200 AD3d at 1685 [internal quotation marks omitted]). It is undisputed that "[t]he statute of limitations for a cause of action seeking an accounting is six years" (*id.*; see CPLR 213 [1]; *Matter of Rodken*, 270 AD2d 784, 785 [3d Dept 2000]).

Here, none of the documentary evidence submitted by respondent refutes petitioner's allegations regarding the accounting cause of action, and we conclude that respondent failed to establish that the statute of limitations had expired inasmuch as there was no "open repudiation" of her fiduciary duties or a "judicial settlement of the fiduciary's account" (*Ryba*, 121 AD3d at 759; *see Massey-Hughes*, 200 AD3d at 1686). Furthermore, we conclude that petitioner sufficiently pleaded all of the requisite elements for a cause of action for an accounting (*see generally Lost Lake Holdings LLC*, 225 AD3d at 1023; *Metropolitan Bank & Trust Co.*, 189 AD3d at 446). We therefore conclude that the court erred in dismissing that cause of action.

With respect to petitioner's cause of action for breach of fiduciary duty, "[t]he elements of a cause of action for a breach of fiduciary duty are 'the existence of a fiduciary relationship, misconduct by [respondent], and damages directly caused by that misconduct' " (*Kaleida Health v Hyland*, 200 AD3d 1654, 1655 [4th Dept 2021]; *see Massey-Hughes*, 200 AD3d at 1687). Petitioner sufficiently alleged that there was a fiduciary relationship, that respondent engaged in misconduct and that petitioner suffered damages as a result (*see generally Matter of Ferrara*, 7 NY3d 244, 254 [2006]; *Kaleida Health*, 200 AD3d at 1655; *Mandelblatt v Devon Stores*, 132 AD2d 162, 167-168 [1st Dept 1987]). Moreover, we agree with petitioner that the "documentary evidence submitted by [respondent] does not conclusively establish a defense to the action as a matter of law" (*Roller v Walsh*, 278 AD2d 811, 811 [4th Dept 2000]). Furthermore, we agree with petitioner that respondent failed to establish that the proceeding was untimely. A cause of action for breach of fiduciary duty " 'accrues when the fiduciary openly repudiates his or her obligation or the fiduciary relationship has otherwise been terminated' " (*Borrelli v Thomas*, 195 AD3d 1491, 1493 [4th Dept 2021]). Respondent failed to establish as a matter of law that the statute of limitations had expired inasmuch as she failed to establish if and when the relationship was openly repudiated or terminated (*see id.*).

We have reviewed respondent's contentions raised as alternative grounds for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]) and conclude that none has merit.

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

365

KA 23-00860

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER L. WILMET, DEFENDANT-APPELLANT.

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

ASHLEY WILLIAMS, DISTRICT ATTORNEY, GENESEO, NEW YORK PROSECUTORS TRAINING INSTITUTE, ALBANY (GLENN D. GREEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered January 10, 2023. 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 and Livingston County Court is directed to redact all copies of defendant's presentence report in accordance with the following 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 reject defendant's contention that the verdict is against the weight of the evidence. Viewing the evidence, including DNA 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 an acquittal would not have been unreasonable, the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). We note that deference should be afforded to the jurors' superior ability to evaluate credibility based on their "opportunity to view the witnesses, hear the testimony and observe demeanor" (*id.*; see *People v Savery*, 209 AD3d 1268, 1269-1270 [4th Dept 2022], *lv denied* 39 NY3d 1075 [2023]; *People v Baker*, 30 AD3d 1102, 1102-1103 [4th Dept 2006], *lv denied* 7 NY3d 846 [2006]).

Defendant's contention that County Court erred in removing a juror is unpreserved inasmuch as he did not object to the dismissal of the juror (see CPL 470.05 [2]; *People v Bailey*, 32 NY3d 70, 77-79 [2018]). Defendant's contention that the court erred in not giving an Allen charge is not preserved for our review inasmuch as he failed to request an Allen charge (see *People v Love*, 307 AD2d 528, 531 [3d Dept

2003], *lv denied* 100 NY2d 643 [2003]; *People v Velez*, 150 AD2d 514, 515 [2d Dept 1989], *lv denied* 74 NY2d 748 [1989]). Defendant's contentions regarding the use of the term "rape kit" by the People and their witnesses are not preserved for review inasmuch as he failed to object to the use of that term (see *People v Cullen*, 110 AD3d 1474, 1475 [4th Dept 2013], *affd* 24 NY3d 1014 [2014]; *People v Maull*, 167 AD3d 1465, 1467-1468 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]). Defendant's constitutional challenge to the persistent felony offender statute is unpreserved for our review inasmuch as defendant failed to object to its constitutionality (see *People v Woodard*, 83 AD3d 1440, 1442 [4th Dept 2011], *lv denied* 17 NY3d 803 [2011]; *People v Perez*, 67 AD3d 1324, 1326 [4th Dept 2009], *lv denied* 13 NY3d 941 [2010]; see generally *People v Cabrera*, 41 NY3d 35, 45-51 [2023]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

We reject defendant's alternative contention that the imposition of persistent felony offender status is unduly harsh and severe. Here, we conclude that defendant's "history and character . . . and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest" (*People v Lowery*, 158 AD3d 1179, 1181 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018] [internal quotation marks omitted]; see *People v Nelson*, 16 AD3d 1172, 1173 [4th Dept 2005], *lv denied* 5 NY3d 766 [2005], *cert denied* 546 US 1043 [2005]), and it cannot be said that the court acted arbitrarily or irrationally (see *People v Rivera*, 5 NY3d 61, 68 [2005], *cert denied* 546 US 984 [2005]; *People v Garno*, 184 AD3d 1106, 1107 [4th Dept 2020], *lv denied* 35 NY3d 1065 [2020]). We decline to exercise our discretion in the interest of justice to vacate the persistent felony offender finding (see CPL 470.20 [6]).

Defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to challenge the People's amended certificate of compliance or bring a speedy trial claim, failure to ask meaningful questions during voir dire, failure to object to the use of the term "rape kit," and failure to request an Allen charge. We reject that contention. First, inasmuch as defendant failed to show how an objection to the People's amended certificate of compliance would have resulted in a successful speedy trial claim, we cannot conclude that defendant was denied effective assistance of counsel on that ground (see *People v Little*, 229 AD3d 1156, 1157-1158 [4th Dept 2024], *lv denied* 42 NY3d 971 [2024]; see generally *People v Myles*, 232 AD3d 1295, 1296 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025]). Second, we conclude that "[d]efendant has failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's brief questioning of prospective jurors during voir dire" (*People v Ortega*, 233 AD3d 1526, 1528 [4th Dept 2024], *lv denied* 43 NY3d 946 [2025]). Third, defense counsel's failure to object to the use of the term "rape kit" by the People and their witnesses did not constitute ineffective assistance inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to make a motion or argument that has

little or no chance of success" (*People v Caban*, 5 NY3d 143, 152 [2005] [internal quotation marks omitted]). Fourth, defense counsel's failure to request an Allen charge did not constitute ineffective assistance of counsel because the request for that charge had "little or no chance of success" (*id.*; see generally *People v Roman*, 85 AD3d 1630, 1631 [4th Dept 2011], *lv denied* 17 NY3d 821 [2011]). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude on the record before us that defendant received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147 [1981]).

We agree with defendant, however, that the court erred in failing to redact improper statements from the presentence report (PSR) because they reference criminal conduct of which defendant was acquitted (see *People v Lovines*, 208 AD3d 1639, 1639-1640 [4th Dept 2022]; *People v Bubis*, 204 AD3d 1492, 1495 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022]; *People v Washington*, 170 AD3d 1608, 1609-1610 [4th Dept 2019], *lv denied* 33 NY3d 1036 [2019]). Specifically, we agree with defendant that the inclusion in the PSR of statements regarding alleged sexual offenses by defendant involving another child, of which he was acquitted, "was inappropriate and inflammatory" (*Washington*, 170 AD3d at 1610). We therefore direct County Court to redact the sentence on page 10 of the PSR referring to a statement by the victim "that there could be another victim . . . who was inappropriately touched by [defendant]"; the quotation on page 10 from an investigator stating that defendant " 'was having sexual intercourse with another underage female as well. High risk for children' "; and the sentence on page 12 referring to a disclosure "that [defendant] has been sexually assaulting [the other victim] since she was nine years old" from all copies of defendant's PSR.

Finally, the sentence is not unduly harsh or severe.

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

373

CA 24-01627

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

NIKIR BROWN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT,
POLICE OFFICER PATRICK S. GARRY, POLICE
OFFICER BRIAN A. NAGY, MARQUEL MCCARLEY,
DEFENDANTS-RESPONDENTS,
AND ABDIHAKIM H. MUKTAR, DEFENDANT-APPELLANT.

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

PILLINGER MILLER TARALLO, LLP, SYRACUSE (KENNETH A. KRAJEWSKI OF
COUNSEL), FOR DEFENDANT-RESPONDENT MARQUEL MCCARLEY.

Appeal from an order of the Supreme Court, Erie County (John DelMonte, J.), entered October 1, 2024 in a case involving a motor vehicle accident. The order denied the motion of defendant Abdihakim H. Muktar for summary judgment dismissing the complaint and cross-claims against him.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted, and the complaint and cross-claims against defendant Abdihakim H. Muktar are dismissed.

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries he sustained while a passenger in a vehicle (Honda) that collided with a vehicle operated by defendant Abdihakim H. Muktar (defendant). The accident occurred at the intersection of Walden Avenue and Lathrop Street in Buffalo. Traffic approaching Walden Avenue from Lathrop Street had a stop sign, whereas traffic on Walden Avenue in that vicinity did not. Defendant was traveling west on Walden Avenue and approaching Lathrop Street to his left. The driver of the Honda had been fleeing the police and was traveling on Lathrop Street approaching Walden Avenue. The Honda proceeded past the stop sign without stopping and collided with defendant's vehicle. Defendant moved for summary judgment dismissing the complaint and all cross-claims against him. Supreme Court denied the motion, and defendant appeals.

We agree with defendant that the court erred in denying his motion. "[A] driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring

them to yield to the driver with the right-of-way . . . Although a driver with the right-of-way has a duty to use reasonable care to avoid a collision . . . , a driver with the right-of-way who has only seconds to react to a vehicle that has failed to yield is not comparatively negligent for failing to avoid the collision" (*Carpentieri v Kloc*, 213 AD3d 1314, 1315 [4th Dept 2023] [internal quotation marks omitted]; see *Doxtader v Janczuk*, 294 AD2d 859, 859-860 [4th Dept 2002], *lv denied* 99 NY2d 505 [2003]). Here, defendant met his initial burden of establishing as a matter of law that he "was operating his vehicle in a lawful and prudent manner and that there was nothing [he] could have done to avoid the collision" (*Heltz v Barratt*, 115 AD3d 1298, 1299 [4th Dept 2014], *affd* 24 NY3d 1185 [2014] [internal quotation marks omitted]; see *Gomez v Buczynski*, 213 AD3d 1312, 1313 [4th Dept 2023]; *Godwin v Mancuso*, 170 AD3d 1672, 1672-1673 [4th Dept 2019]). In opposition to the motion, plaintiff and the remaining defendants failed to raise a triable issue of fact (see *Gomez*, 213 AD3d at 1313; *Godwin*, 170 AD3d at 1673; *Malbory v David Chevrolet Buick Pontiac, Inc.*, 108 AD3d 1109, 1110 [4th Dept 2013]).

We respectfully disagree with our dissenting colleagues that defendant failed to meet his initial burden of establishing that he was free of comparative fault. Although defendant testified at his deposition that he had seen the Honda "like thirty, forty seconds" before the impact, he corrected that testimony when questioned by his counsel and stated that the collision occurred "instantly" after he first saw the car. The dissent also relies on plaintiff's purported testimony concerning the speed of the Honda at the time of the collision. Plaintiff testified that, while they were being pursued by the police, the driver of the Honda was proceeding two or three miles per hour over the speed limit and, "[a]s far as [he] remember[ed]," the driver obeyed traffic signals and stop signs. However, plaintiff testified that he "blacked out" in the accident and did not know how it was caused. He was not even sure that the accident occurred at an intersection. All he could remember was the Honda proceeding straight with the police behind them and that he was "a little shaken up because [he had] never been in a high speed [chase]." That was "all [he could] remember, and [then] it was just boom." Another occupant of the Honda testified that, as the Honda approached the intersection, "[i]t tried to stop, but . . . [they] were going a little too fast" and slid into the intersection. Defendant therefore established that the Honda never stopped at the stop sign before proceeding into the intersection and colliding with defendant's vehicle. Inasmuch as the evidence submitted by defendant established that he had, at most, "only seconds to react" to the Honda that failed to yield the right-of-way, he established as a matter of law that he was not comparatively negligent (*Carpentieri*, 213 AD3d at 1315 [internal quotation marks omitted]).

All concur except BANNISTER and NOWAK, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm. Although defendant Abdihakim H. Muktar (defendant) was entitled to anticipate that the driver of the Honda would stop at the stop sign and yield the right-of-way to him (see *Deering v Deering*, 134 AD3d 1497, 1498 [4th Dept 2015]; *Dorr v Farnham*, 57 AD3d 1404,

1405-1406 [4th Dept 2008]), in moving for summary judgment, defendant had the burden of establishing that he was free of comparative fault (see *Deering*, 134 AD3d at 1498; *Cooley v Urban*, 1 AD3d 900, 901 [4th Dept 2003]). "[I]t is well settled that 'drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident' " (*Cupp v McGaffick*, 104 AD3d 1283, 1284 [4th Dept 2013]; see *Murray v Sminkey*, 200 AD3d 1705, 1706 [4th Dept 2021]).

In support of his motion for summary judgment, defendant submitted his deposition testimony, where he claimed that the Honda was "less than one foot" from his vehicle when he first saw it. Nonetheless, as the majority notes, defendant also testified that he saw the Honda 30 or 40 seconds before the impact. Defendant's later claim that the collision occurred "instantly" after he first saw the Honda was upon questioning by his own attorney, and in explaining the change in his testimony, defendant added, "I did not see anything . . . It was just a big bang I heard." The inconsistencies in defendant's own sworn testimony thus raise questions of fact as to whether he "[saw] what should be seen and . . . exercise[d] reasonable care under the circumstances to avoid an accident" (*Cupp*, 104 AD3d at 1284 [internal quotation marks omitted]).

In addition to his own sworn testimony, defendant submitted plaintiff's testimony in support of the motion, in which plaintiff claimed that the Honda was traveling approximately two or three miles per hour over the speed limit at the time of the collision. Defendant also submitted the testimony of two police officers in support of his motion, but neither witnessed the collision nor could they estimate the speed of the Honda when it reached the stop sign at the intersection, as they were admittedly two blocks behind the Honda at that point and had already ended their pursuit. The majority notes that the driver of the Honda was fleeing from the police prior to the collision, but we would reject any inference, from that fact alone, that the Honda was traveling so fast that defendant had no time to see it and take some action to avoid the collision.

It is undisputed that defendant did not apply his brakes, sound his horn, or take any other evasive action, and the front of his vehicle struck the center body pillar on the passenger's side of the Honda, where the front door meets the back door. Viewing the evidence in the light most favorable to the nonmoving party (see *Konarski v VanDyke*, 231 AD3d 1508, 1509 [4th Dept 2024]), we conclude that there is a triable issue of fact whether defendant reasonably should have seen and reacted to the Honda as it approached the intersection, proceeded through the eastbound lane of Walden Avenue, and entered the westbound lane, crossing in front of him before the impact. Thus, defendant failed to meet his burden on his motion "inasmuch as his own submissions raised triable issues of fact whether he was negligent" (*Deering*, 134 AD3d at 1498).

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

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KA 18-01560

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARCUS L. DANIELS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (AARON FRIEDMAN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County
(Charles A. Schiano, Jr., J.), rendered February 26, 2018. 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]). Defendant's contention that Penal
Law § 265.03 is unconstitutional in light of the United States Supreme
Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen*
(597 US 1 [2022]) is unpreserved for our review inasmuch as he failed
to raise his constitutional challenge during the proceedings in
Supreme Court (see *People v Bauza*, 224 AD3d 1219, 1220 [4th Dept
2024], lv denied 42 NY3d 925 [2024]; *People v Maddox*, 218 AD3d 1154,
1154-1155 [4th Dept 2023], lv denied 40 NY3d 1081 [2023]).
Defendant's attempt to circumvent the preservation doctrine by framing
his argument as a constitutional challenge to his conviction rather
than the statute is unpersuasive (see generally *People v Brooks*, 196
AD3d 914, 915 [3d Dept 2021]). Similarly, defendant's contention that
the sentencing procedure pursuant to which he was adjudicated a
persistent violent felony offender is unconstitutional in light of the
United States Supreme Court's decision in *Erlinger v United States*
(602 US 821 [2024]) is unpreserved for our review (see *People v*
Hernandez, — NY3d —, 2025 NY Slip Op 00904, *3 [2025]; see generally
People v Cabrera, 41 NY3d 35, 42-46 [2023]). We decline to exercise
our power to review defendant's contentions as a matter of discretion
in the interest of justice (see CPL 470.15 [6] [a]).

Defendant's contention that the sentence constitutes cruel and

unusual punishment is also unpreserved for appellate review, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (see *People v Pena*, 28 NY3d 727, 730 [2017]; see generally *People v Murray*, 232 AD3d 1291, 1291-1292 [4th Dept 2024], lv denied 43 NY3d 931 [2025]). We have considered defendant's remaining contentions on appeal and conclude that they do not warrant reversal or modification of the judgment.

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

401

KA 22-00995

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER COMPTON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN E. MARKARIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered May 6, 2022. The judgment convicted defendant, upon a plea of guilty, of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that he was denied his statutory right to a speedy trial, asserting, inter alia, that the People's original certificate of compliance (see CPL 245.50) was illusory. By failing to move to dismiss the indictment on statutory speedy trial grounds, defendant failed to preserve his contention for our review (see *People v Valentin*, 183 AD3d 1271, 1272 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; see generally *People v Myles*, 232 AD3d 1295, 1295-1296 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025]; *People v Minwalkulet*, 198 AD3d 1290, 1292-1293 [4th Dept 2021], *lv denied* 37 NY3d 1147 [2021]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice.

To the extent that defendant also contends that he received ineffective assistance of counsel based on defense counsel's failure to move to dismiss the indictment on speedy trial grounds and assuming, arguendo, that the contention survives defendant's guilty plea (see *People v Adams*, 232 AD3d 1302, 1303 [4th Dept 2024], *lv denied* 42 NY3d 1078 [2025]), we conclude that, "inasmuch as defendant's speedy trial argument is not 'clear cut,' defense counsel was not ineffective in failing to move to dismiss on that ground" (*Valentin*, 183 AD3d at 1272, quoting *People v Brunner*, 16 NY3d 820, 821 [2011]; see generally *People v Pitts*, 206 AD3d 1582, 1584 [4th Dept 2022], *lv denied* 38 NY3d 1135 [2022]; *People v Claitt*, 222 AD2d

1038, 1038 [4th Dept 1995], *lv denied* 88 NY2d 982 [1996])).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

403

KA 18-01941

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NERO FOWLER, DEFENDANT-APPELLANT.

ADAM AMIRAUT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered July 24, 2018. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We affirm.

Contrary to defendant's contention, County Court properly denied his request for a *Darden* hearing. Where, as here, "information is received from a confidential informant but . . . police officer[s] thereafter make[] [their] own observations of criminal activity without further employment of the informant, those observations form the basis for probable cause to arrest, rendering a *Darden* hearing unnecessary" (*People v Dudden*, 138 AD3d 1452, 1453 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016], *cert denied* 580 US 1162 [2017]; *see People v Crooks*, 27 NY3d 609, 614-615 [2016]; *People v Farrow*, 98 NY2d 629, 631 [2002]).

Defendant's contentions regarding the legal sufficiency of the evidence are not preserved for our review because defendant made only a general motion for a trial order of dismissal (*see People v Gray*, 86

NY2d 10, 19 [1995]; *People v Piasta*, 207 AD3d 1054, 1058 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]).

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

406

KA 23-01786

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY W. SZURGOT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered August 17, 2023. The judgment convicted defendant upon a jury verdict of criminal possession of stolen property in the third degree, criminal possession of stolen property in the fourth degree and bail jumping in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of stolen property in the third degree (Penal Law § 165.50), criminal possession of stolen property in the fourth degree (§ 165.45 [5]), and bail jumping in the second degree (§ 215.56). As defendant properly concedes, his contention that County Court violated CPL 270.15 (2) with respect to the sequence for exercising peremptory challenges is not preserved for our review (*see People v Stewart*, 231 AD3d 1480, 1481 [4th Dept 2024], *lv denied* 42 NY3d 1054 [2024]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's contention, the failure to follow the mandates of CPL 270.15 (2) does not fall within the " 'very narrow exception' " of a mode of proceedings error to the preservation rule (*People v Mack*, 27 NY3d 534, 540 [2016], *rearg denied* 28 NY3d 944 [2016]).

Defendant further contends that the court impermissibly aided the prosecution or otherwise became an advocate for the People at trial. To the extent that defendant's contention is preserved for our review (*see generally People v Charleston*, 56 NY2d 886, 887 [1982]), although

the court made certain improper interventions and remarks "that would better have been left unsaid," we conclude upon our review of the record as a whole that "the jury was not prevented from arriving at an impartial judgment on the merits" (*People v Moulton*, 43 NY2d 944, 946 [1978]; see *People v Nivelio*, 222 AD3d 779, 780 [2d Dept 2023], *lv denied* 41 NY3d 984 [2024]; *People v Tetro*, 181 AD3d 1286, 1287 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]).

By failing to make a motion in writing and upon notice to the People, defendant waived his contention that the court erred in denying his motion during trial to dismiss the indictment based on the alleged denial of his statutory right to a speedy trial pursuant to CPL 30.30 (see *People v Woody*, 24 AD3d 1300, 1301 [4th Dept 2005], *lv denied* 7 NY3d 852 [2006]). Further, even if defendant had not waived that contention, the statutory speedy trial issue is not preserved for our review because defendant sought only to strike the People's certificate of compliance and a discovery sanction (see generally *People v Hickey*, 222 AD3d 1429, 1429 [4th Dept 2023], *lv denied* 41 NY3d 943 [2024]).

We agree with defendant, however, that the evidence is not legally sufficient to support the conviction of criminal possession of stolen property in the third degree under count 1 of the indictment because there is insufficient evidence that the value of the stolen property was more than \$3,000 (see generally *People v Danielson*, 9 NY3d 342, 349 [2007]). "A verdict is legally sufficient when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*id.* [internal quotation marks omitted]). "A sufficiency inquiry requires a court to marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained its burden of proof" (*id.*). Regarding the crime at issue, a person is guilty of criminal possession of stolen property in the third degree when that person "knowingly possesses stolen property, with intent to benefit [that person] or a person other than an owner thereof or to impede the recovery by an owner thereof, and when the value of the property exceeds [\$3,000]" (Penal Law § 165.50). As relevant here, the value of stolen property is "the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime" (§ 155.20 [1]). When the stolen property is a vehicle, in the "absen[ce of] expert testimony, proof of the recognized 'book value,' in combination with other testimony, may suffice to establish market value" (*People v Kirkwood*, 200 AD2d 409, 410 [1st Dept 1994], *lv denied* 83 NY2d 806 [1994]; see *People v Williams*, 74 NY2d 675, 676 [1989]; *People v Irvine*, 197 AD3d 988, 990 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]; *People v Vaughn*, 214 AD2d 972, 973 [4th Dept 1995], *lv denied* 86 NY2d 742 [1995]). Nevertheless, "a victim must provide a basis of knowledge for [their] statement of value before it can be accepted as legally sufficient evidence of such value" (*People v Lopez*, 79 NY2d 402, 404 [1992]), and

"[c]onclusory statements and rough estimates of value are not sufficient to establish the value of the property" (*People v Hensley*, 227 AD3d 1548, 1551 [4th Dept 2024] [internal quotation marks omitted]; see *People v Box*, 181 AD3d 1238, 1241 [4th Dept 2020], lv denied 35 NY3d 1025 [2020], cert denied – US –, 141 S Ct 1099 [2021]).

Here, in addition to photographs of the vehicle admitted in evidence, the victim testified that he purchased the subject 2010 Toyota Prius as a new vehicle for approximately \$20,000, that he drove it 240,000 miles over the course of the subsequent 12 years, and that it was in a "[h]eavily used," albeit running, condition when it was stolen. Although the victim testified that he had previously consulted the "blue book" when considering whether to sell the vehicle, he ultimately provided, based on the condition of the vehicle and unspecified research, only vague testimony that his "guess" or "approximate estimation" was that the vehicle was valued at \$4,000, which constituted a "[c]onclusory statement[or] rough estimate[] of value [that is] not sufficient to establish the value of the property" at the time of its theft (*Hensley*, 227 AD3d at 1551 [internal quotation marks omitted]; see *Kirkwood*, 200 AD2d at 410). Moreover, although a police officer testified that he estimated that the vehicle was valued between \$6,000 and \$10,000 based on his observations of the vehicle and consultation with the "blue book," that testimony was also conclusory. Indeed, there was no evidence that the officer had accurately ascertained the "blue book" value—which inexplicably varied significantly from the victim's estimate—by appropriately accounting for the age, mileage, and condition of the vehicle (see *Kirkwood*, 200 AD2d at 410; cf. *People v Adams*, 198 AD2d 545, 546 [3d Dept 1993]; see generally *Box*, 181 AD3d at 1242). Based on the evidence of value in the record, we cannot conclude " 'that the jury ha[d] a reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold' of \$3,000" (*People v Slack*, 137 AD3d 1568, 1570 [4th Dept 2016], lv denied 27 NY3d 1139 [2016]; see Penal Law § 165.50; *Hensley*, 227 AD3d at 1551). Consequently, we conclude on this record that the evidence is legally insufficient to establish that the value of the stolen vehicle was greater than \$3,000 (see *Hensley*, 227 AD3d at 1551). We therefore modify the judgment by reversing that part convicting defendant of criminal possession of stolen property in the third degree under count 1 of the indictment and dismissing that count.

Viewing the evidence in light of the elements of criminal possession of stolen property in the fourth degree as charged to the jury (see *Danielson*, 9 NY3d at 349), we reject defendant's further contention that the verdict convicting him of that crime is against the weight of the evidence with respect to the element of possession. Among other things, a witness testified that he observed defendant exit the stolen vehicle, which prompted the witness to call law enforcement. We likewise reject defendant's contention that the verdict convicting him of bail jumping in the second degree is against the weight of the evidence (see generally *People v Houghtaling*, 144 AD3d 1591, 1591 [4th Dept 2016], lv denied 29 NY3d 949 [2017], reconsideration denied 30 NY3d 950 [2017]).

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

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

425

KA 18-02189

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ELI S. ROSA, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered July 11, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree, robbery in the first degree and robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of murder in the second degree, and as modified the judgment is affirmed, and a new trial is granted on count 2 of the indictment.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of murder in the second degree (Penal Law § 125.25 [3] [felony murder]), robbery in the first degree (§ 160.15 [4]), and robbery in the second degree (§ 160.10 [1]).

We reject defendant's contention that Supreme Court erred in denying his challenge for cause to a prospective juror. Although no "particular expurgatory oath or 'talismanic' words [are required], . . . [prospective] jurors must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict" (*People v Arnold*, 96 NY2d 358, 362 [2001]; see *People v Mitchum*, 130 AD3d 1466, 1467 [4th Dept 2015]). Here, when a prospective juror's statements raised a concern, the court elicited unequivocal affirmations from the prospective juror that she would "decide the case impartially and based on the evidence" (*People v Garcia*, 148 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 980 [2017] [internal quotation marks omitted]).

However, we agree with defendant that the court erred in refusing to charge the jury on the affirmative defense to felony murder pursuant to Penal Law § 125.25 (3). "In determining whether to issue

a particular instruction [to the jury], the court 'must view the evidence adduced at trial in the light most favorable to the defendant' " (*People v J.L.*, 36 NY3d 112, 119 [2020], quoting *People v Zona*, 14 NY3d 488, 493 [2010]). "[V]iew[ing] the evidence in the light most favorable to the defendant . . . [is] an exercise understood to be incompatible with weighing the evidence to resolve competing inferences" (*People v McKenzie*, 19 NY3d 463, 466 [2012]; see *People v Butts*, 72 NY2d 746, 750 [1988]). "Only when there is 'no reasonable view of the evidence [that] would support a finding of the tendered defense [is] the court' relieved of its 'obligation to submit the question to the jury' " (*J.L.*, 36 NY3d at 119 [emphasis in original], quoting *People v Watts*, 57 NY2d 299, 301 [1982]). Thus, a requested charge "must be given if there is evidence reasonably supportive of the defense, even if there is other evidence which, if credited, would negate it" (*McKenzie*, 19 NY3d at 466).

It is an affirmative defense to felony murder that the defendant "(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury" (Penal Law § 125.25 [3]).

A video entered into evidence at trial shows two codefendants approaching a male victim standing at the passenger door of a vehicle, while defendant approached a female victim at the driver's side of the vehicle. While defendant had his back to the codefendants, one of them shot and killed the male victim. Defendant then knocked the female victim to the ground and stole her purse. Defendant did not testify at trial. However, the People introduced a video of a police interrogation of defendant, in which he asserted that, although he drove his codefendants to the scene, he did not know they intended to commit a crime, was not aware they were armed, and was not himself carrying a weapon at the time of the crime.

The court determined that defendant was not entitled to the affirmative defense. We disagree. Even where, as here, the evidence shows that a defendant "intentionally aided [the primary assailant] in the commission of" the underlying felony, a trial court errs in refusing to charge the affirmative defense to felony murder where there is evidence that the defendant "did not participate in the acts causing the victim's death" (*Matter of Anthony M.*, 63 NY2d 270, 282-283 [1984]; see also *People v Johnson*, 169 AD2d 498, 499-501 [1st Dept 1991], *lv denied* 77 NY2d 962 [1991]). Here, the trial evidence was "reasonably supportive of the view" that defendant satisfied the four elements of the affirmative defense and, "regardless of evidence to the contrary, the court [was] without discretion to deny the charge, and error in this regard requires reversal and a new trial" (*J.L.*, 36 NY3d at 120). We therefore modify the judgment by reversing that part

convicting defendant of murder in the second degree, and we grant him a new trial on count 2 of the indictment.

Finally, 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

426

KA 22-01563

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CAMERYON NELSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN E. MARKARIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered August 1, 2022. The judgment convicted defendant upon a nonjury verdict of manslaughter 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 nonjury verdict of manslaughter in the second degree (Penal Law § 125.15 [1]), arising out of a fatal two-car motor vehicle collision. We affirm.

Defendant contends that the evidence is legally insufficient to support his conviction because the People failed to establish that he acted recklessly. We reject that contention. Under the Penal Law, a person is guilty of manslaughter in the second degree when they "recklessly cause[] the death of another person" (§ 125.15 [1]). Insofar as relevant here, "[a] person acts recklessly with respect to a result or to a circumstance . . . when [the person] is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation" (§ 15.05 [3]). In the context of motor vehicle accidents involving speeding, "the culpable risk-creating conduct necessary to support a finding of recklessness or criminal negligence generally requires some additional affirmative act aside from driving faster than the posted speed limit" (*People v Asaro*, 21 NY3d 677, 684 [2013] [internal quotation marks omitted]; see *People v Cabrera*, 10 NY3d 370, 377 [2008]; *People v Vazquez*, 211 AD3d 1592, 1593 [4th Dept 2022], *lv denied* 40 NY3d 937 [2023]).

Here, viewed in the light most favorable to the People, the evidence established a "valid line of reasoning and permissible inferences from which a rational [trier of fact] could have found the element[of recklessness] proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]; see *People v Delamota*, 18 NY3d 107, 113 [2011]; *People v Contes*, 60 NY2d 620, 621 [1983]). The evidence at trial established, inter alia, that defendant operated a motor vehicle at a speed more than double the posted speed limit in a residential neighborhood, crossed the double yellow centerline while passing another vehicle, ignored lines on the roadway, and accelerated without braking when he collided head-on into the victim's vehicle, which was traveling in the opposite direction and was located in the opposite lane. Indeed, viewed in the light most favorable to the People, defendant's conduct while operating his vehicle in the moments before the fatal collision was consistent with him racing another vehicle side-by-side down the northbound lane of travel (see *Vazquez*, 211 AD3d at 1593-1594). Additionally, defendant admitted to consuming cannabis immediately before operating the vehicle leading up to the collision (see *Asaro*, 21 NY3d at 685; *People v Briskin*, 125 AD3d 1113, 1119 [3d Dept 2015], lv denied 25 NY3d 1069 [2015]). Consequently, we reject defendant's contention to the extent he asserts that the evidence at trial failed "to establish any inculpatory driving behavior other than excessive speed" (*Vazquez*, 211 AD3d at 1593 [internal quotation marks omitted]; see *Asaro*, 21 NY3d at 684).

To the extent that defendant contends that the evidence is legally insufficient to establish that he caused the victim's death, defendant failed to preserve that contention for our review inasmuch as he did not raise that specific ground in support of his motion for a trial order of dismissal (see *People v Gray*, 86 NY2d 10, 19 [1995]; *People v Johnson*, 225 AD3d 1115, 1116 [4th Dept 2024]). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime in this nonjury trial (see *Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that County Court erred in admitting in evidence at trial that defendant did not have a valid driver's license. Initially, we conclude that the testimony in question does not constitute *Molineux* evidence inasmuch as it "is relevant to the very same crime for which defendant is on trial," and we note that the fact "[t]hat the People classified it as *Molineux* evidence, and the trial court considered it on that basis, does not prevent us from concluding it was not, because the parties' arguments . . . regarding the probative value of the [evidence] and its prejudicial effect would remain the same" (*People v Frumusa*, 29 NY3d 364, 370 [2017], rearg denied 29 NY3d 1110 [2017] [internal quotation marks omitted]; see *People v Hart*, 225 AD3d 1158, 1160 [4th Dept 2024], lv denied 41 NY3d 1019 [2024]). Indeed, we conclude that the court did not abuse its discretion in admitting the challenged evidence at trial inasmuch as it was plainly relevant to the issue of defendant's recklessness (see generally *People v Caban*, 14 NY3d 369, 374-375 [2010]; *People v West*,

166 AD3d 1080, 1088 [3d Dept 2018], *lv denied* 32 NY3d 1129 [2018]), and its probative value "was not 'substantially outweighed by the danger that [the evidence would] unfairly prejudice the other side or mislead the [factfinder]' " (*Hart*, 225 AD3d at 1161; see generally *People v Scarola*, 71 NY2d 769, 777 [1988]).

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

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

427

KA 24-00130

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS SAVINO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Steuben County (Jason L. Cook, J.), rendered September 7, 2023. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree, menacing in the second degree and resisting arrest.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), menacing in the second degree (§ 120.14 [1]), and resisting arrest (§ 205.30), arising from incidents in which defendant threatened a neighbor (victim) with a knife and later struggled with police officers who were effectuating his arrest.

Defendant contends that, contrary to the determination of County Court (Watches, J.), the evidence at the suppression hearing established that he was unlawfully arrested without an arrest warrant in violation of *Payton v New York* (445 US 573 [1980]). We conclude that defendant's contention lacks merit. The record establishes, as defendant acknowledges on appeal, that the police officers approached defendant after he exited his house and, while remaining outside the house, arrested defendant in his unfenced rear yard. We therefore conclude that, in the absence of other circumstances not raised here, there was no *Payton* violation (see *People v Garvin*, 30 NY3d 174, 179-186 [2017], cert denied 586 US 814 [2018]; *People v Williams*, 159 AD2d 743, 743 [2d Dept 1990]; cf. *People v Shaw*, 229 AD3d 1180, 1183-1184 [4th Dept 2024]; *People v Avinger*, 140 AD3d 895, 896-897 [2d Dept 2016]; see also *People v Rodriguez*, 180 AD3d 1343, 1344-1345 [4th Dept 2020], lv denied 35 NY3d 973 [2020]; *People v Pope*, 113 AD3d 1121, 1122 [4th Dept 2014], lv denied 23 NY3d 1041 [2014]).

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 Roach*, 147 AD3d 1423, 1424 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *People v Collins*, 63 AD3d 1609, 1610 [4th Dept 2009], *lv denied* 13 NY3d 795 [2009]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that the jury did not fail to give the evidence the weight it should be accorded (see generally *Bleakley*, 69 NY2d at 495). 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 Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014] [internal quotation marks omitted]). 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 *Roach*, 147 AD3d at 1424; *Collins*, 63 AD3d at 1610).

Inasmuch as defendant has completed serving the sentence imposed, his contention that the sentence is unduly harsh and severe has been rendered moot (see *People v Ismael*, 210 AD3d 1528, 1529-1530 [4th Dept 2022]; *People v Boley*, 126 AD3d 1389, 1390 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]). Even assuming, arguendo, that defendant's contention is not moot, we would decline to reduce the sentence as a matter of discretion in the interest of justice (see *Ismael*, 210 AD3d at 1530).

Finally, we note that both the certificate of disposition and the uniform sentence and commitment form incorrectly reflect that defendant was convicted and sentenced in Steuben County Court, and those documents must therefore be amended to reflect that defendant was convicted and sentenced in Supreme Court, Steuben County (see *People v Daniqua S.D.*, 92 AD3d 1226, 1227 [4th Dept 2012]).

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

431

CA 24-00563

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

IN THE MATTER OF ARBITRATION BETWEEN
KRISTIN DAVIS, PETITIONER-RESPONDENT,

AND

MEMORANDUM AND ORDER

STATE OF NEW YORK OFFICE OF MENTAL HEALTH
(BUFFALO PSYCHIATRIC CENTER),
RESPONDENT-APPELLANT.

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

SANDERS & SANDERS, CHEEKTOWAGA (HARVEY P. SANDERS OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered March 8, 2024 in a CPLR article 75 proceeding. The order, insofar as appealed from, granted the petition, vacated an arbitration award, effectively denied respondent's application to confirm the award and directed, among other things, the reinstatement of petitioner's employment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is denied, the application is granted, the arbitration award is confirmed, and the third through seventh ordering paragraphs are vacated.

Memorandum: In this CPLR article 75 proceeding to vacate an arbitration award, respondent appeals from an order insofar as it granted the petition seeking to vacate the award, effectively denied respondent's application to confirm the award, reinstated petitioner to her employment as a dental hygienist employed by respondent at Buffalo Psychiatric Center's dental clinic, and directed the parties to negotiate any questions of retroactive pay and benefits.

In 2021, consistent with respondent's obligation under 14 NYCRR part 557 to ensure that personnel be fully vaccinated against COVID-19, respondent directed petitioner to receive her full COVID-19 vaccine by a date certain and informed her that upon her failure to do so, or her failure to obtain a reasonable accommodation based on a documented pre-existing health condition, she would not be permitted to report to work (see 14 NYCRR 557.5 [a], [c], [e]). Petitioner's request for a reasonable accommodation due to a pre-existing health condition was denied by respondent, and she did not obtain a COVID-19

vaccine by the required deadline. Consequently, respondent suspended petitioner without pay and issued a Notice of Discipline in accordance with Article 33 of the collective bargaining agreement (CBA) with petitioner's union. Petitioner filed a disciplinary grievance and demanded arbitration.

In his arbitration award, the arbitrator concluded that his jurisdiction was limited to interpreting and applying the provisions in the CBA and, therefore, he lacked the authority to determine whether respondent should have granted petitioner a reasonable accommodation due to a pre-existing health condition, thereby obviating her need to get the COVID-19 vaccine under 14 NYCRR part 557. The arbitrator further concluded that respondent met its burden of establishing misconduct and that the misconduct prevented petitioner from performing her job duties. Thus, the arbitrator concluded that respondent had probable cause to suspend her and just cause to issue the Notice of Discipline and terminate her employment.

Petitioner commenced this CPLR article 75 proceeding seeking, inter alia, to vacate the arbitration award and, in its answer, respondent sought an order confirming the award (application). Supreme Court concluded that the arbitrator's award violated public policy, that it was irrational, and that vacatur was in the interest of justice inasmuch as the arbitrator did not consider whether petitioner was entitled to a reasonable accommodation that vitiated her obligation to obtain the COVID-19 vaccine and he ignored several trial court decisions concluding that similar vaccine mandates were null and void. Thus, the court, inter alia, granted the petition, effectively denied the application, vacated the arbitration award, ordered that petitioner be reinstated and that her employment record be amended, and ordered that the parties negotiate any questions of retroactive pay and benefits. We reverse the order insofar as appealed from.

A court's authority to vacate an arbitrator's award is limited to the grounds set forth in CPLR 7511 (b), which permits vacatur of an award where the arbitrator, as relevant here, "exceed[s] [their] power" (CPLR 7511 [b] [1] [iii]) by issuing an " 'award [that] violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power' " (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 90 [2010], quoting *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]). Where, as here, the parties agree to submit their dispute to an arbitrator pursuant to a collective bargaining agreement, "[c]ourts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies. A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]). "The party seeking to vacate

an arbitration award thus bears a heavy burden to establish that the arbitrator exceeded their power" (*Matter of Buffalo Teachers' Fedn. [Board of Educ. of Buffalo City Sch. Dist.]*, 227 AD3d 1435, 1436 [4th Dept 2024]).

We agree with respondent that the court "erred in vacating the award on the ground that it was against public policy because petitioner[] failed to meet [her] heavy burden to establish that the award in this employer-employee dispute violated public policy" (*Matter of Spence [State Univ. of N.Y.]*, 230 AD3d 1559, 1561 [4th Dept 2024], *lv denied* 43 NY3d 905 [2025]; see *Matter of Cooper [Roswell Park Comprehensive Cancer Ctr.]*, 237 AD3d 1500, 1502 [4th Dept 2025]; *Matter of Rochester City School Dist. [Rochester Assn. of Paraprofessionals]*, 34 AD3d 1351, 1351-1352 [4th Dept 2006], *lv denied* 8 NY3d 807 [2007]). We further agree with respondent that the court "erred in vacating the award on the ground that it was irrational" (*Spence*, 230 AD3d at 1561). " 'An award is irrational if there is no proof whatever to justify the award' " (*Buffalo Teachers' Fedn.*, 227 AD3d at 1437). Where, however, "an arbitrator 'offer[s] even a barely colorable justification for the outcome reached,' the arbitration award must be upheld" (*Matter of Professional, Clerical, Tech., Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.]*, 103 AD3d 1120, 1122 [4th Dept 2013], *lv denied* 21 NY3d 863 [2013]). Here, there is no dispute that respondent directed petitioner to fully receive the COVID-19 vaccine by a specific date, that it apprised her that her continued employment was contingent upon her compliance, and that petitioner refused to be vaccinated by the required date. It is also undisputed that petitioner was never granted a reasonable accommodation that excused her compliance with the vaccine mandate. Consequently, the court erred in concluding that the arbitrator's award was irrational (see *Cooper*, 237 AD3d at 1502; *Spence*, 230 AD3d at 1561-1562). To the extent petitioner argues that the arbitrator erred in not considering the propriety of respondent's denial of petitioner's request for a reasonable accommodation based on a pre-existing health condition, we note that the arbitrator interpreted the CBA as precluding any review of that decision. Inasmuch as we conclude that "the arbitrator's 'interpretation of the [CBA] [is] not . . . completely irrational, [it] is beyond [our] review power' " (*Matter of Monroe County Deputy Sheriffs' Assn., Inc. [Monroe County]*, 155 AD3d 1616, 1617 [4th Dept 2017], *lv denied* 31 NY3d 910 [2018]). Finally, we note that the court was not permitted to vacate the award merely because it believed vacatur would better serve the interest of justice (see generally *New York State Correctional Officers & Police Benevolent Assn.*, 94 NY2d at 326).

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

438

KA 19-01307

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SAMAR K. BARRON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered July 20, 2017. The appeal was held by this Court by order entered April 28, 2023, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (215 AD3d 1256 [4th Dept 2023]). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed to a determinate term of 12 years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We previously held the case, reserved decision, and remitted the matter for County Court to make and state for the record a new determination whether defendant should be afforded youthful offender status (*People v Barron*, 206 AD3d 1687, 1687 [4th Dept 2022]). Upon remittal, the court declined to adjudicate defendant a youthful offender, and on resubmission, we determined that defendant was denied effective assistance of counsel at the remittal proceeding, and we again held the case, reserved decision, and remitted the matter to County Court to make and state on the record a new determination whether defendant should be afforded youthful offender status (*People v Barron*, 215 AD3d 1256, 1256-1257 [4th Dept 2023]; see generally *People v Rudolph*, 21 NY3d 497, 499-501 [2013]). Upon the second remittal, the court determined that defendant should not be afforded youthful offender status. We conclude that the court did not thereby abuse its discretion (see generally *People v McCall*, 187 AD3d 1682, 1683 [4th Dept 2020], *lv denied* 36 NY3d 930 [2020]; *People v Lester*, 167 AD3d 1559, 1560 [4th Dept 2018], *lv denied* 32 NY3d 1206 [2019]).

In addition, upon our review of the record, we decline to exercise our discretion in the interest of justice to adjudicate defendant a youthful offender (see *People v Mohawk*, 142 AD3d 1370, 1371 [4th Dept 2016]; cf. *People v Thomas R.O.*, 136 AD3d 1400, 1402-1403 [4th Dept 2016]).

We agree with defendant, however, that the sentence of imprisonment imposed is unduly harsh and severe under the circumstances of this case. This Court has "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range," and may exercise that power, "if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]; see CPL 470.15 [6] [b]). We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed to a determinate term of 12 years, to be followed by the five-year period of postrelease supervision previously imposed by the court.

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

443

KA 24-01724

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BENJAMIN D. SEEKINS, ALSO KNOWN AS
BENJAMIN DONALD SEEKINS, ALSO KNOWN AS
BENJAMIN SEEKINS, DEFENDANT-APPELLANT.

NAPIER & NAPIER, ESQS., ROCHESTER (ROBERT A. NAPIER OF COUNSEL), FOR
DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Donald G. O'Geen, J.), rendered May 10, 2024. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, as a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]).

Contrary to defendant's contention, we conclude that, viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), the evidence is legally sufficient to establish defendant's guilt (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The arresting officer testified that, after pulling defendant's vehicle over for speeding, she found that defendant had slurred speech, could not exit his vehicle without steadying himself, failed two sobriety tests and refused to submit to a third, was combative, and refused to submit to a chemical test. That testimony was corroborated by the officer's body-worn camera footage that was entered in evidence. Further, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that an acquittal would have been unreasonable and thus that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We conclude that any challenge by defendant to the adequacy of the jury charge is not preserved for our review because defendant

failed to object to the jury charge as given (*see People v Clark*, 142 AD3d 1339, 1340 [4th Dept 2016], *lv denied* 28 NY3d 1143 [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]).

Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted upon a plea of guilty, and it must therefore be amended to reflect that he was convicted upon a jury verdict (*see People v Melendez*, 198 AD3d 1293, 1294-1295 [4th Dept 2021], *lv denied* 37 NY3d 1097 [2021]; *People v Baldwin*, 173 AD3d 1748, 1749-1750 [4th Dept 2019], *lv denied* 34 NY3d 928 [2019]).

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

446

KA 19-00095

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TYKYAL GLOVER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered November 20, 2018. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree and criminal possession of a weapon in the second degree (four counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed on each count to a determinate term of 13 years, and as modified the judgment is affirmed.

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

Defendant contends that his plea was involuntary because Supreme Court did not conduct an inquiry regarding a possible justification defense during the plea colloquy. It is well settled that, " 'where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea, . . . the trial court has a duty to inquire further to ensure [the] guilty plea is knowing and voluntary' " (*People v Mox*, 20 NY3d 936, 938 [2012], quoting *People v Lopez*, 71 NY2d 662, 666 [1988]). " '[W]here the court fails in this duty and accepts the plea without further inquiry, the defendant may challenge the sufficiency of the allocution on direct appeal' despite failing to do so in the form of a 'postallocation motion' " (*id.*, quoting *Lopez*, 71 NY2d at 666). Here, because "[n]othing [defendant] said [during the plea colloquy] raised the possibility of a viable justification defense" (*People v Manor*,

121 AD3d 1581, 1582 [4th Dept 2014], *affd* 27 NY3d 1012 [2016] [internal quotation marks omitted]), no further inquiry was necessary. Thus, the narrow exception to the preservation rule does not apply (see *People v Steele*, 167 AD3d 1514, 1515 [4th Dept 2018], *lv denied* 33 NY3d 954 [2019]).

Next, defendant contends that the court did not properly consider whether defendant should receive youthful offender status. Specifically, he contends that the court predetermined that he would not receive youthful offender status inasmuch as, when the court extended its plea offer, the promised sentencing range exceeded the maximum term for a youthful offender sentence. At the time of defendant's plea, the court acknowledged that a youthful offender adjudication was "on the table," and that it "would have to review the [youthful offender] situation, [and] use [its] discretion at sentencing." At sentencing, because defendant was convicted of armed felony offenses (see CPL 1.20 [41]; Penal Law § 70.02 [1] [a], [b]), the court was required to make a threshold determination whether defendant was an eligible youth pursuant to CPL 720.10 (3) before considering the range of factors pertinent to a youthful offender determination (see *People v Middlebrooks*, 25 NY3d 516, 527 [2015]). When the court determined that defendant was not eligible for youthful offender status, its stated reasons were that defendant was a "major participant" in the crime and that there were "no mitigating circumstances" bearing directly on the manner in which the crime was committed. We conclude that defendant's contention that the court did not properly consider whether he should receive youthful offender status is not supported by the record (see *Middlebrooks*, 25 NY3d at 526-527; see generally *People v Rudolph*, 21 NY3d 497, 499 [2013]).

We decline to grant the request of defendant that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender. Assuming, arguendo, that there were sufficient mitigating circumstances to warranting a determination that defendant is an eligible youth (see *People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]; see generally *People v Z.H.*, 192 AD3d 55, 56-57 [4th Dept 2020]; *People v Amir W.*, 107 AD3d 1639, 1640-1641 [4th Dept 2013]), we nonetheless conclude, after considering the "broad range of factors pertinent to any youthful offender determination" (*Middlebrooks*, 25 NY3d at 527), that defendant should not be afforded youthful offender status (see *People v McDaniels*, 199 AD3d 1403, 1404 [4th Dept 2021], *lv denied* 37 NY3d 1162 [2022]).

We conclude, however, that the sentence imposed is unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]) by reducing the term of imprisonment imposed on each count to a determinate term of 13 years (see Penal Law § 70.02 [1] [a], [b]; [3] [a], [b]).

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

447

KA 19-01373

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ERIN E. RHYNES, ALSO KNOWN AS ERIN ROSHAD
KENDRELL EDWARDS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Ontario County
(Craig J. Doran, J.), rendered April 29, 2019. The judgment convicted
defendant upon a jury verdict of attempted murder in the second
degree, assault in the first degree, criminal use of a firearm in the
first degree, criminal possession of a weapon in the second degree
(two counts) and criminal possession of a controlled substance in the
third degree.

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

Memorandum: Defendant appeals from a judgment convicting him
upon a jury verdict of, inter alia, one count each of attempted murder
in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the
first degree (§ 120.10 [1]), and criminal use of a firearm in the
first degree (§ 265.09 [1] [a]), and two counts of criminal possession
of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Defendant
shot the victim in the back of the head while they were inside the
victim's vehicle. Although the victim survived, he had no memory of
the incident.

Defendant contends that Supreme Court erred in admitting the
victim's out-of-court statement that he was shot by a Black male with
the nickname "E" under the excited utterance and dying declarations
exceptions to the hearsay rule. "A spontaneous declaration or excited
utterance—made contemporaneously or immediately after a startling
event—which asserts the circumstances of that occasion as observed by
the declarant is an exception to the prohibition on hearsay" (*People v*
Almonte, 33 NY3d 1083, 1084 [2019] [internal quotation marks omitted];
see People v Edwards, 47 NY2d 493, 496-497 [1979]). "The test is
whether the utterance was made before there has been time to contrive

and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance" (*Almonte*, 33 NY3d at 1084 [internal quotation marks omitted]; see *People v Brown*, 70 NY2d 513, 518 [1987]). "The decision to admit hearsay as an excited utterance is left to the sound judgment of the trial court, which must consider, among other things, the nature of the startling event, the amount of time between the event and the statement, and the activities of the declarant in the interim" (*People v Hernandez*, 28 NY3d 1056, 1057 [2016]). " 'Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection' " (*id.*, quoting *Edwards*, 47 NY2d at 497).

Here, the victim made the statement while being treated at the hospital for three gunshot wounds to his head. From the time of the shooting until the time that he made the statement approximately two hours later, there were periods when the victim was uncommunicative. The victim's condition continued to deteriorate and, after the victim received a CAT scan, the treating emergency room physician allowed an officer to converse with the victim briefly before he was placed on a ventilator and airlifted to another hospital. The fact that the statement was made in response to questioning by the police "did not interrupt the stress and excitement of the shooting" (*People v Brooks*, 71 NY2d 877, 879 [1988]; see *People v Cotto*, 92 NY2d 68, 79 [1998]). When the victim made the statement, he was spitting blood as he talked; the physician testified that the victim was decompensating and agreed that the situation had become a matter of "life or death." The court properly considered all the circumstances and was reasonably justified in concluding that the statement was made under the stress of excitement caused by the shooting and was "not made under the impetus of studied reflection" (*Edwards*, 47 NY2d at 497; see *Brown*, 70 NY2d at 519-520). Indeed, the surrounding circumstances of the victim's life-threatening injuries were "sufficient to still his reflective faculties" (*People v Miklejohn*, 184 AD2d 735, 736 [2d Dept 1992]; see *People v Houston*, 142 AD3d 1397, 1397 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017]). We conclude that the court did not abuse its discretion in admitting the victim's hearsay statement as an excited utterance, and we therefore do not need to address whether the court erred in admitting the statement as a dying declaration.

Defendant next contends that the court erred in ordering him to submit to a buccal swab because there was no probable cause to believe he committed the crimes. We reject that contention. The police had the victim's statement that "E" had shot him, and the police knew that defendant went by that nickname. The court's reliance on that hearsay statement was permissible (see *People v Clark*, 15 AD3d 864, 865 [4th Dept 2005], *lv denied* 4 NY3d 885 [2005], *reconsideration denied* 5 NY3d 787 [2005]). The police also had information that .25 caliber shells were found in the victim's vehicle and that a .25 caliber handgun had been located. A firearms examination established that the casings found in the victim's vehicle were discharged from that gun, and DNA testing of swabs of the trigger and barrel of the gun revealed that mixtures of multiple DNA profiles were present, with the major component of both mixtures originating from the same unknown male.

That evidence was sufficient to support a reasonable belief that an offense had been committed by defendant (*see generally People v Bigelow*, 66 NY2d 417, 423 [1985]), and a "clear indication" that a buccal swab would supply "substantial probative evidence" (*Matter of Abe A.*, 56 NY2d 288, 297 [1982] [internal quotation marks omitted]; *see People v Brown*, 92 AD3d 1216, 1216 [4th Dept 2012], *lv denied* 18 NY3d 992 [2012]).

We reject defendant's contention that the court erred in its *Molineux* ruling. The evidence of defendant's prior drug sales to the victim was relevant on the issue of identity, and its probative value exceeded its prejudicial effect (*see People v Young*, 190 AD3d 1087, 1092-1093 [3d Dept 2021], *lv denied* 36 NY3d 1102 [2021]; *People v Moore* [appeal No. 2], 78 AD3d 1658, 1659 [4th Dept 2010]).

Defendant further contends that his arrest and the search of his apartment were not supported by probable cause. We reject that contention. The testimony at the suppression hearing established that, in addition to the victim's statement that he had been shot by "E" and that the police were aware that defendant's nickname was "E," the police had statements from the victim's family that "E" was the victim's cocaine supplier, that the victim owed money to "E," and that "E" had threatened the victim's life. Moreover, the police viewed surveillance footage of the area of the shooting and recognized defendant in the video. Based on the identification of defendant by the victim (*see People v Thompson*, 132 AD3d 1364, 1365 [4th Dept 2015], *lv denied* 27 NY3d 1156 [2016]) and the identification of defendant by the police from the surveillance video (*see People v Muhammad*, 204 AD3d 1402, 1403 [4th Dept 2022], *lv denied* 38 NY3d 1073 [2022]), the police had probable cause to arrest defendant and to obtain a warrant to search his residence.

To the extent defendant contends that the police detective who testified at the suppression hearing was not credible, we note that it is well settled that "great deference should be given to the determination of the suppression court, which had the opportunity to observe the demeanor of the witnesses and to assess their credibility, and its factual findings should not be disturbed unless clearly erroneous" (*People v Layou*, 134 AD3d 1510, 1511 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016], *reconsideration denied* 28 NY3d 932 [2016]; *see People v Archie*, 227 AD3d 1406, 1407 [4th Dept 2024], *lv denied* 42 NY3d 925 [2024]; *see generally People v Prochilo*, 41 NY2d 759, 761 [1977]). We perceive no basis in the record to disturb the suppression court's determination to credit the detective's testimony (*see People v Tyler*, 166 AD3d 1556, 1556-1557 [4th Dept 2018], *lv denied* 32 NY3d 1179 [2019], *reconsideration denied* 33 NY3d 954 [2019]). Defendant's remaining challenges to the evidence at the suppression hearing are not preserved for our review (*see People v Burden*, 191 AD3d 1260, 1261 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *People v Zuke*, 87 AD3d 1290, 1290-1291 [4th Dept 2011], *lv denied* 18 NY3d 887 [2012]), and we decline to exercise our power to review those challenges as a matter of discretion in the interest of justice (*see CPL 470.15* [6] [a]).

Defendant also contends that the court erred in permitting a police detective to identify defendant on surveillance footage during the trial. " 'A lay witness may give an opinion concerning the identity of a person depicted in a surveillance [video] if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the [video] than is the jury' " (*People v Graham*, 174 AD3d 1486, 1487-1488 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *see People v Griffin*, 203 AD3d 1608, 1612 [4th Dept 2022], *lv denied* 38 NY3d 1008 [2022]; *see generally People v Mosley*, 41 NY3d 640, 647-650 [2024]). Defendant did not object to the detective's testimony on that ground and thus failed to preserve his contention for our review (*see People v Johnson*, 235 AD3d 1267, 1269 [4th Dept 2025]; *People v Hollis*, 219 AD3d 1686, 1687 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant next contends that he was denied effective assistance of counsel. Defendant's contention that he was not provided with certain discovery materials or that defense counsel did not communicate with him enough to prepare for trial involves matters outside the record on appeal and must be raised by way of motion pursuant to CPL 440.10 (*see People v Fox*, 124 AD3d 1252, 1253 [4th Dept 2015]). We have reviewed defendant's remaining claims of ineffective assistance of counsel and conclude that they are without merit. We conclude that the evidence, the law, and the circumstances of the case, viewed in totality and as of the time of the representation, reveal that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Contrary to defendant's contention, the court properly allowed a jailhouse informant to testify and admitted in evidence a videotape depicting defendant's purported confession to the informant. Defendant's request for a Cardona hearing, made near the end of the trial, was untimely (*see* CPL 255.20 [1]; *People v Watson*, 202 AD3d 549, 550 [1st Dept 2022], *lv denied* 38 NY3d 1075 [2022]; *People v Jackson*, 48 AD3d 891, 893 [3d Dept 2008], *lv denied* 10 NY3d 841 [2008]). Defendant failed to establish good cause either for his failure to make a timely motion or for the trial court to nevertheless entertain the motion in the exercise of its discretion (*see* CPL 255.10 [1] [f]; 255.20 [1], [3]; *People v Green*, 121 AD3d 808, 810 [2d Dept 2014], *lv denied* 25 NY3d 1164 [2015]; *Jackson*, 48 AD3d at 893). We note that nothing in the testimony of the jailhouse informant indicated that he was acting as an agent of the government, and thus his testimony was not amenable to suppression (*see People v Bell*, 191 AD3d 1308, 1310 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *see generally People v Cardona*, 41 NY2d 333, 335 [1977]). With respect to the videotape, contrary to defendant's contention, the footage is not so "indistinct that the jury would have to speculate concerning [its] contents and would not learn anything relevant from [it]" (*People v Jones*, 208 AD3d 1632, 1632 [4th Dept 2022], *lv denied* 39 NY3d 986 [2022] [internal quotation marks omitted]).

We conclude that the evidence is legally sufficient to support the conviction and, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant also contends that the court erred in denying his request to proceed pro se. Defendant's application, made after four jurors had been selected and sworn, was untimely, and thus the court did not abuse its discretion in denying it (see *People v Crespo*, 32 NY3d 176, 178 [2018], *cert denied* – US –, 140 S Ct 148 [2019]; cf. *People v Barksdale*, 191 AD3d 1370, 1371-1372 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]). We reject defendant's contention that he requested to proceed pro se approximately one month earlier in a letter to the court. Defendant never requested to proceed pro se in that letter and instead asked only for substitute counsel. There was therefore no unequivocal request to proceed pro se at that time (cf. *People v Lewis*, – NY3d –, 2025 NY Slip Op 03011, *3-4 [2025]; see generally *People v Silburn*, 31 NY3d 144, 150-151 [2018]; *People v McIntyre*, 36 NY2d 10, 17 [1974]). Defendant further contends that he requested to proceed pro se through statements made by his defense counsel three weeks before trial. That contention is raised for the first time in defendant's postargument submission and is therefore not properly before us (see *People v Wassell*, 171 AD3d 1499, 1500 [4th Dept 2019], *lv dismissed* 34 NY3d 1020 [2019]; see generally *People v McMurtry*, 224 AD3d 1310, 1310-1311 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]; *People v Reeder*, 221 AD3d 1592, 1594 [4th Dept 2023], *lv denied* 41 NY3d 944 [2024]).

Defendant's contention that the sentence is vindictive is not preserved for our review and, in any event, is without merit (see *People v McCullough*, 128 AD3d 1510, 1512 [4th Dept 2015], *lv denied* 26 NY3d 1010 [2015]; *People v Williams*, 125 AD3d 1300, 1302 [4th Dept 2015], *lv denied* 26 NY3d 937 [2015]). The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that none warrants reversal or modification of the judgment.

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

463

KA 23-01778

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAYSON L. GREENFIELD, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

JOHN NABINGER, DISTRICT ATTORNEY, WATERLOO (KEVIN URBAITIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Barry L. Porsch, J.), rendered October 4, 2023. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [2]). We affirm.

We reject defendant's contention that his waiver of the right to appeal is invalid. Here, the oral waiver colloquy, which followed the appropriate model colloquy, establishes that defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Linda R.M.*, 236 AD3d 1488, 1488 [4th Dept 2025]; *People v Smith*, 164 AD3d 1621, 1621 [4th Dept 2018], *lv denied* 32 NY3d 1177 [2019]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant's valid waiver encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Bailey*, 230 AD3d 1543, 1544 [4th Dept 2024], *lv denied* 42 NY3d 1034 [2024]; *People v Foumakoye*, 229 AD3d 1380, 1380 [4th Dept 2024], *lv denied* 42 NY3d 970 [2024]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

464

KA 22-00395

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT SIMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered February 9, 2022. The judgment convicted defendant upon a jury verdict of grand larceny in the fourth degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the fourth degree (Penal Law § 155.30 [5]) and robbery in the second degree (§ 160.10 [2] [b]). Defendant contends that the evidence is legally insufficient to establish that the victim perceived the "display[]" of a firearm. To establish the "display" element of the robbery statute, "[t]he People must show that the defendant consciously displayed something that could reasonably be perceived as a firearm, with the intent of forcibly taking property, and that the victim actually perceived the display" (*People v Lopez*, 73 NY2d 214, 220 [1989]; see *People v Nelson*, 177 AD3d 1258, 1259 [4th Dept 2019], lv denied 34 NY3d 1161 [2020]). "[T]he display requirement has been construed broadly to cover a wide range of actions which might reasonably create the impression in the mind of the victim that the robber is armed with a firearm" (*Lopez*, 73, NY2d at 220-221). Thus, it has been held that a hand consciously concealed in clothing may satisfy the display requirement "if under all the circumstances the defendant's conduct could reasonably lead the victim to believe that a gun is being used during the robbery" (*id.* at 220; see *People v Smith*, 29 NY3d 91, 97-99 [2017]; *People v Williams*, 100 AD3d 1444, 1445 [4th Dept 2012], lv denied 20 NY3d 1015 [2013]). Viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that defendant, during the course of the robbery, "by his

actions, consciously manifest[ed] the presence of an object to the victim in such a way that the victim reasonably perceive[d] that" defendant had a firearm (*Lopez*, 73 NY2d at 222; see *People v Moody*, 278 AD2d 862, 862-863 [4th Dept 2000]; *People v Van Voorhis*, 207 AD2d 1023, 1023-1024 [4th Dept 1994], *lv denied* 84 NY2d 1016 [1994]). Furthermore, although a finding that defendant did not display a firearm would not have been unreasonable (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]), we conclude that, upon viewing the evidence in light of the elements of the crime of robbery in the second degree as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), it cannot be said that the jury failed to give the evidence the weight it should be accorded (see generally *Bleakley*, 69 NY2d at 495).

Defendant further contends that the victim's identification testimony should have been suppressed because the pretrial identification procedure was unduly suggestive. Even assuming, *arguendo*, that the identification procedure was unduly suggestive, we conclude that any error in admitting the victim's identification of defendant is harmless beyond a reasonable doubt (see *People v Howard*, 209 AD2d 1014, 1014 [4th Dept 1994], *affd* 87 NY2d 940 [1996]; *People v Owens*, 74 NY2d 677, 678 [1989]; *People v Burton*, 191 AD3d 1311, 1313-1314 [4th Dept 2021], *lv denied* 36 NY3d 1095 [2021]).

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

468

KA 23-00781

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAMEEK M. COPES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered April 24, 2023. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, after a jury trial, of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We affirm.

Defendant contends that County Court erred by allowing testimony from two police detectives stating their opinions as to what certain surveillance videos depicted. As defendant correctly concedes, that contention is not preserved for our review inasmuch as defendant failed to raise any objection to the testimony (see CPL 470.05 [2]; *People v Bullock*, 213 AD3d 1351, 1354 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023]; *People v Johnson*, 164 AD3d 1593, 1595 [4th Dept 2018], *lv denied* 32 NY3d 1173 [2019]), and we decline to exercise our power to review the contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Contrary to defendant's further contention, she was not deprived of meaningful representation based on defense counsel's failure to properly move for a change of venue inasmuch as defendant failed to articulate how defense counsel's failure lacked a strategic or otherwise legitimate explanation (see *People v Benevento*, 91 NY2d 708, 712-713 [1998]; see generally *People v Pardee*, 24 AD3d 1252, 1252 [4th Dept 2005], *lv denied* 6 NY3d 851 [2006]). Additionally, defense counsel cannot be deemed ineffective for failing to make a motion

"that has little or no chance of success" (*People v Caban*, 5 NY3d 143, 152 [2005] [internal quotation marks omitted]; see *People v Cahill*, 2 NY3d 14, 41 [2003]; *People v Jenkins*, 197 AD3d 927, 928 [4th Dept 2021], *lv denied* 37 NY3d 1097 [2021]).

Defendant's sentence is not unduly harsh or severe.

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

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

469

KA 24-00901

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEITH RENALDO, DEFENDANT-APPELLANT.

ROSENBERG LAW FIRM, BROOKLYN (MORGAN NAMIAN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered July 25, 2023. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) in connection with a fatal shooting in which the victim was shot several times, including in the head. We affirm.

Defendant contends that he was denied a fair trial by prosecutorial misconduct on summation, but we note that he neither formally objected nor requested any relief from County Court with respect to the comments he now raises on appeal, and thus his contention is not preserved for our review (see CPL 470.05 [2]; *People v Williams*, 233 AD3d 1463, 1465 [4th Dept 2024], *lv denied* – NY3d – [2025]; *People v Smith*, 150 AD3d 1664, 1666 [4th Dept 2017], *lv denied* 30 NY3d 953 [2017]). 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 contends that the evidence is legally insufficient to establish that he was the perpetrator of the shooting and that he intended to cause the victim's death and that the verdict is against the weight of the evidence. Preliminarily, although defendant failed to preserve for our review his contention that his conviction is based on legally insufficient evidence because his motion for a trial order of dismissal was not specifically directed at the alleged errors raised on appeal (see *People v McGuire*, 227 AD3d 1499, 1500 [4th Dept 2024], *lv denied* 42 NY3d 971 [2024]), we "necessarily review the

evidence adduced as to each of the elements of the crime[] in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Cartagena*, 149 AD3d 1518, 1518 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017], *reconsideration denied* 30 NY3d 1018 [2017] [internal quotation marks omitted]; see *People v Exford*, 234 AD3d 1252, 1253 [4th Dept 2025]). Here, three witnesses testified at the trial that defendant told them he had killed the victim, and there was circumstantial evidence placing the victim in the vicinity of defendant's home around the time of the shooting. We conclude that the verdict is not against the weight of the evidence with respect to defendant's identity as the perpetrator (see *People v Spencer*, 191 AD3d 1331, 1332 [4th Dept 2021], *lv denied* 37 NY3d 960 [2021]). The evidence at trial further established that the victim suffered multiple gunshot wounds, including a fatal shot to the head. We conclude that the verdict is not against the weight of evidence with respect to the element of intent to cause the victim's death (see Penal Law § 125.25 [1]; see generally *People v Schrader*, 232 AD3d 1293, 1294 [4th Dept 2024], *lv denied* 43 NY3d 946 [2025]; *People v Graham*, 174 AD3d 1486, 1490 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *People v Velazquez*, 100 AD3d 1504, 1506 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]). With respect to defendant's remaining grounds for contending that the verdict is against the weight of the evidence, we conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1997]). Even assuming, arguendo, that an acquittal would not have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded (see generally *Danielson*, 9 NY3d at 348; *Bleakley*, 69 NY2d at 495).

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

475

CA 24-00965

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

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

V

MEMORANDUM AND ORDER

EDWIN B., RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered June 5, 2024, in a proceeding pursuant to Mental Hygiene Law § 33.03. The order, inter alia, authorized petitioner to administer medication to respondent over his objection.

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

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

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

476

CA 24-01936

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

PORSCHIA C., AN INFANT, BY HER MOTHER AND
NATURAL GUARDIAN MELISSA A.C., MELISSA A.C.,
INDIVIDUALLY, PLAINTIFFS-APPELLANTS,
BAILEE P., AN INFANT, BY HER MOTHER AND
NATURAL GUARDIAN CASSIE L.F., AND CASSIE L.F.,
INDIVIDUALLY, PLAINTIFFS,

V

MEMORANDUM AND ORDER

SODUS CENTRAL SCHOOL DISTRICT, SODUS ELEMENTARY
SCHOOL, SODUS CENTRAL SCHOOL DISTRICT BOARD OF
EDUCATION AND SODUS CENTRAL SCHOOL DISTRICT
DEPARTMENT OF TRANSPORTATION,
DEFENDANTS-RESPONDENTS.

BELLUCK & FOX, LLP, NEW YORK CITY (MICHAEL A. MACRIDES OF COUNSEL),
FOR PLAINTIFFS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (GIANCARLO FACCIPONTE OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wayne County (Richard M. Healy, A.J.), entered July 5, 2023 in a negligent supervision case. The order, insofar as appealed from, granted that part of the motion of defendants for summary judgment dismissing the complaint of plaintiffs Porschia C., an infant, by her mother and natural guardian Melissa A.C., and Melissa A.C., individually.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, and the complaint of plaintiffs Porschia C., an infant, by her mother and natural guardian Melissa A.C., and Melissa A.C., individually, is reinstated.

Memorandum: The infant plaintiffs and their mothers commenced these negligence actions, seeking damages based on allegations that the infant plaintiffs were subjected to sexual misconduct by another student (perpetrator) while being transported to and from defendant Sodus Elementary School (school) on a bus operated by defendants. The underlying sexual misconduct allegedly occurred on multiple occasions from the time the infant plaintiffs were in kindergarten through the second grade. In their complaints, plaintiffs asserted causes of action for, inter alia, negligent supervision, alleging that defendants, despite having actual or constructive notice of the

perpetrator's misconduct, failed to protect the infant plaintiffs from sexual misconduct on the school bus. Defendants moved for summary judgment dismissing the complaints, contending, inter alia, that they lacked notice of the perpetrator's propensity for sexual misconduct and, thus, they could not have foreseen the sexual misconduct committed against the infant plaintiffs. Supreme Court granted the motion and dismissed the complaints.

We previously decided an appeal from the order that was perfected by infant plaintiff Bailee P. and her mother, plaintiff Cassie L.F., and we reversed insofar as appealed from, denied the motion insofar as it sought to dismiss their complaint, and reinstated that complaint (*Porschia C. v Sodus Cent. Sch. Dist.*, 231 AD3d 1520 [4th Dept 2024]). Although infant plaintiff Porschia C. and her mother, plaintiff Melissa A.C., purported to appeal from the same order, we noted that because the record on appeal did not contain a notice of appeal from them, their appeal had been deemed dismissed for failure to perfect within six months of the date of the notice of appeal (*id.* at 1521). We therefore declined to consider the contentions of those plaintiffs inasmuch as they were not properly before us (*id.*). We subsequently granted the motion of plaintiffs Porschia C. and Melissa A.C. to vacate the dismissal of their appeal (*Porschia C. v Sodus Cent. Sch. Dist.*, 2024 NY Slip Op 79705[U] [4th Dept 2024]; see 22 NYCRR 1250.10 [c]). Plaintiffs Porschia C. and Melissa A.C. thereafter perfected their appeal, which is therefore properly before us now.

For the reasons set forth in our decision in the appeal perfected by plaintiffs Bailee P. and Cassie L.F. (*Porschia C.*, 231 AD3d at 1521-1523), which involved a materially similar complaint against defendants and the same order granting defendants' motion, we agree with plaintiffs Porschia C. and Melissa A.C. that defendants did not satisfy their initial burden of establishing as a matter of law that they lacked actual or constructive notice of the conduct that allegedly caused injury and therefore the court erred in granting the motion on that basis (see *id.*; see generally *Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *Charles D.J. v City of Buffalo*, 185 AD3d 1488, 1489 [4th Dept 2020]). Consequently, we reverse the order insofar as appealed from, deny the motion insofar as it sought to dismiss the complaint of plaintiffs Porschia C. and Melissa A.C., and reinstate their complaint.

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

482

KA 24-00655

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON L. LOPER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Chauncey J. Watches, J.), rendered April 10, 2024. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Steuben County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of grand larceny in the fourth degree (Penal Law § 155.30 [1]), defendant contends that he received ineffective assistance of counsel that infected his guilty plea. “[I]n the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt upon the apparent effectiveness of [defense] counsel” (*People v Dale*, 142 AD3d 1287, 1290 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017] [internal quotation marks omitted]). Upon our review of the record, we conclude that defendant was afforded meaningful representation here. To the extent that defendant contends that certain conversations and advice from defense counsel gave rise to ineffective assistance of counsel and also established that his plea was involuntary, those contentions are “based on matters outside the record and must therefore be raised by way of a motion pursuant to CPL article 440” (*id.* [internal quotation marks omitted]; see *People v Irby*, 158 AD3d 1050, 1051 [4th Dept 2018], *lv denied* 31 NY3d 1014 [2018]).

Defendant further contends that County Court erred in denying his ostensible motion to withdraw his guilty plea without permitting defense counsel an opportunity to either make the motion or to explain why she was unable to do so. Defense counsel had stated at a presentencing appearance that, although defendant wished to withdraw his plea, “the basis for him to do so . . . necessarily require[d]

some analysis of [defense counsel's] handling of his case." Defense counsel thus informed the court that she believed she was not "ethically allowed to continue representing [defendant] on that application," and she asked the court to appoint new counsel who could "properly handle [defendant's] application." The court did not address defense counsel's concerns and, without permitting defendant an opportunity to speak, stated that it was denying the motion to withdraw the plea. Although defendant thereafter attempted to speak to the court regarding his desire to proceed to trial, the court did not engage with defendant and instead began discussing issues of sentencing with the prosecutor.

Although the nature and extent of the fact-finding inquiry on a motion to withdraw a guilty plea rests "largely in the discretion of the Judge to whom the motion is made" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]), that exercise of discretion presupposes that a motion has, in fact, been articulated. Thus, when moving to withdraw a plea, a "defendant should be afforded [a] reasonable opportunity to present his [or her] contentions [in support of the motion] and the court should be enabled to make an informed determination based thereon" (*People v Buske*, 87 AD3d 1354, 1355 [4th Dept 2011], *lv denied* 18 NY3d 882 [2012] [internal quotation marks omitted]; see *People v Tinsley*, 35 NY2d 926, 927 [1974]; *People v Harris*, 63 AD3d 1653, 1653 [4th Dept 2009], *lv denied* 13 NY3d 744 [2009]). Here, to the extent that defense counsel made a motion to withdraw the plea in the first place, the court erred in summarily denying the motion without providing either defense counsel or defendant an opportunity to state the contentions in support of the motion (see generally *People v Henderson*, 137 AD3d 1670, 1671 [4th Dept 2016]). We therefore hold the case, reserve decision, and remit the matter to County Court so the court can afford defendant a reasonable opportunity to state the contentions in support of his motion to withdraw his guilty plea and, if appropriate, hold a hearing before deciding the motion (see generally *id.*).

To the extent that defendant contends that his plea was rendered involuntary for reasons other than ineffective assistance of counsel, we note that such a contention must be preserved by a motion to withdraw the guilty plea or to vacate the judgment of conviction on that ground (see *People v Barrett*, 153 AD3d 1600, 1600-1601 [4th Dept 2017], *lv denied* 30 NY3d 1058 [2017]). In light of our determination, we do not address defendant's contention at this time.

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

483

KA 22-01835

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NEHEMIAH JONES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (LEO DRAWS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered September 2, 2022. The judgment convicted defendant upon his plea of guilty of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). We reject defendant's contention that the waiver of the right to appeal is invalid. The oral colloquy, together with the written waiver, "was sufficient to support a knowing and voluntary waiver under the totality of the circumstances" (*People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Drake*, 195 AD3d 1442, 1442 [4th Dept 2021], *lv denied* 37 NY3d 991 [2021], *reconsideration denied* 37 NY3d 1059 [2021]). The valid waiver encompasses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

485

KA 21-01660

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JENNIFER L. PRITCHARD, DEFENDANT-APPELLANT.

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

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (ROBERT ROSE OF COUNSEL),
FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered July 9, 2018. The judgment convicted defendant upon her plea of guilty of aggravated vehicular homicide and aggravated driving while intoxicated.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of, inter alia, aggravated vehicular homicide (Penal Law § 125.14 [1]). We agree with defendant that her waiver of the right to appeal is invalid. County Court mischaracterized the nature of the right that defendant was being asked to cede by portraying the waiver as an absolute bar to defendant taking an appeal, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues. We therefore conclude that the waiver of the right to appeal was not knowingly and voluntarily made (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]). We nevertheless reject defendant's contention that the negotiated sentence is unduly harsh and severe.

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

487

KA 24-00240

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN A. HUNTINGTON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered May 18, 2023. The judgment convicted defendant upon a plea of guilty of reckless endangerment in the first degree and unauthorized use of a vehicle 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 guilty plea of reckless endangerment in the first degree (Penal Law § 120.25) and unauthorized use of a vehicle in the third degree (§ 165.05 [1]). In appeal No. 2, defendant appeals from a judgment revoking the sentence of probation previously imposed upon that conviction and imposing a sentence of imprisonment.

Contrary to defendant's contention in appeal No. 1, the record reflects that County Court exercised its own discretion pursuant to CPL 720.20 (1) when declining to afford him youthful offender status. Although the prosecution stated at the time of the guilty plea that defendant had agreed to forgo youthful offender treatment, the court at sentencing explicitly acknowledged that both the statute and judicial precedent required the court to consider whether defendant should be granted youthful offender status notwithstanding that agreement (see *People v Rivera*, 41 NY3d 936, 939 [2023]; *People v Rudolph*, 21 NY3d 497, 501 [2013]; cf. *People v Nathan*, 222 AD3d 1416, 1416-1417 [4th Dept 2023]).

In appeal No. 2, we agree with defendant that his purported waiver of the right to appeal "mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal, and there was no

clarification that appellate review remained available for certain issues" (*People v Hussein*, 192 AD3d 1705, 1706 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; see *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, we decline defendant's request that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender (see generally *People v Hall*, 221 AD3d 1600, 1601 [4th Dept 2023], *lv denied* 40 NY3d 1092 [2024]).

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

488

KA 23-01510

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN A. HUNTINGTON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Wayne County Court (Richard M.
Healy, J.), rendered August 29, 2023. The judgment revoked
defendant's sentence of probation and imposed a sentence of
imprisonment.

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

Same memorandum as in *People v Huntington* ([appeal No. 1] – AD3d
– [June 27, 2025] [4th Dept 2025]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

503

KA 24-01089

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRAYDON M. EDWARDS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Wayne County Court (Arthur B. Williams, J.), rendered March 12, 2024. The judgment convicted defendant upon his plea of guilty of 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 his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [c]), defendant contends that County Court erred in imposing an enhanced sentence and that the enhanced sentence is unduly harsh and severe. We affirm.

Initially, we agree with defendant that, as the People correctly concede, defendant's waiver of the right to appeal does not encompass his contentions on appeal because the court failed to advise him of "the potential periods of incarceration for an enhanced sentence" (*People v DeAngelis*, 227 AD3d 1475, 1475 [4th Dept 2024] [internal quotation marks omitted]; see *People v Semple*, 23 AD3d 1058, 1059 [4th Dept 2005], *lv denied* 6 NY3d 852 [2006]; cf. *People v May*, 169 AD3d 1365, 1365 [4th Dept 2019]).

Defendant's contention that the court abused its discretion in imposing the enhanced sentence is unpreserved for our review because he failed to object to the sentence, move to withdraw his plea, or move to vacate the judgment of conviction on that ground (see *People v Little*, 183 AD3d 1269, 1270 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]; *People v Fumia*, 104 AD3d 1281, 1281 [4th Dept 2013], *lv denied* 21 NY3d 1004 [2013]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).

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

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

508

CAF 24-01123

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

IN THE MATTER OF MOSES K.B. AND SOPHIA S.B.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

EZRA B.B., JR., RESPONDENT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL),
FOR RESPONDENT-APPELLANT.

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

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered July 1, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject children.

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

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to the subject children and freeing them for adoption. Contrary to the father's contention, Family Court did not abuse its discretion in denying his request for a suspended judgment. A suspended judgment "is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311 [1992]; see *Matter of Danaryee B. [Erica T.]*, 151 AD3d 1765, 1766 [4th Dept 2017]; *Matter of James P. [Tiffany H.]*, 148 AD3d 1526, 1527 [4th Dept 2017], lv denied 29 NY3d 908 [2017]), and is appropriate only "where the parent has clearly demonstrated that [they] deserve[] another opportunity to show that [they have] the ability to be a fit parent" (*Matter of Illion RR. [Rachael SS.]*, 154 AD3d 1126, 1128 [3d Dept 2017], lv denied 30 NY3d 908 [2018] [internal quotation marks omitted]).

Here, " 'there was no evidence that [the father] had a realistic, feasible plan to care for the children' " (*Matter of Nicholas B. [Eleanor J.]*, 83 AD3d 1596, 1598 [4th Dept 2011], lv denied 17 NY3d 705 [2011]; see *Matter of Sean W. [Brittany W.]*, 87 AD3d 1318, 1319 [4th Dept 2011], lv denied 18 NY3d 802 [2011]). In addition, any progress that the father had made in addressing the issues that led to

the children's removal was not sufficient to warrant "further prolongation of the [children's] unsettled familial status," especially given that the children have now spent almost seven years in petitioner's custody (*Matter of Mea V. [Brandon V.]*, 235 AD3d 1242, 1243 [4th Dept 2025] [internal quotation marks omitted]; see *Matter of Matthew S., Jr. [Matthew S.]*, 169 AD3d 1456, 1456-1457 [4th Dept 2019]; *Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1627-1628 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]). Therefore, the court did not abuse its discretion in determining that a suspended judgment was not in the children's best interests (see *Matter of Latoria B. [Bianca B.]*, 222 AD3d 1449, 1450 [4th Dept 2023], *lv denied* 41 NY3d 987 [2024]).

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

509

CAF 23-01969

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

IN THE MATTER OF DREAM B.

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

MEMORANDUM AND ORDER

JEFFREY D.B., AND CLARA T.B.,
RESPONDENTS-APPELLANTS.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ OF COUNSEL), FOR
RESPONDENT-APPELLANT JEFFREY D.B.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT CLARA T.B.

PETER M. RAYHILL, COUNTY ATTORNEY, UTICA (MARYANGELA SCALZO OF
COUNSEL), FOR PETITIONER-RESPONDENT.

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered May 8, 2025, in a proceeding pursuant to Family Court Act article 10. The order, *inter alia*, determined that respondents had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father and respondent paternal grandmother each appeal from an order, entered after a fact-finding hearing, determining that they neglected the subject child. As a preliminary matter, we exercise our discretion to treat respondents' notices of appeal from the order as valid notices of appeal from the subsequently entered order of disposition (*see* CPLR 5520 [c]; *Matter of Adrian L. [Keetoyia B.]*, 225 AD3d 1166, 1166 [4th Dept 2024], *lv denied* 42 NY3d 903 [2024]).

Contrary to respondents' contentions, Family Court did not err in determining that petitioner established that they neglected the subject child. To establish neglect, petitioner was required to show, by a preponderance of the evidence, " 'first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing

the child with proper supervision or guardianship' " (*Matter of Jayla A. [Chelsea K.—Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], lv denied 30 NY3d 902 [2017]; see Family Ct Act §§ 1012 [f] [i]; 1046 [b] [i]). The court's " 'findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record' " (*Matter of Jeromy J. [Latanya J.]*, 122 AD3d 1398, 1398-1399 [4th Dept 2014], lv denied 25 NY3d 901 [2015]).

Here, the record establishes that respondents, who were legally responsible for the child's care (see generally Family Ct Act § 1012 [a], [g]), left the child at the maternal grandmother's home, and when the maternal grandmother was no longer able to care for the child, respondents failed to make an alternative plan. The record further establishes that respondents failed to address the child's mental health issues and multiple absences from school. We therefore conclude that "there is a sound and substantial basis to support [the court's] finding that the child [was] in imminent danger of impairment as a result of [respondents'] failure to exercise a minimum degree of care" (*Matter of Landen S. [Timothy S.]*, 227 AD3d 1465, 1466 [4th Dept 2024] [internal quotation marks omitted]).

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

521

KA 16-02353

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID S. ALCARAZ-UBILES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered August 3, 2016. The appeal was held by this Court by order entered March 24, 2023, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (214 AD3d 1470 [4th Dept 2023]). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the motion during trial seeking to suppress identification testimony is granted, and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]). When the appeal was previously before us, we concluded that Supreme Court erred in relying on evidence at trial to determine that the pretrial identification of him in a photograph by a prosecution witness was confirmatory, thus obviating the requirement that the People provide notice of the identification to defendant pursuant to CPL 710.30 (*People v Alcaraz-Ubiles*, 214 AD3d 1470 [4th Dept 2023]). In doing so, we summarized the record by finding that the witness had “disclosed on cross-examination at trial that he had identified defendant as the assailant in a photograph shown to him by the police” (*id.* at 1471). That factual finding was based upon the trial transcript showing that the witness—in response to being asked by defense counsel on cross-examination whether the police, after arresting defendant, had ever brought defendant for a showup identification so that the witness could see if defendant was the same person who had accompanied the witness on the day of the crime—answered that “[t]hey,” i.e., the police, “showed [him] the picture.” We then noted that the People’s CPL 710.30 notice had not referenced that identification (*id.* at 1471). We further recounted as

a factual matter that "[d]efense counsel thus asked the court to strike the witness's testimony on the ground of lack of notice"—which effectively constituted a motion to suppress that evidence (*id.*, see CPL 710.40 [2]; 710.60 [5])—"but the court, relying on the witness's trial testimony, ruled that the People were not required to give notice because the identification was confirmatory" (*Alcaraz-Ubiles*, 214 AD3d at 1471).

We concluded that the court erred in so ruling because " 'prior familiarity should not be resolved at trial in the first instance' . . . , and, in any event, the witness's trial testimony was not sufficient to establish as a matter of law that the identification was confirmatory" (*id.* at 1471-1472, quoting *People v Rodriguez*, 79 NY2d 445, 452 [1992]). In support of our legal conclusion that the trial testimony was insufficient to establish a confirmatory identification as a matter of law, we specifically noted that, "[a]lthough the witness testified that he knew defendant because he had seen him 'a couple of times' at the barber shop, and that the two had each other's phone numbers, [the witness] also testified that he did not know defendant well, that he knew him only by a common nickname, and that they never spoke again after the assault" (*id.* at 1472). In light of that insufficiency, we reasoned that "[a] midtrial *Rodriguez* hearing would have allowed defense counsel to flesh out the extent of the relationship between the two men, thereby allowing the court to make a more informed determination as to whether the pretrial identification of defendant was confirmatory as a matter of law" (*id.*). We further concluded that the error was "not harmless because, even assuming, arguendo, that the proof of defendant's guilt, without reference to the error, is overwhelming, it cannot be said that 'there is no reasonable possibility that the error might have contributed to defendant's conviction' " (*id.*, quoting *People v Crimmins*, 36 NY2d 230, 237 [1975]). We therefore "remit[ted] the matter to the trial court for a hearing to determine whether the witness knew defendant so well that no amount of police suggestiveness could have tainted the identification" (*id.* at 1471 [internal quotation marks omitted]).

After conducting a hearing on remittal during which the People called a police officer, an investigator, and the witness, the court concluded in a written decision that the witness knew defendant on the date of the assault, had been with defendant on several prior occasions, and was in defendant's presence on the date of the crime for such an adequate length of time and under sufficient lighting conditions that the witness's identification of defendant as the perpetrator of the assault had an independent basis. Defendant now contends on resubmission that the court erred in concluding, following the hearing, that the identification was merely confirmatory as a matter of law. We agree.

"A court's invocation of the 'confirmatory identification' exception is . . . tantamount to a conclusion that, as a matter of law, the witness is so familiar with the defendant that there is 'little or no risk' that police suggestion could lead to a misidentification" (*Rodriguez*, 79 NY2d at 450). "In effect, it is a ruling that however suggestive or unfair the identification procedure

might be, there is virtually no possibility that the witness could misidentify the defendant" (*id.*). "The People bear the burden in any instance they claim that a citizen identification procedure was 'merely confirmatory' " (*id.* at 452). "[T]he People must show that the protagonists are known to one another, or where . . . there is no mutual relationship, that the witness knows defendant so well as to be impervious to police suggestion" (*id.*). "[W]hether the exception applies depends on the extent of the prior relationship, which is necessarily a question of degree" (*id.* at 450). In determining whether the witness is sufficiently familiar with the defendant, a court may consider factors such as "the number of times [the witness] viewed [the] defendant prior to the crime, the duration and nature of the encounters, the setting, the period of time over which the viewings occurred, the time elapsed between the crime and the previous viewings, and whether the two had any conversations" (*id.* at 451).

Here, as stated above, we previously determined that the evidence was insufficient to establish that the witness's pretrial photo identification of defendant was confirmatory as a matter of law because, "[a]lthough the witness testified that he knew defendant because he had seen him 'a couple of times' at the barber shop, and that the two had each other's phone numbers, [the witness] also testified that he did not know defendant well, that he knew him only by a common nickname, and that they never spoke again after the assault" (*Alcaraz-Ubiles*, 214 AD3d at 1472). The evidence presented by the People at the *Rodriguez* hearing, however, was materially indistinguishable from the trial testimony that we already deemed insufficient, and in some respects the hearing evidence was even weaker. Specifically, the witness testified at trial that he had seen defendant a couple times at the barber shop (*see id.*), and the evidence at the hearing similarly established that the witness had either interacted with defendant twice or approximately four or five times including a couple of times at the barber shop. Just like his testimony at trial, the witness testified at the hearing that he knew defendant "not much but a little bit," that he knew defendant only by his nickname and not his given name, and that he never heard from defendant again after the assault (*cf. id.*). Moreover, while the witness claimed at trial that he and defendant had each other's phone numbers (*see id.*), the evidence at the hearing was that the witness *did not* have a phone number for defendant.

The other evidence presented at the hearing was likewise weak with respect to the witness's ostensible familiarity with defendant. The People's presentation of the witness's statement to the police in which he characterized the perpetrator as a friend was contradicted by the witness's own hearing testimony that he and the perpetrator "weren't friends." Additionally, the witness never provided a physical description of the person he knew by nickname only, including anything about tattoos or other distinctive features that would show familiarity. Related to the absence of any physical description of the perpetrator, the witness also never provided any testimony upon which to support the conclusion that he had intensely focused on the facial or other distinctive features of the perpetrator as they rode in a vehicle together in close proximity to and from the scene of the

crime (*cf. People v Breland*, 83 NY2d 286, 295 [1994]; *People v Myles*, 216 AD3d 1419, 1422 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]).

In sum, given the meager facts adduced by the People at the *Rodriguez* hearing regarding the witness's purported familiarity with defendant, we conclude that the People failed to meet their burden of establishing that the witness was so familiar with defendant that there was little or no risk that police suggestion could lead to a misidentification (see e.g. *People v Coleman*, 73 AD3d 1200, 1202-1203 [2d Dept 2010]; *People v Coleman*, 306 AD2d 549, 551 [3d Dept 2003]; see generally *Rodriguez*, 79 NY2d at 450-452). We therefore reverse the judgment of conviction, grant defendant's motion during trial seeking to suppress the identification testimony in question, and grant a new trial. We have considered defendant's remaining contention raised on resubmission and conclude that it does not warrant any further relief on direct appeal. Finally, in light of our determination, we do not address defendant's remaining contentions raised in his original brief.

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

546

KA 24-01390

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MATTHEW LINCOLN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered January 5, 2024. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends, and the People correctly concede, that County Court violated his right to due process by granting an upward departure based on a factor that was not raised in the risk assessment instrument (RAI) or by the People at the hearing, i.e., defendant's employment as a youth swim coach.

"The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine [their] risk level pursuant to SORA and a meaningful opportunity to respond to the [RAI]" (*People v Wilke*, 181 AD3d 1324, 1325 [4th Dept 2020]). It is therefore improper for a court to depart from the presumptive risk level based on a ground for departure that has never been raised (*see id.*). Here, because defendant's employment was not presented as a basis for departure in the RAI or by the People at the hearing, defendant was not afforded notice and a meaningful opportunity to respond to it (*see id.*; *see generally People v Chrisley*, 172 AD3d 1914, 1915-1916 [4th Dept 2019]). We therefore reverse the order, vacate defendant's risk level determination, and remit the matter to County Court for a new risk level determination and, if necessary, a new hearing in compliance with Correction Law § 168-n (3) and defendant's due process rights (*see Wilke*, 181 AD3d at 1325; *Chrisley*, 172 AD3d at 1916).

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

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

552

CAF 23-00959

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

IN THE MATTER OF IBN I.-A. AND MUJAHID I.-A.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MAKEEN I.-A., RESPONDENT-APPELLANT.

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

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

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Genesee County (Thomas D. Williams, J.), entered May 18, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order that, inter alia, granted petitioner's motion for summary judgment seeking a determination that the father neglected his two children. We affirm.

Summary judgment is, of course, an appropriate procedure in Family Court Act article 10 proceedings (*see Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182 [1994]; *Matter of Celeste S. [Richard B.]*, 164 AD3d 1605, 1605 [4th Dept 2018], lv denied 32 NY3d 912 [2019]; *see also* Family Ct Act § 165 [a]). To establish that the children were neglected, petitioner was required to show that the children's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of the father's failure to exercise a minimum degree of care in providing the children with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof (*see* Family Ct Act § 1012 [f] [i] [B]; *see generally Nicholson v Scoppetta*, 3 NY3d 357, 369-370 [2004]). Here, petitioner proffered in support of the summary judgment motion the criminal indictment charging the father with, inter alia, manslaughter in the second degree for recklessly causing the death of the children's mother. Petitioner also submitted the certificate of conviction establishing that the

father pleaded guilty to that count. We reject the father's contention that because his conviction was based on an *Alford* plea, petitioner failed to establish the factual nexus between the conviction and the allegations in the neglect petition. The conviction and incarceration of a parent for a crime in which the parent intentionally or recklessly caused the death of the other parent is *prima facie* evidence of neglect regardless of the underlying circumstances (see generally *Matter of Scott JJ.*, 280 AD2d 4, 7-8 [3d Dept 2001]). In any event, petitioner established the underlying factual circumstances of the actual impairment of the children's emotional welfare (see generally *Matter of Michael G.*, 300 AD2d 1144, 1144 [4th Dept 2002]) by submission of the certified police records containing the sworn statement of the older child concerning the incident and clearly connected the father's actions to the death of the mother in the presence of the children. While the father now contends that the reports are inadmissible hearsay and the child's statement is uncorroborated, those contentions are raised for the first time on appeal and are not properly before us (see *Bauman v Bauman*, 236 AD3d 1312, 1317 [4th Dept 2025]; see also *Robbins v Emery*, 268 AD2d 515, 515 [2d Dept 2000]; see generally *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

In opposition, the father failed to submit sufficient admissible evidence to create a triable issue of fact regarding the neglect of the children (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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

553

CAF 24-00946

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

IN THE MATTER OF JONATHAN P. WASICKI,
PETITIONER-RESPONDENT-RESPONDENT,

V

MEMORANDUM AND ORDER

KATHRYN L. WILBER, RESPONDENT-PETITIONER-APPELLANT.

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

FELT EVANS, LLP, CLINTON (JAY G. WILLIAMS, III, OF COUNSEL), FOR
PETITIONER-RESPONDENT-RESPONDENT.

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

Appeal from a corrected order of the Family Court, Oneida County (Julia Brouillette, J.), entered April 16, 2024, in proceedings pursuant to Family Court Act article 6. The corrected order, inter alia, directed that the parties shall continue to share joint legal custody of the subject child.

It is hereby ORDERED that the corrected order so appealed from is unanimously modified on the law by denying the violation petition insofar as it sought a finding that respondent-petitioner violated the preschool enrollment terms of a prior custody and visitation order, vacating that finding, and vacating the 1st, 5th, and 18th ordering paragraphs and the first sentence of the 4th ordering paragraph, and as modified the corrected order is affirmed without costs, and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following memorandum: In these proceedings pursuant to Family Court Act article 6, petitioner-respondent father filed separate petitions alleging violations of a prior custody and visitation order and seeking modification of that order by, inter alia, awarding him sole legal custody of the subject child. Respondent-petitioner mother filed a petition seeking modification of the prior order by likewise, inter alia, awarding her sole legal custody. The mother appeals from a corrected order that, among other things, found that she had violated the prior order in multiple respects and required her to pay a \$500 fine, continued joint legal custody of the subject child with primary residence with the mother, gave the mother full medical decision-making authority for the child and ability to attend all of her medical appointments (medical decision-making authority) in even years and gave the father said authority and ability in odd years, gave the father full dental and orthodontic decision-making authority for the child and ability to

attend all of her dental and orthodontic appointments (dental decision-making authority) in even years and gave the mother said authority and ability in odd years, and required the mother to enroll with a mental health services provider or program to assist her with her alleged anxiety and to follow through with the treatment.

Initially, we note that the parties do not dispute that there is a sufficient change in circumstances to warrant an inquiry into whether modification of the existing custody arrangement would be in the child's best interests (see *Matter of Ridall v Jones*, 230 AD3d 1548, 1549 [4th Dept 2024]). Contrary to the mother's contention, Family Court did not err in continuing joint legal custody. It is well settled that "a court's determination regarding custody . . . , based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*id.* [internal quotation marks omitted]). We perceive no basis to disturb the court's credibility assessments and factual findings, and we conclude that its determination to continue joint legal custody is supported by a sound and substantial basis in the record (see *Matter of Doner v Flora*, 229 AD3d 1158, 1158 [4th Dept 2024]). Specifically, and contrary to the mother's contention, there is a sound and substantial basis in the record for the court to conclude that although the mother and the father "have communication issues, neither party offered evidence that their relationship is so acrimonious that joint legal custody is unworkable" (*Matter of Rivas v Rivas*, 193 AD3d 745, 746 [2d Dept 2021]; see *Matter of Mayes v Laplatney*, 125 AD3d 1488, 1489 [4th Dept 2015]).

We agree with the mother, however, that the court erred in awarding the parties sole medical and dental decision-making authority in alternating years. Upon finding that the relationship between the mother and the father was sufficiently amicable to continue joint legal custody but that they were nevertheless unable to consistently agree regarding certain aspects of the child's medical and dental care, the court was permitted to "divide the decision-making authority with respect to the child[]" (*Matter of Andross v Aiello*, 183 AD3d 1266, 1267 [4th Dept 2020] [internal quotation marks omitted]). We conclude, however, that the court's grant of sole medical and dental decision-making authority to each party on an annually alternating basis is arbitrary, poses practical concerns, and should be vacated (see *Fiorelli v Fiorelli*, 34 AD3d 1216, 1217 [4th Dept 2006]). We therefore modify the corrected order by vacating the fifth ordering paragraph and the first sentence of the fourth ordering paragraph, and we remit the matter to Family Court to determine whether medical and dental decision-making authority should be shared between the parties, or to determine which party should have sole authority for each area of decision-making on a non-alternating basis.

Contrary to the mother's contention, the court correctly determined that she violated the prior order by failing to advise the father, as required, of her elected week of summer vacation by a specified date (see generally *Matter of Moreno v Elliott*, 155 AD3d 1561, 1562 [4th Dept 2017], *lv dismissed in part & denied in part* 30

NY3d 1098 [2018])). We agree with the mother, however, that the court erred in finding that she violated the prior order "when she chose not to consult with the father concerning [the child's] enrollment in preschool." The relevant provision of the prior order stated that "the parties agree that the child will attend preschool, and if the parties can agree to a given preschool, in writing, the child shall go there, [but] if there is no agreement between the parties then the child will go to a preschool that is designated in the mother's residence, which is Clinton." The mother voluntarily assumed primary responsibility for researching potential preschools and determining whether those schools had an opening in which to enroll the child. Although the father suggested that the child attend a certain school, the record reflects that the mother had already determined that the school suggested by the father had a wait list, a fact confirmed by the father at the hearing. The mother ultimately enrolled the child at the only school that was suggested by either party that had an opening available, and that school was located in Clinton. On this record, we conclude that the mother complied with the plain terms of the prior order by enrolling the child at a preschool in Clinton upon the parties' inability to agree in writing to an alternative preschool. We thus further modify the corrected order by denying the violation petition insofar as it sought a finding that the mother violated the preschool enrollment terms of the prior order and vacating that finding. In light of the fact that the \$500 fine was based in part upon that erroneous finding, we further modify the corrected order by vacating the first ordering paragraph, and we direct the court on remittal to determine an appropriate penalty based on only the remaining violations.

We further agree with the mother that the court erred in ordering her to "promptly enroll with a mental health services provider or program to assist her in appropriately handling any anxiety she may have and follow through with treatment recommendations." Although the condition is not per se invalid insofar as it does not precondition custody or parenting time on the mother's compliance (see *Matter of Krier v Krier*, 178 AD3d 1372, 1374 [4th Dept 2019]), we conclude that "the record does not otherwise provide a basis for the conclusion that such [mental health treatment] is necessary" (*Matter of Linn v Wilson*, 68 AD3d 1767, 1768 [4th Dept 2009]; cf. *Matter of Sanchez v Alvarez*, 151 AD3d 1869, 1870 [4th Dept 2017]). We therefore further modify the corrected order by vacating the 18th ordering paragraph.

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

555

CAF 23-01715

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

IN THE MATTER OF LATISHA M. MCCLARIN,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TIMOTHY WHITEHEAD, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered September 26, 2023, in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Same memorandum as in *Matter of McClarin v Whitehead* ([appeal No. 2] – AD3d – [June 27, 2025] [4th Dept 2025]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

556

CAF 23-01716

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

IN THE MATTER OF LATISHA M. MCCLARIN,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TIMOTHY WHITEHEAD, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered September 26, 2023, in a proceeding pursuant to Family Court Act article 8. The order granted respondent's motion to, inter alia, dismiss the petition.

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

Memorandum: These consolidated appeals arise from five proceedings pursuant to article 8 of the Family Court Act. In appeal Nos. 2, 4, 6, 8, and 10, petitioner appeals from five orders dated September 26, 2023 that granted respondent's motion to, inter alia, dismiss the petitions based on petitioner's lack of standing. In appeal Nos. 1, 3, 5, 7, and 9, petitioner appeals from five orders also dated September 26, 2023 that dismissed the petitions due to lack of standing.

Initially, we dismiss appeal Nos. 1, 3, 5, 7, and 9 inasmuch as the orders in those appeals are effectively duplicative of the orders in appeal Nos. 2, 4, 6, 8, and 10 (*see generally Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

With respect to the remaining appeals, petitioner's contention that she has standing by virtue of an "intimate relationship" with respondent under Family Court Act § 812 (e) (1) is raised for the first time on appeal and is not properly before us (*see Matter of Jonathan M. v Jessica N.*, 236 AD3d 1360, 1362 [4th Dept 2025]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

557

CAF 23-01717

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

IN THE MATTER OF LATISHA M. MCCLARIN,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TIMOTHY WHITEHEAD, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

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

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered September 26, 2023, in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Same memorandum as in *Matter of McClarin v Whitehead* ([appeal No. 2] – AD3d – [June 27, 2025] [4th Dept 2025]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

558

CAF 23-01718

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

IN THE MATTER OF LATISHA M. MCCLARIN,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TIMOTHY WHITEHEAD, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 4.)

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

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered September 26, 2023, in a proceeding pursuant to Family Court Act article 8. The order granted respondent's motion to, inter alia, dismiss the petition.

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

Same memorandum as in *Matter of McClarin v Whitehead* ([appeal No. 2] – AD3d – [June 27, 2025] [4th Dept 2025]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

559

CAF 23-01719

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

IN THE MATTER OF LATISHA M. MCCLARIN,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TIMOTHY WHITEHEAD, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 5.)

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

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered September 26, 2023, in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Same memorandum as in *Matter of McClarin v Whitehead* ([appeal No. 2] – AD3d – [June 27, 2025] [4th Dept 2025]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

560

CAF 23-01720

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

IN THE MATTER OF LATISHA M. MCCLARIN,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TIMOTHY WHITEHEAD, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 6.)

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

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered September 26, 2023, in a proceeding pursuant to Family Court Act article 8. The order granted respondent's motion to, inter alia, dismiss the petition.

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

Same memorandum as in *Matter of McClarin v Whitehead* ([appeal No. 2] – AD3d – [June 27, 2025] [4th Dept 2025]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

561

CAF 23-01721

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

IN THE MATTER OF LATISHA M. MCCLARIN,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TIMOTHY WHITEHEAD, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 7.)

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

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered September 26, 2023, in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Same memorandum as in *Matter of McClarin v Whitehead* ([appeal No. 2] – AD3d – [June 27, 2025] [4th Dept 2025]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

562

CAF 23-01722

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

IN THE MATTER OF LATISHA M. MCCLARIN,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TIMOTHY WHITEHEAD, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 8.)

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

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered September 26, 2023, in a proceeding pursuant to Family Court Act article 8. The order granted respondent's motion to, inter alia, dismiss the petition.

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

Same memorandum as in *Matter of McClarin v Whitehead* ([appeal No. 2] – AD3d – [June 27, 2025] [4th Dept 2025]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

563

CAF 23-01723

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

IN THE MATTER OF LATISHA M. MCCLARIN,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TIMOTHY WHITEHEAD, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 9.)

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

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered September 26, 2023, in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Same memorandum as in *Matter of McClarin v Whitehead* ([appeal No. 2] – AD3d – [June 27, 2025] [4th Dept 2025]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

564

CAF 23-01724

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

IN THE MATTER OF LATISHA M. MCCLARIN,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TIMOTHY WHITEHEAD, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 10.)

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

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered September 26, 2023, in a proceeding pursuant to Family Court Act article 8. The order granted respondent's motion to, inter alia, dismiss the petition.

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

Same memorandum as in *Matter of McClarin v Whitehead* ([appeal No. 2] – AD3d – [June 27, 2025] [4th Dept 2025]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

580

CAF 24-01169

PRESENT: WHALEN, P.J., MONTOUR, GREENWOOD, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF STACY J. CRANDELL,
PETITIONER-APPELLANT,

V

ORDER

GRAYSON W. HEBBARD, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered July 2, 2024, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of a prior order of custody and visitation.

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

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

581

CAF 24-01189

PRESENT: WHALEN, P.J., MONTOUR, GREENWOOD, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF STACY J. CRANDELL,
PETITIONER-APPELLANT,

V

ORDER

GRAYSON W. HEBBARD, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered July 2, 2024, in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Burns v Grandjean*, 210 AD3d 1467, 1470 [4th Dept 2022]).

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court

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

584

KA 24-00493

PRESENT: LINDLEY, J.P., SMITH, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JUNNELL COPEL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered March 30, 2023. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Entered: June 27, 2025

Ann Dillon Flynn
Clerk of the Court