SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 10, 2023

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED FEBRUARY 10, 2023

_____	887	CA 21 01406	SALVATORE P. PREZIOSO V COUNTY OF NIAGARA
_____	916	KA 21 01729	PEOPLE V JOSHUA MESSANO
_____	926	CA 22 00162	GARY CHWOJDAK V MICHAEL D. SCHUNK
_____	929	CA 22 00371	LAURA GOMEZ V RICHARD P. BUCZYNSKI
_____	930	CA 21 01669	RICHARD A. CARPENTIERI V ELAINE KLOC
_____	950	CA 22 01051	JOSHUA LIPPES V STATE UNIVERSITY OF NEW YORK AT BU
_____	951	CA 22 00106	WILLIAM ULLMARK V THE COBOURN CORPORATION
_____	953	CA 21 01277	SHEILA M. SHAHEEN V ELI H. SHAHEEN
_____	960	KA 21 00935	PEOPLE V BENJAMIN KEMP
_____	965	CA 22 00002	CITIBANK, N.A. V ARTHUR BAILEY
_____	967	CA 21 01597	MARGARET GROOMS-YARBORO V DAVID CARTER
_____	982	KA 22 01018	PEOPLE V JASON BRITTON
_____	986	CAF 21 01790	JAYTOYA ANN BAILEY V DONALD ALBERT BAILEY
_____	987	CAF 21 01791	JAYTOYA ANN BAILEY V DONALD ALBERT BAILEY
_____	999	KA 22 00093	PEOPLE V DEON ANDERSON
_____	1005	KA 18 00445	PEOPLE V BRANDON THORNTON
_____	1013	CA 21 01454	NICHOLAS T. V TOWN OF TONAWANDA
_____	1024	KA 19 00316	PEOPLE V DEVINE JACQUE-CREWS
_____	1025	KA 18 01923	PEOPLE V DONALD RAYFORD
_____	1032	CA 21 01715	WILLIAM LOBIANCO V CITY OF NIAGARA FALLS
_____	1038	CA 22 00210	CRAIG J. ZICARI V GRAEME R. BUCKLEY
_____	1040	KA 18 01776	PEOPLE V VERNON ROBERTS
_____	1041	KA 20 00597	PEOPLE V KEVIN BULLOCK
_____	1043	KA 17 00344	PEOPLE V DAVID L. DESMOND

_____	1044	KA 19 02110	PEOPLE V TREVER E. ANDERSON
_____	1045	KA 21 01632	PEOPLE V TRAVION PETERS
_____	1048	KA 18 02057	PEOPLE V CHARLES THOMAS, JR.
_____	1053	CA 21 01211	DOUGLAS EVANS V OLD FORGE PROPERTIES, INC.
_____	1055	CA 21 01237	RUPP BAASE PFALZGRAF CUNNINGHAM, LL V CITY OF BUFFALO
_____	3	KA 19 00813	PEOPLE V JOSHUA S. VANWUYCKHUYSE
_____	8	KA 19 00814	PEOPLE V JOSHUA S. VANWUYCKHUYSE
_____	28	CAF 22 00138	ASHLEY BONILLA-WRIGHT V TERRANCE WRIGHT, JR.
_____	30	CAF 21 01569	JOHN B. BRYANT V TALIA O. KEPLER
_____	32	CAF 21 01551	ANDREW J. FANFARILLO V DAWN A. FANFARILLO
_____	50	KA 18 02088	PEOPLE V RITCHY C. BELTRAN
_____	52	KA 14 01238	PEOPLE V LATWANN EVERSON
_____	53	KA 20 00223	PEOPLE V LATWANN EVERSON
_____	57	CAF 20 01207	Mtr of JERIMIAH H.
_____	69	KA 19 01413	PEOPLE V TREVOR H. MARTIN
_____	77	KA 19 02333	PEOPLE V WILLIAM MOWERY
_____	102	KA 22 00170	PEOPLE V MATTHEW C. SMITH
_____	117	KA 19 00527	PEOPLE V SAM SIDES, JR.
_____	121	CAF 21 00990	DENISE IANELLO V JUSTIN COLONOMOS

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

887

CA 21-01406

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

SALVATORE P. PREZIOSO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF NIAGARA, JAMES VOUTOUR, AS NIAGARA COUNTY SHERIFF, DR. ANA NATASHA CERVANTES, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (BRIAN P. CROSBY OF COUNSEL), FOR DEFENDANTS-APPELLANTS COUNTY OF NIAGARA AND JAMES VOUTOUR, AS NIAGARA COUNTY SHERIFF.

RICOTTA, MATTREY, CALLOCCHIA, MARKEL & CASSERT, BUFFALO (KATHERINE V. MARKEL OF COUNSEL), FOR DEFENDANT-APPELLANT DR. ANA NATASHA CERVANTES.

O'BRIEN & FORD, P.C., BUFFALO (CHRISTOPHER M. PANNOZZO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered September 28, 2021. The order, among other things, denied in part the motion of defendants County of Niagara, Niagara County Sheriff's Department, and James Voutour, as Niagara County Sheriff, to dismiss the second amended complaint against them and denied the motion of Dr. Ana Natasha Cervantes to dismiss the second amended complaint against her.

It is hereby ORDERED that the order so appealed from is modified on the law by granting in part the motion of defendant Dr. Ana Natasha Cervantes and dismissing the first and fourth causes of action against her, and granting those parts of the motion of defendants County of Niagara, Niagara County Sheriff's Department and James Voutour, as Niagara County Sheriff, seeking to dismiss against Voutour the first and fifth through ninth causes of action and the second and third causes of action insofar as they assert claims under 42 USC § 1983 relating to plaintiff's medical care, and to dismiss against the County of Niagara the first and fifth causes of action insofar as they allege that the County of Niagara is vicariously liable for the negligence of Voutour and the eighth cause of action insofar as it asserts claims for negligent investigation and negligent training in investigative procedures, and as modified the order is affirmed without costs.

Memorandum: In this action against, inter alia, defendants

County of Niagara (County), James Voutour, as Niagara County Sheriff (Sheriff Voutour) (collectively, Niagara defendants) and Dr. Ana Natasha Cervantes, plaintiff asserted, inter alia, causes of action for negligence and alleged violations of his civil rights under 42 USC § 1983. In a notice of claim naming the County and defendant Niagara County Sheriff's Department (Sheriff's Department), plaintiff alleged, inter alia, that he was arrested by employees of the Sheriff's Department and confined in nonparty Niagara County Jail (jail) for a period of 12 days without legal justification. He further alleged that, during the time of his confinement, he was provided with inadequate medical care and, as a result, his health deteriorated. Dr. Cervantes, a psychiatrist employed by defendant PrimeCare Medical of New York, Inc., a private medical company that contracted to provide medical services to individuals detained at the jail, met with plaintiff during his detainment and prescribed medicine to him. Prior to answering, the Niagara defendants, together with the Sheriff's Department, moved to dismiss the second amended complaint against them (Niagara motion), and Dr. Cervantes separately moved to dismiss the second amended complaint against her. Supreme Court, inter alia, granted the Niagara motion with respect to the Sheriff's Department but denied the remainder of that motion and denied Dr. Cervantes' motion. The Niagara defendants and Dr. Cervantes separately appeal.

We agree with Dr. Cervantes that the court should have granted her motion insofar as it sought to dismiss the first and fourth causes of action, for negligence and medical malpractice, respectively, against her. We therefore modify the order accordingly. The record establishes that the jail is a public institution within the meaning of General Municipal Law § 50-d maintained in whole or in part by the County. Moreover, Dr. Cervantes did not receive compensation for her medical services from any persons detained in the jail. Thus, Dr. Cervantes falls within the ambit of General Municipal Law § 50-d (*see Pedrero v Moreau*, 81 NY2d 731, 732 [1992]; *Ayers v Mohan*, 154 AD3d 411, 412-413 [1st Dept 2017], *lv denied* 32 NY3d 904 [2018]), and the statute of limitations set forth under General Municipal Law § 50-i (1) (c) applies to plaintiff's negligence and malpractice claims against her. Plaintiff failed to assert those claims against Dr. Cervantes within one year and 90 days after plaintiff's date of release from the jail (*see* General Municipal Law §§ 50-d [2]; 50-i [1] [c]) and, thus, those claims against Dr. Cervantes are time-barred.

Contrary to the contentions of Dr. Cervantes and the Niagara defendants, we conclude that the court properly denied that part of Dr. Cervantes' motion and that part of the Niagara motion seeking dismissal of the second and third causes of action against Dr. Cervantes and against the County, respectively, insofar as they assert claims against those defendants pursuant to 42 USC § 1983 relating to plaintiff's medical care while detained in the jail. "[I]t is well established that[,] in order to state a claim under [section] 1983, a plaintiff must allege (1) that the challenged conduct was attributable at least in part to a person acting under color of state law, and (2) that such conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States" (*Kennedy v St. Barnabas Hosp.*, 283 AD2d 364, 366 [1st Dept 2001]

[internal quotation marks omitted]; *see Andrews v County of Cayuga*, 142 AD3d 1347, 1349 [4th Dept 2016]). Accepting as true the facts as alleged in the second amended complaint and according plaintiff the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Kaleida Health v Hyland*, 200 AD3d 1654, 1655 [4th Dept 2021]), we conclude that plaintiff's allegations that he was denied his Fourteenth Amendment right to adequate medical care by jail personnel and Dr. Cervantes are sufficient to state a cause of action pursuant to 42 USC § 1983 with respect to Dr. Cervantes and the County (*see Andrews*, 142 AD3d at 1349; *see generally Powlowski v Wullich*, 102 AD2d 575, 583-584 [4th Dept 1984]). Given plaintiff's medical history and the information available at the time, the failure to provide plaintiff with the appropriate dose of his prescribed medication was sufficiently serious. Moreover, plaintiff alleged that the County had a deliberate policy and a pattern of conduct which, if proven, demonstrate a willful refusal or failure to provide adequate medical care to persons detained in the jail (*see Cooper v Morin*, 50 AD2d 32, 38 [4th Dept 1975]).

We agree with the Niagara defendants, however, that plaintiff's allegations of Sheriff Voutour's personal involvement were conclusory and offered nothing in support of any particular action Sheriff Voutour personally took with respect to his alleged negligent supervision of the medical care provided at the jail. Because "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under [42 USC §] 1983," we conclude that the second and third causes of action must be dismissed against Sheriff Voutour insofar as they assert claims under 42 USC § 1983 relating to plaintiff's medical care (*Shelton v New York State Liq. Auth.*, 61 AD3d 1145, 1149 [3d Dept 2009] [internal quotation marks omitted]; *see Vendetti v Zywiak*, 191 AD3d 1268, 1272 [4th Dept 2021], *appeal dismissed* 37 NY3d 933 [2021], *lv denied* 37 NY3d 914 [2021]). We therefore further modify the order accordingly.

We also agree with the Niagara defendants that the court should have granted that part of the Niagara motion seeking to dismiss the first and fifth through ninth causes of action against Sheriff Voutour on the ground that the statute of limitations had run. We therefore further modify the order accordingly. Plaintiff does not dispute that those causes of action were not timely asserted against Sheriff Voutour, but instead contends that the relation back doctrine applies. In order for the relation back doctrine to apply, a plaintiff must establish that "(1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he [or she] will not be prejudiced in maintaining his [or her] defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff[] as to the identity of the proper parties, the action would have been brought against him [or her] as well" (*Norman K. v Posner*, 207 AD3d 1228, 1229 [4th Dept 2022] [internal quotation marks omitted]; *see Buran v Coupal*, 87 NY2d 173, 178 [1995]). We agree with the Niagara

defendants that the second prong is not met. There is no unity of interest with respect to the original defendants, i.e., the County and Sheriff's Department, inasmuch as the County is not vicariously liable for the acts of the Sheriff (*see Johanson v County of Erie*, 134 AD3d 1530, 1531 [4th Dept 2015]), and the Sheriff's Department does not have a legal identity separate from the County (*see id.* at 1531-1532). In light of that determination, we need not reach the third prong of the analysis.

The Niagara defendants also contend that the court should have granted that part of the Niagara motion seeking to dismiss against them the fifth, sixth and seventh causes of action, for false arrest, false imprisonment and malicious prosecution, respectively, on the ground that they fail to state a cause of action inasmuch as the second amended complaint effectively acknowledges that probable cause existed for the arrest and contains no allegations of malice. We reject that contention. The allegations in the second amended complaint do not conclusively establish that the arresting police officers had the requisite probable cause (*cf. Nasco v Sgro*, 130 AD3d 588, 589-590 [2d Dept 2015]) and, furthermore, the second amended complaint alleges facts that would support a finding that exculpatory evidence that was subsequently disclosed indicates that probable cause to believe that plaintiff had committed a crime was lacking. Moreover, contrary to the Niagara defendants' contention, the second amended complaint adequately alleges the element of malice (*see Broughton v State of New York*, 37 NY2d 451, 457 [1975], *cert denied* 423 US 929 [1975]).

We conclude, however, that the court should have granted that part of the Niagara motion seeking to dismiss the eighth cause of action to the extent that it asserts claims against the County for negligent investigation and negligent training in investigative procedures. We therefore further modify the order accordingly. "[A] cause of action for negligent investigation is not recognized in New York" (*Maldovan v County of Erie*, 188 AD3d 1597, 1600 [4th Dept 2020], *affd on other grounds* — NY3d —, 2022 NY Slip Op 06632 [2022]), and a claim of "negligent training in investigative procedures is akin to a claim for negligent investigation or prosecution, [and is thus also] not actionable in New York" (*id.*). We note that the eighth cause of action must also be dismissed against Sheriff Voutour to that extent for that additional reason.

We also agree with the Niagara defendants that the court should have granted that part of the Niagara motion seeking to dismiss the first and fifth causes of action against the County insofar as those causes of action allege that the County is vicariously liable for the negligence of Sheriff Voutour, and we therefore further modify the order accordingly. "[A] county may not be held responsible for the negligent acts of the Sheriff and his deputies on the theory of respondeat superior in the absence of a local law assuming such responsibility" (*Mosey v County of Erie*, 117 AD3d 1381, 1385 [4th Dept 2014] [internal quotation marks omitted]; *see Trisvan v County of Monroe*, 26 AD3d 875, 876 [4th Dept 2006], *lv dismissed* 6 NY3d 891 [2006]). Here, plaintiff did not allege that the County assumed such

responsibility by local law.

We have considered the remaining contentions of Dr. Cervantes and the Niagara defendants and conclude that they are either unpreserved for our review (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]) or without merit.

All concur except WINSLOW, J., who is not participating.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

916

KA 21-01729

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA MESSANO, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered July 23, 2021. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to suppress the weapon that was found in a vehicle he was operating. We reject that contention, and thus we affirm.

This prosecution arises from an incident in which a sheriff's detective observed a vehicle commit several traffic violations before approaching a second vehicle, and the occupants of the vehicles began conversing with each other. Both vehicles then pulled into a parking lot that served only a closed business, and the detective observed the driver of the second vehicle, later identified as defendant, exit his vehicle and repeatedly lean into the first vehicle to talk to the person sitting inside that vehicle. In between talking to the occupant, defendant looked around outside the vehicle and also looked at and texted on his phone. The detective described what he observed, based on his experience of observing hundreds of similar transactions, as a drug transaction. He then observed a third vehicle drive into the lot, and the driver who exited that vehicle was known to the detective as someone who had prior narcotics arrests. The detective called for assistance, and several sheriff's deputies responded. As one of the deputies approached defendant's vehicle, defendant exited it, closed the driver's door, and walked toward the deputy. The deputy frisked defendant and then directed him to wait behind his

vehicle. The frisk yielded no evidence. As the deputy approached defendant's vehicle, he observed a rolled-up dollar bill and white powdery substance on the driver's seat. A handgun was seized during the ensuing search of the vehicle.

We reject defendant's contention that he was unlawfully seized. The court properly determined that, based on the totality of the observations by the detective, which he communicated with the deputy (*see People v Mobley*, 120 AD3d 916, 918 [4th Dept 2014]), the deputy had a reasonable suspicion that defendant was involved in a drug transaction (*see People v Wright*, 158 AD3d 1125, 1126 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]; *cf. People v Hernandez*, 187 AD3d 1502, 1504 [4th Dept 2020]). In any event, "the seizure of [the items inside the vehicle] was not the result of the allegedly illegal detention of defendant, who was outside the parked vehicle when the police officer approached and detained him" (*People v Washington*, 37 AD3d 1131, 1132 [4th Dept 2007], *lv denied* 8 NY3d 992 [2007]). Even if the deputy had not detained defendant, he could have simply walked up to the vehicle, looked in the window, and observed the drugs in plain view on the driver's seat. Contrary to defendant's further contention, the deputy's observations of the rolled-up dollar bill and white powdery substance provided probable cause to arrest defendant for possession of drugs (*see generally People v Langen*, 60 NY2d 170, 172 [1983], *cert denied* 465 US 1028 [1984]; *People v Mason*, 186 AD2d 590, 590-591 [2d Dept 1992], *lv dismissed* 80 NY2d 1028 [1992]).

All concur except WHALEN, P.J., and BANNISTER, J., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent inasmuch as we conclude that County Court erred in denying that part of defendant's omnibus motion seeking to suppress a firearm that was found in a vehicle he was operating. We agree with defendant that the law enforcement officers lacked reasonable suspicion to detain him. Reasonable suspicion "may not rest on equivocal or 'innocuous behavior' that is susceptible of an innocent as well as a culpable interpretation" (*People v Brannon*, 16 NY3d 596, 602 [2011]; *see People v Riddick*, 70 AD3d 1421, 1422 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]). Here, a sheriff's detective, after observing a vehicle driving erratically, followed that vehicle and another vehicle driven by defendant into a parking lot. Defendant exited his vehicle and leaned into the passenger window of the first vehicle to have a conversation with the other driver, during which defendant occasionally stood up to use his cell phone. A third man, whom the detective recognized as having prior narcotics possession arrests, then arrived in a separate vehicle. The detective relayed his observations to, among others, a sheriff's deputy who approached defendant, immediately pat frisked him, and ordered him to stand behind his vehicle with another officer. The deputy then looked through the open driver's side window of defendant's vehicle and observed a white powdered substance and rolled dollar bill on the driver's seat. A subsequent search of defendant's vehicle revealed the firearm.

In our opinion, the facts of this case are indistinguishable from *People v Hernandez* (187 AD3d 1502, 1504-1505 [4th Dept 2020]) where we

concluded that the police officers lacked reasonable suspicion to detain the defendant because "the officer conducting the surveillance and directing the stop of defendant 'did not see what the defendant and [the alleged buyer] exchanged, could not see if one of the [participants] gave the other something in return for something else, and did not see money pass between the two [individuals]' " (*id.* at 1505, quoting *People v Loper*, 115 AD3d 875, 879 [2d Dept 2014]). Here, the sheriff's detective admitted at the suppression hearing that he did not actually observe a hand-to-hand drug transaction. Further, the detective testified that he did not observe defendant drive erratically or commit any traffic violations before defendant drove into the parking lot with the other vehicle. Although the business associated with the parking lot was closed, it was early evening on a summer day, it was not an unusual hour, nor was there inclement weather (*see id.* at 1504; *cf. People v Johnston*, 103 AD3d 1202, 1203 [4th Dept 2013], *lv denied* 21 NY3d 912 [2013]). The arrival of the third man with prior convictions for narcotics possession after the presumed hand-to-hand drug transaction occurred lacks any significance inasmuch as an officer's awareness that an individual has a history of drug-related convictions, without more, does not provide a reasonable suspicion that a crime has been committed, is being committed, or is about to be committed (*see People v King*, 206 AD3d 1576, 1577 [4th Dept 2022]). The detective did not observe any interaction between defendant and this third man and did not testify to any knowledge of a relationship between the two men. Additionally, the sheriff's deputy who detained defendant testified that he observed no indicia of criminality himself and acknowledged that defendant was not acting in a threatening manner when he approached the deputy. Inasmuch as the actions observed by the law enforcement officers were " 'at all times innocuous and readily susceptible of an innocent interpretation' " (*People v Mobley*, 120 AD3d 916, 918 [4th Dept 2014]; *see Riddick*, 70 AD3d at 1422), the law enforcement officers lacked the requisite reasonable suspicion to detain defendant.

Next, having concluded that the police action was not justified in its inception (*see People v De Bour*, 40 NY2d 210, 222 [1976]), we further disagree with the majority's conclusion that suppression is unwarranted because the observation by the sheriff's deputy of a rolled-up dollar bill and white powdery substance on the driver's seat of defendant's vehicle was independent of or attenuated from the improper police conduct in seizing defendant (*see generally People v Bradford*, 15 NY3d 329, 333 [2010]). "The attenuation doctrine requires a court to consider 'the temporal proximity of the [unlawful conduct] and the [evidence obtained], the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct' " (*id.*). Here, there were no intervening circumstances. Instead, upon completing the pat frisk of defendant, the sheriff's deputy directed a fellow officer to detain defendant at the back of the vehicle, resulting in a continuation of the initial seizure that permitted the sheriff's deputy an unobstructed view of the driver's seat. We would therefore reverse the judgment, vacate the plea, grant that part of defendant's omnibus motion seeking to suppress the firearm seized from his vehicle, dismiss the indictment,

and remit the matter to County Court for proceedings pursuant to CPL 470.45.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

926

CA 22-00162

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

GARY CHWOJDAK AND KAREN CHWOJDAK,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MICHAEL D. SCHUNK, DEFENDANT-RESPONDENT.

FRANCIS M. LETRO ATTORNEYS AND COUNSELORS AT LAW, BUFFALO (CAREY C. BEYER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from a judgment of the Supreme Court, Erie County (Dennis E. Ward, J.), entered January 10, 2022. The judgment dismissed the complaint 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, the verdict is set aside, the complaint is reinstated, and a new trial is granted.

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Gary Chwojdak (plaintiff) sustained when a vehicle operated by defendant collided with a vehicle operated by plaintiff. The collision occurred while plaintiff's vehicle was stopped at a red light in the left-turn-only lane. The vehicle operated by defendant veered from a through-traffic lane and struck plaintiff's vehicle from behind. Following a trial on liability, the jury rendered a verdict in favor of defendant, and plaintiffs moved to set aside the verdict based on, inter alia, Supreme Court's admission at trial of a police report containing a police officer's conclusions that a contributing factor of the collision was slippery pavement, and admission of that officer's testimony with respect to that conclusion. The court denied the motion and issued a judgment dismissing the complaint on the merits. We reverse.

Here, although the officer who authored the police report and testified at the trial was qualified as an expert witness, he testified prior to trial that he did not witness the collision and that his conclusion regarding the cause of the collision was based solely on hearsay—i.e., defendant's statements after the collision—as well as the officer's own observations of the weather conditions at some undetermined time after the accident. "It is well settled that

an expert must give an evidentiary foundation for his or her expert opinion in order to render the opinion admissible" (*Silverman v Sciartelli*, 26 AD3d 761, 762 [4th Dept 2006], citing, inter alia, *Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 9 [2005]; and *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Inasmuch as the officer's testimony was based on an inadmissible exculpatory statement and post-collision observations of only the weather, we agree with plaintiffs that the court erred in admitting the testimony of the officer regarding his opinion on the cause of the accident (*see Christopher v Coach Leasing, Inc.*, 66 AD3d 1522, 1523 [4th Dept 2009]). Indeed, the officer failed to provide an evidentiary basis for his conclusion that a contributing factor of the collision was slippery pavement, such as through examination of the roadway for skid marks in the snow or other evidence that defendant's vehicle slid into plaintiff's vehicle. In the absence of such an independent examination, on the facts of this case, we conclude that defendant failed to establish a foundation for the officer to testify with respect to his opinion concerning the cause of the accident (*see Silverman*, 26 AD3d at 762; *Arricale v Leo*, 295 AD2d 920, 921 [4th Dept 2002]).

We likewise conclude that the court erred in admitting the partially redacted police accident report in evidence. Although a police report is generally admissible as a business record (*see* CPLR 4518; *Silverman*, 26 AD3d at 762-763), "statements contained in the report concerning the cause of an accident constitute inadmissible hearsay unless" a relevant exception applies (*Huff v Rodriguez*, 45 AD3d 1430, 1432 [4th Dept 2007]). Here, because the conclusion regarding the cause of the collision contained in the police accident report was based on an inadmissible exculpatory statement from defendant, it did not fall within a hearsay exception and was improperly admitted (*see id.*).

Further, under the circumstances of this case, we conclude that the erroneous admission of the police accident report and the officer's testimony " 'cannot be deemed harmless because the report [and the officer's testimony] bore on the ultimate issue to be determined by the jury' " (*id.*; *cf. Christopher*, 66 AD3d at 1523; *see generally Carr v Burnwell Gas of Newark, Inc.*, 23 AD3d 998, 1000 [4th Dept 2005]). We therefore reverse the judgment, grant plaintiffs' posttrial motion, set aside the verdict, reinstate the complaint, and grant a new trial. In light of our determination, we do not address plaintiffs' remaining contentions.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

929

CA 22-00371

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

LAURA GOMEZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD P. BUCZYNSKI, DEFENDANT-APPELLANT.

LAW OFFICE OF VICTOR M. WRIGHT, ORCHARD PARK (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered March 10, 2022. The order denied defendant's motion seeking summary judgment dismissing the complaint or, in the alternative, an order directing bifurcation of the trial.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion insofar as it sought summary judgment dismissing the complaint is granted, the complaint is dismissed, and the second ordering paragraph is vacated.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when her vehicle was struck by a vehicle operated by defendant. The accident occurred at an intersection when plaintiff, who was traveling southerly along New York State Route 5 (Route 5), attempted to make a left turn in front of defendant's oncoming vehicle, which was traveling northerly along Route 5. Defendant moved for summary judgment dismissing the complaint or, in the alternative, for an order directing the bifurcation of the trial. Defendant appeals from an order that denied his motion, and we reverse.

We conclude that Supreme Court erred in denying defendant's motion insofar as it sought summary judgment dismissing the complaint. "It is well settled that [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" (*Penda v Duvall*, 141 AD3d 1156, 1157 [4th Dept 2016] [internal quotation marks omitted]; *see Heltz v Barratt*, 115 AD3d 1298, 1299 [4th Dept 2014],

affd 24 NY3d 1185 [2014]; *Gilkerson v Buck*, 167 AD3d 1470, 1471 [4th Dept 2018]).

Here, we conclude that defendant met his initial burden of establishing that he was not negligent because he had the right-of-way while traveling along Route 5, was operating his vehicle in a lawful and prudent manner, and was traveling at a lawful rate of speed, and that there was nothing he could have done to avoid the accident, which occurred when plaintiff suddenly turned left into defendant's lane of travel (*see Godwin v Mancuso*, 170 AD3d 1672, 1672 [4th Dept 2019]; *Heltz*, 115 AD3d at 1299; *Lescenski v Williams*, 90 AD3d 1705, 1705-1706 [4th Dept 2011], *lv denied* 18 NY3d 811 [2012]; *see also* Vehicle and Traffic Law § 1141). We further conclude that plaintiff failed to raise an issue of fact in opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to plaintiff's assertion, the deposition testimony did not raise an issue of fact whether defendant was negligently passing another vehicle on the right in violation of Vehicle and Traffic Law § 1123 at the time of the collision. Although there is conflicting deposition testimony concerning the precise lane in which defendant was traveling at the time of the collision, there is no dispute that defendant never changed lanes while driving along Route 5 at the time of the collision. Thus, plaintiff's assertion that defendant unsafely attempted to go around another vehicle at the time of the accident " 'is based on speculation and is insufficient to defeat a motion for summary judgment' " (*Wallace v Kuhn*, 23 AD3d 1042, 1043 [4th Dept 2005]).

Based on the foregoing, defendant's remaining contentions are academic.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

930

CA 21-01669

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

RICHARD A. CARPENTIERI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ELAINE KLOC, AS EXECUTOR OF THE ESTATE OF
PAUL KLOC, DECEASED, AND KLOC BLOSSOM CHAPEL,
DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA,
AS SUBROGEE OF KLOC BLOSSOM CHAPELS, INC.,
PLAINTIFF-APPELLANT,

V

RICHARD A. CARPENTIERI, DEFENDANT-RESPONDENT.
(ACTION NO. 2.)

ELAINE KLOC, AS EXECUTOR OF THE ESTATE OF
PAUL KLOC, DECEASED, PLAINTIFF-APPELLANT,

V

RICHARD A. CARPENTIERI, DEFENDANT-RESPONDENT.
(ACTION NO. 3.)

ELAINE KLOC, PLAINTIFF-APPELLANT,

V

RICHARD A. CARPENTIERI, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(ACTION NO. 4.)

LAW OFFICE OF MICHAEL D. HOLLENBECK, BUFFALO (MICHAEL D. HOLLENBECK OF COUNSEL), FOR PLAINTIFF-APPELLANT IN ACTION NO. 3.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-APPELLANT IN ACTION NO. 4.

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR DEFENDANTS-APPELLANTS IN ACTION NO. 1.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (CHARLES S. DESMOND, II, OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered November 1, 2021. The order granted the motions of Richard A. Carpentieri for summary judgment.

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

Memorandum: These actions, which have been joined for trial and discovery on the issues of negligence, arise from an accident involving a motor vehicle operated by Richard A. Carpentieri, plaintiff in action No. 1 and a defendant in action Nos. 2 through 4, and a vehicle operated by Paul Kloc (decedent), whose estate by his executor, Elaine Kloc, is a defendant in action No. 1 and a plaintiff in action No. 3 (Estate). Decedent's vehicle was owned by Kloc Blossom Chapel (Chapel), a defendant in action No. 1, and insured by Selective Insurance Company of South Carolina, as subrogee of Kloc Blossom Chapels, Inc. (Selective), plaintiff in action No. 2. The accident occurred on a four-lane highway with a center turning lane, which ran in a northerly and southerly direction. Carpentieri was driving northbound in the passing lane when decedent's vehicle suddenly entered the road from the driveway of an apartment complex. Decedent, who was intending to turn left into the southbound lanes, pulled into the path of Carpentieri's vehicle and stopped, resulting in the collision. Carpentieri commenced action No. 1 to recover damages for the injuries he sustained in the collision. Selective commenced action No. 2 to recover payments it made under the Chapel's insurance policy relating to the damage to the vehicle operated by decedent. The Estate commenced action No. 3 asserting wrongful death and decedent's wife, Elaine Kloc, who was a passenger in decedent's vehicle at the time of the accident, commenced action No. 4 in her individual capacity to recover damages for injuries she sustained in the collision. Carpentieri moved in action No. 1 for summary judgment on the issue of liability on, inter alia, the grounds that decedent was negligent and the sole proximate cause of the collision. In action Nos. 2 through 4, Carpentieri moved for summary judgment dismissing the complaints in those actions against him on the same grounds. The Estate, Chapel, Selective, and Elaine Kloc (collectively, appellants) appeal from an order granting Carpentieri's motions, and we affirm.

We reject appellants' contention with respect to all four actions that Supreme Court erred in granting Carpentieri's motions. "It is well settled that '[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' " (*Penda v Duvall*, 141 AD3d 1156, 1157 [4th Dept 2016]; *see e.g. Vazquez v New York City Tr. Auth.*, 94 AD3d 870, 871 [2d Dept 2012]). Here,

Carpentieri met his initial burden on the motions by submitting evidence that, at the time of impact, he was driving northbound in the passing lane with the right-of-way when decedent's vehicle suddenly entered Carpentieri's lane. According to the opinion of Carpentieri's expert, Carpentieri had only two seconds to perceive, and react to, decedent's lane incursion. The expert opined that Carpentieri was unable to avoid the collision. Carpentieri also submitted the testimony of an officer who investigated the accident and was an accident reconstructionist. The officer concluded that there was no evidence that Carpentieri was at fault for the collision. While Carpentieri also submitted evidence that he was driving while intoxicated at the time of the collision and such intoxication may constitute negligence per se, Carpentieri's expert and the officer each opined that Carpentieri's intoxication in no way contributed to the collision and that decedent's action was the sole proximate cause of the collision (*see Wallace v Terrell*, 295 AD2d 840, 841-842 [3d Dept 2002]; *Tiberi v Barkley*, 226 AD2d 1005, 1007 [3d Dept 1996]; *see generally Pagels v Mullen*, 167 AD3d 185, 186 [4th Dept 2018]; *Limardi v McLeod*, 100 AD3d 1375, 1375 [4th Dept 2012]).

In opposition, appellants failed to raise a triable issue of fact whether Carpentieri's alleged negligence was a proximate cause of the accident (*see Penda*, 141 AD3d at 1157). The opinion of appellants' expert that Carpentieri was driving at an excessive speed, i.e., 57 miles per hour in a speed zone of 45 miles per hour, and that had Carpentieri been driving at the speed limit, he would have had sufficient time to react when decedent's vehicle entered his lane is speculative and failed to refute the evidence that Carpentieri had, at most, two seconds to react to decedent's vehicle (*see id.*; *see also Marx v Kessler*, 145 AD3d 1618, 1619 [4th Dept 2016]; *Stewart v Kier*, 100 AD3d 1389, 1390 [4th Dept 2012]). The further opinion of appellants' expert that Carpentieri's intoxication or impairment slowed his reaction decision-making process was also speculative as to how it related to the collision and therefore was insufficient to raise an issue of fact sufficient to defeat the motions (*see Wallace*, 295 AD2d at 841-842; *Tiberi*, 226 AD2d at 1007; *see generally Wittman v Nice*, 144 AD3d 1675, 1676-1677 [4th Dept 2016]).

In light of our determination, we need not consider appellants' remaining contentions.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

950

CA 22-01051

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF JOSHUA LIPPES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT BUFFALO,
SATISH TRIPATHI, IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF STATE UNIVERSITY OF NEW YORK
AT BUFFALO, AND STATE UNIVERSITY OF NEW YORK,
RESPONDENTS-RESPONDENTS.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MELISSA H. THORE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered January 31, 2022 in a proceeding pursuant to CPLR article 78. The order awarded petitioner attorney's fees in the amount of $5,000 and $350 in costs.

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

Memorandum: In this CPLR article 78 proceeding arising from a Freedom of Information Law ([FOIL] Public Officers Law art 6) request, petitioner appeals from an order awarding him $5,000 in attorney's fees and $350 in costs pursuant to Public Officers Law § 89 (4) (c). We reject petitioner's contention that Supreme Court erred in awarding attorney's fees in an amount less than petitioner had requested. "In evaluating what constitutes . . . reasonable attorney's fee[s], factors to be considered include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount [of money] involved, the customary fee charged for such services, and the results obtained" (*Matter of Dessauer*, 96 AD3d 1560, 1561 [4th Dept 2012] [internal quotation marks omitted]; *see A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1290 [4th Dept 2014]). "[A] trial court is in the best position to determine those factors integral to fixing [attorney's] fees . . . and, absent an abuse of discretion, the trial court's determination will not be disturbed" (*A&M Global Mgt. Corp.*, 115 AD3d at 1290 [internal quotation marks omitted]). Upon our review of the record

and the requisite factors, we conclude that the court did not abuse its discretion in fixing the award (*see Hinman v Jay's Vil. Chevrolet*, 239 AD2d 748, 748-749 [3d Dept 1997]; *see generally Meadowlands Portfolio, LLC v Manton*, 118 AD3d 1439, 1441 [4th Dept 2014]; *A&M Global Mgt. Corp.*, 115 AD3d at 1290; *Dessauer*, 96 AD3d at 1560-1561).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

951

CA 22-00106

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

WILLIAM ULLMARK AND JAMIE ULLMARK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

THE COBOURN CORPORATION, FORMERLY KNOWN AS
THE BUFFALO MOUNT VERNON CORPORATION, AND
TOWN OF HAMBURG, DEFENDANTS.

MARY E. MALONEY, RONALD B. VINCENT AND
SHARON E. VINCENT, APPELLANTS.

MALONEY & MALONEY, NIAGARA FALLS (MARY E. MALONEY OF COUNSEL), APPELLANT PRO SE, AND FOR RONALD B. VINCENT AND SHARON E. VINCENT, APPELLANTS.

LONG & PAULO-LEE, PLLC, WILLIAMSVILLE (OLIVIA T. PAULO-LEE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered January 10, 2022. The amended order denied the motion of appellants seeking to, inter alia, vacate a default judgment.

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

Memorandum: Plaintiffs, owners of a lakefront parcel in defendant Town of Hamburg (Town), commenced this action seeking quiet title to or adverse possession of an adjacent strip of lakefront property, identified in a 1923 subdivision map as a “Lane” (Lane). Defendant The Cobourn Corporation, formerly known as The Buffalo Mount Vernon Corporation (Cobourn), defaulted and, after plaintiffs and the Town entered into a stipulation to preserve the Town’s easement over the Lane, Supreme Court granted plaintiffs a default judgment awarding them, inter alia, sole title to the Lane.

After that judgment was entered, an inland neighbor, Mary E. Maloney, and the prior owners of plaintiffs’ property, Ronald B. Vincent and Sharon E. Vincent (collectively, nonparties), moved, inter alia, to vacate the default judgment and void the deed issued to plaintiffs. The nonparties contended, inter alia, that they had legitimate property interests in the Lane and that plaintiffs’ statements to the contrary, i.e., that no one else had an interest in

the Lane or would be affected by their action against defendants, were false and untrue (*see* CPLR 5015 [a] [3]). The court denied the motion, determining that the nonparties lacked standing to seek vacatur of the default judgment. We now affirm.

Initially, " '[t]o seek relief from a judgment or order, all that is necessary is that some legitimate interest of the moving party will be served and that judicial assistance will avoid injustice' " (*Amalgamated Bank v Helmsley-Spear, Inc*., 25 NY3d 1098, 1100 [2015], quoting *Oppenheimer v Westcott*, 47 NY2d 595, 602 [1979]; *see generally* CPLR 5015 [a]; *Woodson v Mendon Leasing Corp*., 100 NY2d 62, 68-69 [2003]). "It is the movant's burden 'to show that the prior [judgment] should be set aside by submission of sufficient evidence supporting the grant of such relief' " (*Mortgage Elec. Registration Sys., Inc. v Dort-Relus*, 107 AD3d 861, 862 [2d Dept 2013]; *see Matter of Jean G.S.*, 59 AD3d 998, 999 [4th Dept 2009]).

Contrary to the contention of the nonparties, they failed to meet their burden of establishing the existence of an express or implied easement that would have provided them with any legitimate interest in the Lane (*see generally* CPLR 5015 [a]; *Amalgamated Bank*, 25 NY3d at 1100). With respect to any express easement, the nonparties failed to submit any document affording either Maloney or the Vincents with any express easement on, over or across the Lane. Although a 1932 deed purported to grant all subdivision lot owners an easement over "Beach Lot A" and a "Park," with the intent that those areas would be used for general recreational uses, no mention was made of the *Lane* as designated in the 1923 subdivision map, and no deed in the record contains any grant of an easement or right-of-way over the *Lane* to any of the subdivision owners. Neither "Beach Lot A" nor the "Park" encompass the area of the Lane.

With respect to any alleged implied easement, we reject the nonparties' contention that the Lane constituted a "paper street" or the equivalent of a park, providing access to all neighbors on, over and across the Lane (*see generally Matter of City of New York*, 258 NY 136, 147-148 [1932], *rearg denied* 258 NY 610 [1932]). "Implied easements are not favored in the law and the burden of proof rests with the party asserting the existence of the facts necessary to create an easement by implication to prove such entitlement by clear and convincing evidence" (*Zentner v Fiorentino*, 52 AD2d 1036, 1036 [4th Dept 1976]; *see Tarolli v Westvale Genesee, Inc.*, 6 NY2d 32, 34-35 [1959]; *Guardino v Colangelo*, 262 AD2d 777, 780 [3d Dept 1999]). The nonparties did not meet that burden here. Moreover, "[t]he easement sought to be imposed in the instant case does not flow naturally from the notation used [on the filed map], nor does it necessarily arise by its very nature" (*Huggins v Castle Estates*, 36 NY2d 427, 432 [1975]).

Further, the nonparties failed to establish that the Vincents, as prior owners of plaintiffs' property, had any legitimate interest in the Lane. Although plaintiffs' claim for adverse possession of the Lane is based on tacking the time of their alleged possession thereof onto an alleged period of adverse possession by the Vincents during

the Vincents' prior ownership of the contiguous parcel (*see generally Brand v Prince*, 35 NY2d 634, 637 [1974]), plaintiffs were never required to prove their entitlement to title by adverse possession due to Cobourn's default. On the nonparties' motion, however, the nonparties had the burden of establishing that the Vincents had an existing legitimate interest in the Lane. Even assuming, arguendo, that the Vincents could assert an adverse possessory interest in the Lane without ever having sought a judicial determination of such an interest, we conclude that the nonparties failed to establish that the Vincents had such an interest (*see generally Walling v Przybylo*, 7 NY3d 228, 232 [2006]) or that the Vincents intended to retain such an interest after selling their property to plaintiffs and relocating to a different state (*see Brand*, 35 NY2d at 637; *cf. Connell v Ellison*, 86 AD2d 943, 944 [3d Dept 1982], *affd* 58 NY2d 869 [1983]).

Inasmuch as the nonparties failed to establish any legitimate interest in the Lane, we conclude that the nonparties do not constitute necessary parties (*see* CPLR 1001 [a]). In light of our determination, the nonparties' remaining contentions are academic.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

953

CA 21-01277

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

SHEILA M. SHAHEEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ELI H. SHAHEEN, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered August 13, 2021. The order, among other things, denied the cross motion of defendant seeking "to amend and/or to reopen and amend" a judgment of divorce.

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

Memorandum: The parties in this postjudgment matrimonial proceeding were divorced in 2000. Plaintiff moved in 2021 for the entry of a qualified domestic relations order (QDRO) relating to defendant's pension, and defendant cross-moved seeking "to amend and/or to reopen and amend" the judgment of divorce to include a provision securing his marital interest in plaintiff's pension. According to defendant, he and plaintiff had intended at the time of the divorce for plaintiff's pension to be equitably distributed, but the judgment of divorce was silent on that issue. As limited by his brief, defendant now appeals from an order insofar as it denied his cross motion.

As a preliminary matter, we note that, contrary to plaintiff's contention, defendant is not appealing from a QDRO, which would not be appealable as of right (*see generally* CPLR 5701 [a]; *Andress v Andress*, 97 AD3d 1151, 1152 [4th Dept 2012]), and the order on appeal insofar as it denied defendant's cross motion, which was made upon notice, is appealable as of right (*see generally* CPLR 5701 [a] [2]; *Jordan v Premo*, 70 AD3d 1466, 1466 [4th Dept 2010], *lv denied* 15 NY3d 707 [2010]).

We conclude that Supreme Court (Murad, J.) properly denied defendant's cross motion. "A court has the discretion to cure a mistake or defect in a judgment or an order that does not affect a substantial right of a party" (*Page v Page*, 39 AD3d 1204, 1205 [4th

Dept 2007]; *see* CPLR 5019 [a]; *Kiker v Nassau County*, 85 NY2d 879, 881 [1995]). A court also has the inherent power to exercise control over its judgments "to relieve a party from judgments taken through [fraud], mistake, inadvertence, surprise or excusable neglect" (*Matter of McKenna v County of Nassau, Off. of County Attorney*, 61 NY2d 739, 742 [1984] [internal quotation marks omitted]).

Here, the court (Murad, J.) denied defendant's cross motion on the basis that, in issuing the judgment of divorce in 2000, the court (Ringrose, A.J.) considered and ruled upon the issues that the parties stipulated to submit to it, and there was no reason to presume that any inadvertent omission occurred with respect to plaintiff's pension. Contrary to defendant's contention, the record on appeal does not reflect an unambiguous agreement of the parties to equitably distribute plaintiff's pension. Rather, the oral stipulation by the parties reflects that the decision to distribute plaintiff's pension was left to the sound discretion of the court. The mere fact that the court (Ringrose, A.J.) did not distribute plaintiff's pension in the judgment of divorce does not establish a mistake on the part of the court warranting amendment or reopening of the judgment of divorce (*cf. Jordan*, 70 AD3d at 1466).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

960

KA 21-00935

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENJAMIN KEMP, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB 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 June 23, 2021. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), criminal possession of a weapon in the second degree (two counts) and attempted robbery in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of defendant's omnibus motion seeking to suppress statements defendant made to his father in the interview room at the police station is granted, and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]). Defendant contends that County Court erred in denying that part of his omnibus motion seeking to suppress recorded statements that he made to his father in an interview room at the police station after he asserted his right to counsel. We agree.

"It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to [a parent]" (*Matter of A. & M.*, 61 AD2d 426, 429 [4th Dept 1978]). "Unlike conversations between a suspect and his attorney, however, communications between parent and child do not enjoy the protection of the Sixth Amendment, nor are they privileged either under common law or by statute" (*People v Harrell*, 87 AD2d 21, 25 [2d Dept 1982], *affd* 59 NY2d 620 [1983]). Nonetheless, a parent-child privilege has been recognized in certain circumstances and "that privilege is rarely more appropriate than when a minor, under arrest

for a serious crime, seeks the guidance and advice of a parent in the unfriendly environs of a police precinct" (*id.* at 26; *see A. & M.*, 61 AD2d at 429; *see generally People v Bevilacqua*, 45 NY2d 508, 513 [1978]).

Here, defendant was 15 years old at the time of the indicted offenses and his arrest and the police were therefore statutorily required to contact a parent or guardian when he was taken into custody (*see* CPL 140.20 [6]). It was as a result of that notification that defendant's father joined him in the interview room, where defendant had been waiting by himself prior to the interview. As seen on the video recording of the interview room that was admitted into evidence at the suppression hearing, defendant looked to his father for advice throughout the short interview with two detectives, including expressly asking his father whether he should keep speaking with the detectives or ask for a lawyer. Based on his father's advice, defendant requested an attorney and ended the interview. The detectives then left defendant alone with his father in the interview room, but said nothing regarding the presence of recording devices. Once ostensibly alone, defendant started to speak to his father, who responded by admonishing defendant not to speak because there were cameras in the room. Defendant nonetheless moved closer to his father, covered his face with his hands, and continued to attempt to converse quietly with his father.

We conclude that a parent-child privilege did arise under the circumstances of this case (*see Harrell*, 87 AD2d at 26). The application of the privilege is not dependent on a finding of police misconduct (*see id.* at 24-26) and we are therefore not called upon to review either the rationale proffered by the detective who testified at the suppression hearing for the recording of defendant's conversation with his father or the failure of either interviewing detective to warn defendant about the recording devices. Instead, we recognize, as other courts have, that a young defendant will naturally look to a parent "as a primary source of help and advice" (*Bevilacqua*, 45 NY2d at 513; *see Harrell*, 87 AD2d at 24; *see also A. & M.*, 61 AD2d at 429). The statements defendant now seeks to suppress were made in an attempt to utilize his father as such a source of assistance. "It would not be consistent with basic fairness to exact as a price for that assistance, his acquiescence to the overhearing presence of government agents" (*Harrell*, 87 AD2d at 26; *see A. & M.*, 61 AD2d at 429).

We reject the People's contention that defendant waived any applicable privilege by continuing to speak after his father warned him about the cameras. Generally, a party may waive any applicable privilege when communications are knowingly made in front of a third party (*see e.g. Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]; *People v Harris*, 57 NY2d 335, 343 [1982], *cert denied* 460 US 1047 [1983]; *Calhoun v County of Herkimer*, 169 AD3d 1495, 1497 [4th Dept 2019]). Here, however, most of defendant's statements to his father are inaudible as a direct result of defendant's efforts to prevent his conversation from being overheard and recorded. Defendant therefore attempted to speak "to his father

in confidence and for the purpose of obtaining support, advice or guidance" and it may easily be inferred from the father's warnings "that the father wished to remain silent and keep [defendant's statements] confidential" (*Matter of Mark G.*, 65 AD2d 917, 917 [4th Dept 1978]). Thus, this is not a case where a defendant waived any privilege by knowingly speaking openly in front of third parties (*cf. People v Tesh*, 124 AD2d 843, 844 [2d Dept 1986], *lv denied* 69 NY2d 750 [1987]).

We also reject the People's further contention that any error in admitting the recording of defendant's conversation with his father is harmless. As noted, the majority of defendant's statements are inaudible and the phrases that are discernible, including isolated words such as "body," "killed," and "rob," are devoid of any specific context. One of the detectives who participated in the interview of defendant testified at trial that he could hear only "part" of defendant's conversation with his father on the recording, but nonetheless testified that defendant "appear[ed]" to say on the recording, "maybe he forced me or they forced him." The prosecutor also implied in a question that defendant said "something about he was only supposed to rob the dude," however, the detective testified that he was unable to hear that himself. Inasmuch as the jury specifically requested that the recording of defendant's statements to his father be replayed during deliberations, we cannot conclude that the error in admitting the privileged statements was harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]), particularly in light of the quality of the recording, which may have resulted in impermissible jury speculation regarding a purported confession that defendant never in fact made (*see People v Melendez*, 196 AD3d 647, 650 [2d Dept 2021]). We therefore reverse the judgment, grant that part of the omnibus motion seeking to suppress the statements made by defendant to his father at the police station and we grant a new trial. In light of our determination, defendant's remaining contentions are academic.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

965

CA 22-00002

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, AND MONTOUR, JJ.

CITIBANK, N.A., NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE OF NRZ PASS-THROUGH TRUST VI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ARTHUR BAILEY, AS HEIR TO THE ESTATE OF DAVID B. BAILEY, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (KYLE C. DIDONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROACH & LIN, P.C., SYOSSET (EDWARD RUGINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered November 29, 2021. The order, among other things, denied the motion of defendant Arthur Bailey, as heir to the estate of David B. Bailey, insofar as it sought dismissal of the amended complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted insofar as it sought dismissal of the amended complaint against defendant Arthur Bailey, as heir to the estate of David B. Bailey, and the amended complaint against that defendant is dismissed.

Memorandum: Plaintiff commenced this mortgage foreclosure action in January 2020 against, as relevant on appeal, the mortgagee, David B. Bailey (decedent), and certain “John Does” and “Jane Does” defined in the complaint as “the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint.” Plaintiff subsequently discovered that decedent had died in 2018 and made an ex parte application seeking, among other things, to substitute Arthur Bailey, in his capacity as heir to decedent’s estate (defendant), as a John Doe defendant and for leave to file an amended complaint. That application was granted in May 2021 and plaintiff subsequently filed and served an amended complaint on defendant. Defendant now appeals from an order that, inter alia, denied his motion insofar as it sought to dismiss the amended complaint against him.

We agree with defendant that his motion should be granted insofar

as it seeks dismissal of the amended complaint against him. Defendant correctly contends that he was improperly substituted as John Doe #1 pursuant to CPLR 1024. Inasmuch as the original complaint "fail[ed] to mention decedent's death" and defendant is being sued in the amended complaint in his capacity as an heir to decedent's estate, defendant does not fit within the categories of John and Jane Does set forth in the original complaint and thus cannot be substituted therefor (*Wendover Fin. Servs. v Ridgeway*, 93 AD3d 1156, 1157-1158 [4th Dept 2012]). Further, although here plaintiff also filed and served an amended complaint on defendant solely in his capacity as heir to decedent's estate and not as a representative thereof (*cf. id.* at 1157; *see generally* EPTL 3-3.6 [a], [b]; *U.S. Bank Trust N.A. v Gedeon*, 181 AD3d 745, 747 [2d Dept 2020]), we agree with defendant that the relevant statute of limitations expired prior to the order granting plaintiff's ex parte application for leave to file the amended complaint (*see generally* CPLR 213 [4]). We reject plaintiff's contention that defendant lacks standing to assert a statute of limitations defense (*see U.S. Bank N.A. v Balderston*, 163 AD3d 1482, 1483 [4th Dept 2018]). With respect to the merits of that defense, there is no dispute that the statute of limitations began to run no later than November 19, 2014, when plaintiff's predecessor-in-interest commenced an earlier mortgage foreclosure action against, inter alia, decedent that was ultimately dismissed on the motion of the defendants (*see* CPLR 213 [4]; *Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006]; *see generally Freedom Mtge. Corp. v Engel*, 37 NY3d 1, 19, 21 [2021], *rearg denied* 37 NY3d 926 [2021]). Thus, as defendant correctly contends, the six-year statute of limitations expired prior to both the order granting plaintiff's application to amend the complaint and its filing and service of the same on defendant. Supreme Court therefore should have granted defendant's motion insofar as it sought to dismiss the amended complaint against defendant.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

967

CA 21-01597

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

MARGARET GROOMS-YARBORO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID CARTER AND MARIA MACKIN,
DEFENDANTS-RESPONDENTS.

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

OSBORN, REED & BURKE, LLP, ROCHESTER (MICHAEL C. PRETSCH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered October 25, 2021. The order denied plaintiff's motion seeking, inter alia, a protective order.

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

Memorandum: In this personal injury action arising from injuries plaintiff allegedly sustained when she slipped and fell in a parking lot owned by defendants, plaintiff appeals from an order denying her motion for a protective order pursuant to CPLR 3103 (a) and/or the appointment of a judicial hearing officer or referee to supervise discovery. The motion sought to preclude defendants from asking plaintiff questions at her deposition about the extent and nature of various preexisting medical conditions identified in her medical records.

"It is well settled that the court is invested with broad discretion to supervise discovery . . . , and only a clear abuse of discretion will prompt appellate action" (*Mosey v County of Erie*, 148 AD3d 1572, 1573 [4th Dept 2017] [internal quotation marks omitted]; *see Castro v Admar Supply Co., Inc*. [appeal No. 2], 159 AD3d 1616, 1617 [4th Dept 2018]). Here, we conclude that, given the elements of damages requested by plaintiff in her bill of particulars, Supreme Court did not abuse its broad discretion in denying plaintiff's motion (*see generally Castro*, 159 AD3d at 1618).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

982

KA 22-01018

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON BRITTON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 12, 2020. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the third degree (two counts) and criminal possession of marihuana 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 possession of a weapon in the second degree (Penal Law § 265.03 [2]), criminal possession of marihuana in the third degree (former § 221.20), and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1], [12]). We affirm.

Defendant contends that he was deprived of a fair trial by the admission of certain evidence at trial, including a photograph depicting the weapons at issue with other weapons that defendant legally possessed and certain evidence seized from trash that he had placed outside his house. By stipulating to the admissibility of the photograph, defendant waived his present contention that it should not have been admitted in evidence (*see People v Hutchings*, 142 AD3d 1292, 1294 [4th Dept 2016], *lv denied* 28 NY3d 1124 [2016]; *People v Santos-Sosa*, 233 AD2d 833, 833 [4th Dept 1996], *lv denied* 89 NY2d 988 [1997]). In any event, "photographs are admissible if they tend 'to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered or to be offered.' They should be excluded 'only if [their] *sole purpose* is to arouse the emotions of the jury and to prejudice the defendant' " (*People v Wood*, 79 NY2d 958, 960

[1992], quoting *People v Pobliner*, 32 NY2d 356, 369-370 [1973], *rearg denied* 33 NY2d 657 [1973], *cert denied* 416 US 905 [1974]). Here, we conclude that the photograph was relevant to a material issue in the case and its sole purpose was not to arouse the emotions of the jury (*see People v Walton*, 178 AD3d 1459, 1459-1460 [4th Dept 2019], *lv denied* 35 NY3d 1030 [2020]; *People v Boop*, 118 AD3d 1273, 1274 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]).

With respect to defendant's contention concerning the evidence recovered from his trash can nine days prior to his arrest, which included five sandwich bags containing cocaine residue, we conclude that evidence of his prior possession of the drug residue was admissible to establish his intent to sell drugs, which is a necessary element of one of the controlled substance charges (*see People v Laws*, 27 AD3d 1116, 1117 [4th Dept 2006], *lv denied* 7 NY3d 758 [2006]), and the probative value of the evidence outweighed its prejudicial effect (*see generally People v Whitfield*, 115 AD3d 1181, 1182 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]).

We reject defendant's contention that County Court erred in declining to suppress the results of a fingerprint comparison in which a police officer used a fingerprint card that, as the People correctly concede, should have been sealed pursuant to CPL 160.50. That statute "was not designed to immunize a defendant from the operations of [a] law enforcement official's investigatory use of fingerprints" (*People v Pate*, 182 AD2d 717, 718 [2d Dept 1992], *lv denied* 80 NY2d 836 [1992]; *see generally People v Patterson*, 78 NY2d 711, 717-718 [1991]).

Defendant contends that the court deprived him of the ability to present a defense based on Penal Law § 265.20 (a) (3), which exempts the possession of certain weapons from a number of weapons charges, including criminal possession of a weapon in the second degree under section 265.03. Although defendant inquired regarding the defense, we conclude that "defendant failed to provide the court with an adequate factual basis for his proposed" defense (*People v Breheny*, 270 AD2d 926, 927 [4th Dept 2000], *lv denied* 95 NY2d 851 [2000]). "[O]ffers of proof must be made clearly and unambiguously" (*People v Williams*, 6 NY2d 18, 23 [1959], *cert denied* 361 US 920 [1959], *rearg denied* 10 NY2d 1011 [1961]; *see Breheny*, 270 AD2d at 927), and inasmuch as defendant failed to make an offer of proof demonstrating that the proposed affirmative defense applied in this case (*see generally People v Santana*, 7 NY3d 234, 236-237 [2006]; *People v Hazzard*, 129 AD3d 1598, 1600 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015]; *People v Procanick*, 68 AD3d 1756, 1756 [4th Dept 2009], *lv denied* 14 NY3d 844 [2010]), defendant's contention is not preserved for our review (*see generally People v Schafer*, 81 AD3d 1361, 1363 [4th Dept 2011], *lv denied* 17 NY3d 861 [2011]).

Defendant further contends that the conviction is not supported by legally sufficient evidence and that the verdict is contrary to the weight of the evidence. Initially, we conclude that defendant failed to preserve his sufficiency challenge with respect to the conviction

of criminal possession of a controlled substance in the third degree under count three of the indictment inasmuch as his motion for a trial order of dismissal with respect to that count was not " 'specifically directed' " at the error raised on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we conclude that the evidence with respect to that count and the remaining charges upon which defendant was convicted, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of all of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally id.* at 348-349; *Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that, in sentencing him, the court penalized him for exercising the right to a jury trial, inasmuch as he failed to raise that contention at sentencing (*see People v Motzer*, 96 AD3d 1635, 1636 [4th Dept 2012], *lv denied* 19 NY3d 1104 [2012]). The sentence is not unduly harsh or severe.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

986

CAF 21-01790

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

IN THE MATTER OF JAYTOYA ANN BAILEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DONALD ALBERT BAILEY, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Ontario County (Kristina Karle, J.), entered September 20, 2021 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part stating that the order is entered upon the default of respondent, and as modified the order is affirmed without costs.

Memorandum: In these consolidated appeals arising from proceedings pursuant to article 6 and article 8 of the Family Court Act, respondent father appeals in appeal No. 1 from an order of protection directing that he have no contact with petitioner mother and the subject children for a period of two years. In appeal No. 2, the father appeals from an order that, inter alia, granted sole legal custody to the mother and suspended the father's visitation. Initially, we agree with the father in appeal No. 1 that Family Court erred in entering the order of protection upon his default based on his failure to appear in court. The record establishes that the father was represented by counsel, and we have previously determined that "[w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded" (*Matter of Abdo v Ahmed*, 162 AD3d 1742, 1743 [4th Dept 2018] [internal quotation marks omitted]). We therefore modify the order accordingly.

The father failed to preserve for our review his contention in both appeals that the court erred in conducting part of the fact-finding hearing on the petitions in his absence (*see Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]). In any event, we conclude that "the court

did not abuse its discretion in conducting [that part of] the hearing in his absence inasmuch as he appeared by counsel and had notice of the hearing" (*Matter of Williams v Richardson*, 181 AD3d 1292, 1292 [4th Dept 2020], *lv denied* 36 NY3d 911 [2021]; *see Matter of Triplett v Scott*, 94 AD3d 1421, 1422 [4th Dept 2012]).

With respect to the merits on appeal No. 1, we agree with the father that "[the court] erred in issuing an order of protection without adhering to the procedural requirements of Family Court Act § 154-c (3) . . . , inasmuch as the court did not make a finding of fact that [the mother] was entitled to an order of protection based upon 'a judicial finding of fact, judicial acceptance of an admission by [the father] or judicial finding that the [father] has given knowing, intelligent and voluntary consent to its issuance' " (*Matter of Hill v Trojnor*, 137 AD3d 1671, 1672 [4th Dept 2016], quoting § 154-c [3] [ii]). Indeed, the court failed to specify which family offense the father committed. Nevertheless, "remittal is not necessary because the record is sufficient for this Court to conduct an independent review of the evidence" (*Matter of Langdon v Langdon*, 137 AD3d 1580, 1582 [4th Dept 2016]; *see Matter of Masciello v Masciello*, 130 AD3d 626, 626 [2d Dept 2015]). Exercising our independent review power (*see Matter of Telles v DeWind*, 140 AD3d 1701, 1701 [4th Dept 2016]), we conclude that the record is sufficient to establish by a fair preponderance of the evidence that the father committed the family offenses of criminal obstruction of breathing or blood circulation (Penal Law § 121.11; *see generally Matter of Rosa N. v Luis F.*, 166 AD3d 451, 452 [1st Dept 2018]) and stalking in the fourth degree (§ 120.45 [1]; *see generally Matter of Cousineau v Ranieri*, 185 AD3d 1421, 1422 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]), warranting the issuance of an order of protection against him (*see* Family Ct Act § 832).

In appeal No. 2, the father contends that there is not a sound and substantial basis in the record to support the court's determination to suspend his visitation. We reject that contention. Although the court did not specify the factors it relied on in conducting its best interests analysis (*see Matter of Howell v Lovell*, 103 AD3d 1229, 1231 [4th Dept 2013]), "[o]ur authority in determinations of custody [and visitation] is as broad as that of Family Court . . . and where, as here, the record is sufficient for this Court to make a best interests determination . . . , we will do so in the interests of judicial economy and the well-being of the child[ren]" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450 [4th Dept 2007]; *see also Matter of Butler v Ewers*, 78 AD3d 1667, 1667 [4th Dept 2010]; *see generally Matter of Louise E. S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]). Here, we conclude that the court properly suspended the father's visitation with the children (*see generally Matter of Owens v Chamorro*, 114 AD3d 1037, 1039-1040 [3d Dept 2014]). Although visitation with a noncustodial parent is presumed to be in a child's best interests (*see Matter of Granger v Misercola*, 21 NY3d 86, 92 [2013]), the mother rebutted that presumption inasmuch as she demonstrated by a preponderance of the evidence (*see id.*) that the children's "health and safety were compromised" while in the father's

care (*Matter of Jared MM. v Mark KK.*, 205 AD3d 1084, 1090 [3d Dept 2022]; *see generally* Domestic Relations Law § 240 [1]; *Matter of Robert C. E. v Felicia N. F.*, 197 AD3d 100, 104 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

987

CAF 21-01791

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

IN THE MATTER OF JAYTOYA ANN BAILEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DONALD ALBERT BAILEY, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Ontario County (Kristina Karle, J.), entered October 5, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal custody of the subject children.

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

Same memorandum as in *Matter of Bailey v Bailey* ([appeal No. 1] — AD3d — [Feb. 10, 2023] [4th Dept 2023]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

999

KA 22-00093

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEON ANDERSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CAITLIN M. CONNELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered November 12, 2021. The judgment convicted defendant, upon a plea of guilty, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of rape in the first degree (Penal Law § 130.35 [3]). As defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid inasmuch as "County Court 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 Somers*, 186 AD3d 1111, 1112 [4th Dept 2020], *lv denied* 36 NY3d 976 [2020]; *see also People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, contrary to defendant's further contention, we conclude that his sentence is not unduly harsh or severe.

Finally, we note that the certificate of conviction contains clerical errors (*see generally People v Thurston*, 208 AD3d 1629, 1630 [4th Dept 2022]). The certificate of conviction erroneously states that defendant was sentenced on July 15, 2019 when, in fact, no sentence was imposed on that date. It further erroneously states that defendant was resentenced on November 12, 2021 when, in fact, November 12 was the first date on which the sentence was pronounced. The certificate of conviction must therefore be amended to correct those

clerical errors.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

1005

KA 18-00445

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON THORNTON, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered November 6, 2017. The judgment convicted defendant upon his plea of guilty of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [3]), defendant contends that his sentence is unduly harsh and severe and that he was deprived of effective assistance of counsel by the attorney who was appointed by County Court to represent him on his motion to withdraw his plea. As the People correctly concede, defendant did not validly waive his right to appeal because "[t]he written waiver of the right to appeal signed by defendant [at the time of the plea] and the verbal waiver colloquy conducted by [the court] together improperly characterized the waiver as 'an absolute bar to the taking of a direct appeal and the loss of attendant rights to counsel and poor person relief,' as well as to 'all postconviction relief separate from the direct appeal' " (*People v McMillian*, 185 AD3d 1420, 1421 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020], quoting *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

With respect to defendant's claim of ineffective assistance of counsel, we agree with defendant that the attorney assigned to represent him on his motion to withdraw his plea lacked basic knowledge of the case, including that defendant had admitted to the police in a video recorded interview that he shot the victim but claimed that he did so under duress. To prevail on a claim of

ineffective assistance of counsel, however, "a defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's failure to pursue 'colorable' claims" (*People v Garcia*, 75 NY2d 973, 974 [1990], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Carver*, 124 AD3d 1276, 1276 [4th Dept 2015], *affd* 27 NY3d 418 [2016]). A defendant is not denied effective assistance of counsel due to his counsel's failure to "make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *see People v Brown*, 181 AD3d 1301, 1304 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020]).

Here, according to defendant, his attorney on the motion should have argued that his guilty plea was involuntarily entered because defendant was not advised by his prior attorney of the potential affirmative defense of duress. In other words, defendant contends that his attorney on the motion was ineffective for failing to argue that his prior attorney was ineffective. Although there is evidence in the record upon which a duress defense could have been pursued at trial had defendant not elected to plead guilty, there is no basis for us to conclude that defendant was unaware of that potential affirmative defense when he pleaded guilty or that his prior attorney failed to consult with him about the defense. Thus, defendant's contention must be raised, if at all, in a motion pursuant to CPL 440.10 (*see People v Saunders*, 209 AD3d 1292, 1293 [4th Dept 2022]; *People v Defio*, 200 AD3d 1672, 1674 [4th Dept 2021], *lv denied* 38 NY3d 949 [2022]; *People v Timmons*, 151 AD3d 1682, 1684 [4th Dept 2017], *lv denied* 30 NY3d 984 [2017]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1013

CA 21-01454

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

NICHOLAS T., AS PARENT AND NATURAL GUARDIAN OF R.D., NICHOLAS T., AS ADMINISTRATOR OF THE ESTATE OF JENNIFER D., DECEASED, AND MARK BAILEY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA, TOWN OF AMHERST, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

FEROLETO LAW, BUFFALO (JILL WNEK OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WALSH, ROBERTS & GRACE, BUFFALO (JOSEPH H. EMMINGER, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF TONAWANDA.

HURWITZ FINE P.C., BUFFALO (STEPHEN M. SORRELS OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF AMHERST.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered October 6, 2021. The order granted the motions of defendants Town of Tonawanda and Town of Amherst to dismiss the complaint and all cross claims against them.

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

Memorandum: Jennifer D. (decedent) was killed when she was struck by a vehicle while crossing Niagara Falls Boulevard, which comprises the boundary between defendants Town of Tonawanda and Town of Amherst (collectively, Towns). Insofar as relevant here, plaintiffs, one of whom is decedent's son and the other of whom is the administrator of decedent's estate and the parent and natural guardian of decedent's infant daughter, commenced this negligence action against the Towns, among others, alleging that they negligently permitted a dangerous condition to exist on Niagara Falls Boulevard. Each Town moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint against it on the ground that the road is a state highway and thus the Towns had no duty of care regarding the road. Plaintiffs appeal from an order granting the motions, and we affirm.

It is well settled that "[t]he threshold question in any

negligence action is: does defendant owe a legally recognized duty of care to plaintiff?" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]; *see Rosario v Monroe Mech. Servs., Inc.*, 158 AD3d 1155, 1156 [4th Dept 2018], *lv dismissed* 31 NY3d 1067 [2018]). Furthermore, whether a defendant owes a duty of care to the plaintiff is an issue of law for the court to determine (*see Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015]; *Pingtella v Jones*, 305 AD2d 38, 40 [4th Dept 2003], *lv dismissed* 100 NY2d 640 [2003], *rearg denied* 1 NY3d 594 [2004]). Contrary to plaintiffs' contention, "[a] municipality has no duty to maintain in a reasonably safe condition a road it does not own or control unless it affirmatively undertakes such a duty" (*Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 675 [1999], *rearg denied* 93 NY2d 1042 [1999]; *see Ostrowski v Baldi*, 61 AD3d 1403, 1404 [4th Dept 2009], *lv denied* 13 NY3d 701 [2009]; *Alcalay v Town of N. Hempstead*, 262 AD2d 258, 259 [2d Dept 1999], *lv dismissed* 94 NY2d 796 [1999]) and, here, the record establishes that the Towns undertook no duty to maintain this state highway.

We reject plaintiffs' further contention that Highway Law § 327 imposed a duty upon the Towns to adequately light the road. Highway Law § 327 states that a town may provide lighting for a state highway and may, in its discretion, discontinue lighting at any time (*see Mastro v Maiorino*, 174 AD2d 654, 655 [2d Dept 1991]). Consequently, we conclude that "there is no duty on the part of the [Towns] to light the [road] so as to support a cause of action sounding in negligence based on the lack of lighting" (*Bauer v Town of Hempstead*, 143 AD2d 793, 794 [2d Dept 1988]; *see Mastro*, 174 AD2d at 655; *see also Hayden v Ward*, 283 AD2d 942, 942 [4th Dept 2001]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1024

KA 19-00316

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVINE D. JACQUE-CREWS, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING 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 a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered April 23, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of criminal possession of a weapon in the third degree (§ 265.02 [3]). The charges arose from an incident in which defendant displayed a handgun during an altercation with several other people, left the scene in a black Mercedes, returned and displayed a handgun again, and then left the scene again in the same vehicle. He fled from that vehicle after it was stopped by the police a short time later, and a firearm was recovered from a backpack that Rochester police officers located on the path defendant took when he ran. We affirm.

Initially, defendant contends that all three crimes are facially unconstitutional under the Second Amendment of the United States Constitution in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]). As defendant correctly concedes, his challenge to the constitutionality of the statutes is not preserved for our review inasmuch as he failed to raise any such challenge during the proceedings in Supreme Court (*see People v Reese*, 206 AD3d 1461, 1462-1462 [3d Dept 2022]; *People v Gerow*, 85 AD3d 1319, 1320 [3d Dept 2011]; *cf. People v Hughes*, 22 NY3d 44, 48-49 [2013]; *see generally People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27

NY3d 1074 [2016], *cert denied* — US —, 137 S Ct 392 [2016]). Contrary to defendant's contention, we conclude that his constitutional challenge is not exempt from the preservation rule (*see People v Thomas*, 50 NY2d 467, 472-473 [1980]; *cf. People v Patterson*, 39 NY2d 288, 296 [1976], *affd* 432 US 197 [1977]; *see generally People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]).

Defendant's contention that the court erred in refusing to suppress the handgun that the police recovered from the backpack that he abandoned during his flight from the police is "based on a ground not raised before the suppression court and thus is unpreserved for our review" (*People v Poole*, 55 AD3d 1354, 1355 [4th Dept 2008], *lv denied* 11 NY3d 929 [2009]; *see People v Zuke*, 87 AD3d 1290, 1291 [4th Dept 2011], *lv denied* 18 NY3d 887 [2012]; *cf. People v Walls*, 37 NY3d 987, 989 [2021]). Although defendant contended at the suppression hearing that the police lacked reasonable suspicion to stop the vehicle in which he was riding, he did not challenge the reliability of the citizen who called 911 to report the incident, nor did he challenge the arresting officer's reliance on the ensuing radio dispatch. "Under the fellow officer rule, [a] police officer is entitled to act on the strength of a radio bulletin . . . from a fellow officer or department and to assume its reliability . . . Under those circumstances, the agency or officer transmitting the information presumptively possesses the requisite [reasonable suspicion] . . . However, where . . . defendant challenges the reliability of the information transmitted to the arresting officers, the presumption of [reasonable suspicion] disappears and it becomes incumbent upon the People to establish that the officer or agency imparting the information . . . in fact possessed [reasonable suspicion] to act" (*People v Searight*, 162 AD3d 1633, 1634-1635 [4th Dept 2018] [internal quotation marks omitted]; *see People v Landy*, 59 NY2d 369, 375 [1983]; *see also People v Fenner*, 61 NY2d 971, 973 [1984]). Inasmuch as defendant did not challenge the reliability of the radio transmissions at the suppression hearing, the People were not obligated, contrary to defendant's contention, to establish that the officer or agency imparting the information possessed reasonable suspicion to act (*see People v Shabazz*, 289 AD2d 1059, 1059-1060 [4th Dept 2001], *cert denied* 537 US 1165 [2003], *affd* 99 NY2d 634 [2003], *rearg denied* 100 NY2d 556 [2003]).

Defendant further contends that the court erred in admitting in evidence at trial the recording of the 911 call, in which the caller reported defendant's initial display of the weapon and then excitedly informed the 911 operator that defendant had returned and was again displaying a weapon as the caller spoke. Defendant raised a hearsay objection, and the court concluded that the recording was admissible for nonhearsay purposes because it was not admitted for the truth of the matter asserted. Assuming, arguendo, that the court erred in admitting the recording under that rationale (*see e.g. People v Almonte*, 160 AD3d 594, 594 [1st Dept 2018], *affd* 33 NY3d 1083 [2019]; *People v Buie*, 201 AD2d 156, 158-160 [4th Dept 1994], *affd* 86 NY2d 501 [1995]), we conclude that any error in admitting the recording was harmless (*see People v Spencer*, 96 AD3d 1552, 1553 [4th Dept 2012], *lv*

denied 19 NY3d 1029 [2012], *reconsideration denied* 20 NY3d 989 [2012]). Defendant further contends that the court erred in failing to give a limiting instruction regarding the evidence, despite its promise to do so. That contention is not preserved for our review (*see People v Hymes*, 174 AD3d 1295, 1299 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]; *People v Cartagena*, 170 AD3d 451, 451 [1st Dept 2019], *lv denied* 33 NY3d 1029 [2019]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

The sentence is not unduly harsh or severe.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

1025

KA 18-01923

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD RAYFORD, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (TONYA PLANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 13, 2018. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and aggravated criminal contempt.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law 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]) and aggravated criminal contempt (§ 215.52 [1]). The conviction arose from a late-night interaction between defendant and the complainant, defendant's former girlfriend who had an order of protection against defendant but nonetheless continued to socialize with him. During the interaction, which took place at the complainant's home, the complainant sustained two serious stab wounds from a knife. Defendant contends that Supreme Court committed reversible error in denying his requests to provide the jury with a justification charge because, contrary to the court's determination, such an instruction is available even where the defendant asserts that the injuries were inflicted accidentally during an act of self-defense and, here, a reasonable view of the evidence supported that instruction. We agree with defendant, and we therefore reverse the judgment and grant a new trial.

"The defense of justification (Penal Law art 35) affirmatively permits the use of force under certain circumstances" (*People v McManus*, 67 NY2d 541, 545 [1986]). "The defense does not operate to excuse a criminal act, nor does it negate a particular element of a crime. Rather, by recognizing the use of force to be privileged under certain circumstances, it renders such conduct entirely lawful" (*id.* at 546). "A trial court must charge the factfinder on the defense of

justification 'whenever there is evidence to support it' . . . Viewing the record in the light most favorable to the defendant, a court must determine whether any reasonable view of the evidence would permit the factfinder to conclude that the defendant's conduct was justified. If such evidence is in the record, the court must provide an instruction on the defense" (*People v Petty*, 7 NY3d 277, 284 [2006], quoting *McManus*, 67 NY2d at 549).

Initially, as defendant correctly contends and the People effectively concede, the court erred in determining that a justification charge was unavailable "where there's either an accidental stabbing[or] an unintentional stabbing" and in refusing to acknowledge the case law provided by defendant, which demonstrated that the court had misstated the law. It has long been settled law that "[a] defendant is entitled to a justification charge if there is some reasonable view of the evidence to support it, even if the defendant alleges that the victim's injuries were accidentally inflicted" (*People v Liggins*, 2 AD3d 1325, 1327 [4th Dept 2003]; *see People v Khan*, 68 NY2d 921, 922 [1986]; *McManus*, 67 NY2d at 547; *People v Padgett*, 60 NY2d 142, 145-146 [1983]). That is so because "the defense of justification applies fully to a defendant's risk-creating conduct, even though it had unintended consequences" (*People v Magliato*, 68 NY2d 24, 28 [1986]). Here, defendant's statements during his interview with a police investigator, an audio recording of which was introduced in evidence by the People, indicated that the stabbing injuries sustained by the complainant were the unintended result of defendant's defensive maneuvers. In particular, defendant asserted that the complainant, while intoxicated, confronted him with a knife and swung it at him, thereby prompting him to act defensively by twisting the complainant's arm behind her back with the knife still in her hand and pinning it against her. Contrary to the court's determination, defendant's statements "do[ ] not defeat his entitlement to a justification charge" (*People v Scott*, 224 AD2d 926, 926-927 [4th Dept 1996]; *see People v Collier*, 303 AD2d 1008, 1009 [4th Dept 2003], *lv denied* 100 NY2d 579 [2003]; *People v Neal*, 254 AD2d 752, 752 [4th Dept 1998]).

Next, viewing the record in the light most favorable to defendant, we conclude that, "[b]ased upon defendant's version of the events, the jury could have reasonably found that the [complainant was] the initial aggressor[] and that the actions of defendant [in twisting the complainant's arm behind her back and pinning the knife there] were justified, even though the resulting injur[ies were] unintended" (*Neal*, 254 AD2d at 752). In particular, although defendant initially denied involvement in the incident, upon prompting by the investigator to provide his truthful account, defendant recounted that the complainant was the initial aggressor insofar as she swung the knife at him when he returned upstairs from the basement of complainant's home and that, in response, he performed the aforementioned defensive maneuvers. Defendant maintained that he never had the knife in his hand during the incident and that, instead, he was just trying to protect himself (*see People v Huntley*, 87 AD2d 488, 494 [4th Dept 1982], *affd* 59 NY2d 868 [1983]; *People v Sackey-El*, 149 AD3d 1104, 1104-1105 [2d Dept 2017]; *Scott*, 224 AD2d at 926-927).

We agree with defendant that the People's counterarguments do not warrant a different conclusion. The People assert that, because defendant repeatedly denied causing any injury to the complainant, there was "no proof in the trial record of any nexus or causal connection between defendant's account of his actions and [the complainant's] injuries." We reject that assertion. While defendant initially denied any involvement in the incident, the interview clearly changed when the investigator suggested that other witnesses had placed defendant at the complainant's house and encouraged defendant to provide his truthful version of events. Defendant thereafter provided the narrative previously described, which accounted for the injuries to the complainant. Contrary to the People's suggestion, submission of the justification defense to the jury on the basis of defendant's statements would not have required the jury to engage in "selective dissection of the integrated testimony of a single witness as to whom credibility, or incredibility, could only be a constant factor" (*People v Scarborough*, 49 NY2d 364, 373 [1980]). The jury would simply have to believe, as the audio recording of the interview supports, that defendant was not being forthright when he initially denied involvement in the incident, but that he thereafter gave his truthful version of events in which the stabbing injuries to the complainant were an unintended result of his deliberate defensive maneuvers. Given that defendant's account of the incident was placed in evidence by the People, this is not a case in which submission of the justification defense "would have required the jury to speculate as to a sequence of events not supported by any of the testimony presented by either side" (*People v Bryant*, 306 AD2d 66, 66 [1st Dept 2003], *lv denied* 100 NY2d 618 [2003]).

The People also assert that the proof at trial "entirely contradicts" defendant's claim that the stabbing was accidental and that defendant's version of the incident does not rationally account for the complainant's wounds. We reject that assertion because defendant's description of the physical struggle could rationally account for the location of the complainant's wounds (*cf. People v Frazier*, 86 AD2d 557, 557-558 [1st Dept 1982], *lv denied* 56 NY2d 651 [1982]), and the jury would not have been required to disregard expert testimony to the effect that the wounds could not have been inflicted as defendant described because the People presented no such evidence (*cf. People v Rivera*, 23 NY3d 112, 124 [2014]). Moreover, contrary to the People's further assertion, when defendant's statements to the investigator are viewed in the appropriate light, a jury could have reasonably concluded that defendant, upon being confronted with the knife-wielding complainant as he returned upstairs from the basement, could not have safely retreated (*see Sackey-El*, 149 AD3d at 1105).

Finally, contrary to the People's assertion, the court's error in denying defendant's requests for a justification charge is not subject to harmless error analysis because where, as here, "on any reasonable view of the evidence, the fact finder might have decided that defendant's actions were justified, the failure to charge the defense constitutes reversible error" (*Padgett*, 60 NY2d at 145; *see People v Brown*, 33 NY3d 316, 321 [2019], *rearg denied* 33 NY3d 1136 [2019];

People v Watts, 57 NY2d 299, 301 [1982]). Defendant is therefore entitled to a new trial on assault in the first degree (Penal Law § 120.10 [1]) and aggravated criminal contempt (§ 215.52 [1]), each of which constitutes a "crime involving the use of force" (*McManus*, 67 NY2d at 549; *see generally People v Dillon*, 53 AD3d 692, 692-693 [3d Dept 2008], *lv denied* 11 NY3d 831 [2008]). In light of our determination, we do not address defendant's remaining contention.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

1032

CA 21-01715

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

WILLIAM LOBIANCO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, ET AL., DEFENDANTS,
NIAGARA FALLS WATER BOARD AND NIAGARA FALLS
PUBLIC WATER AUTHORITY, DEFENDANTS-RESPONDENTS.

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

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (KEVIN J. FEDERATION OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered November 9, 2021. The order granted the motion of defendants Niagara Falls Water Board and Niagara Falls Public Water Authority for summary judgment and dismissed the complaint and all cross claims against said defendants.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint insofar as it alleges that defendants Niagara Falls Water Board and Niagara Falls Public Water Authority had constructive notice of the allegedly dangerous condition and reinstating any cross claims against those defendants and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries he allegedly sustained when he stepped off a curb onto a street and fell into an uncovered storm drain—the grate for which was located at the bottom of the four-foot-deep drain—owned and maintained by Niagara Falls Water Board and Niagara Falls Public Water Authority (defendants). Defendants moved for summary judgment dismissing the complaint and all cross claims against them on the grounds that they neither created the alleged defect nor received actual or constructive notice thereof. Supreme Court granted the motion, and plaintiff now appeals.

We note at the outset that, in opposition to defendants' motion, plaintiff abandoned his claims that defendants created or had actual notice of the alleged defect (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We thus conclude that the court properly granted the motion insofar as defendants sought summary judgment

dismissing those claims.

We nonetheless agree with plaintiff that the court erred in granting the motion with respect to the claim that defendants had constructive notice of the alleged defect and with respect to any cross claims against them, and we therefore modify the order accordingly. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a] defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see Arghittu-Atmekjian v TJX Cos., Inc.*, 193 AD3d 1395, 1395-1396 [4th Dept 2021]). Here, viewing the evidence in the light most favorable to plaintiff as the nonmoving party and drawing every available inference in his favor (*see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), we conclude that defendants "failed to meet their burden of establishing that the allegedly dangerous condition was not visible and apparent for a sufficient length of time prior to the accident to permit them, in the exercise of reasonable care, to discover and remedy it" (*Mikolajczyk v Morgan Contrs.*, 273 AD2d 864, 865 [4th Dept 2000]; *see Farrauto v Bon-Ton Dept. Stores, Inc.*, 143 AD3d 1292, 1293 [4th Dept 2016]).

In particular, plaintiff's testimony that he did not notice the uncovered storm drain before he stepped off the curb onto the street "does not establish defendants' entitlement to judgment as a matter of law on the issue whether that condition was visible and apparent" (*Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469-1470 [4th Dept 2013]; *see Farrauto*, 143 AD3d at 1293). Indeed, plaintiff testified that he was looking for any oncoming traffic on the street before falling into the uncovered storm drain, which he observed immediately after he fell (*see Navetta*, 106 AD3d at 1470; *Gwitt v Denny's, Inc.*, 92 AD3d 1231, 1232 [4th Dept 2012]). We further conclude that the photographs included in defendants' moving papers, which were taken within days of the accident and, according to plaintiff's testimony, constitute fair and accurate representations of the uncovered storm drain at the time of the accident (*see Batton v Elghanayan*, 43 NY2d 898, 899 [1978]), raise a triable issue of fact whether the allegedly dangerous condition was visible and apparent (*see Bovee v Posniewski Enters., Inc.*, 206 AD3d 1112, 1114-1115 [3d Dept 2022]; *Williams v Forward Realty Corp.*, 198 AD3d 503, 503-504 [1st Dept 2021]).

Moreover, while defendants submitted evidence that its employees generally maintained storm drains, including by cleaning them out and reporting missing grates, their submissions failed to establish when the storm drain into which plaintiff fell was last cleaned out or inspected (*see Farrauto*, 143 AD3d at 1293); that reasonable care did not require any such inspection (*see id.*; *cf. Pommerenck v Nason*, 79 AD3d 1716, 1717-1718 [4th Dept 2010]; *see generally Catalano v Tanner*, 23 NY3d 976, 977 [2014]); or that the uncovered storm drain would not have been visible upon a reasonable inspection (*see O'Bryan v Tonawanda Hous. Auth.*, 140 AD3d 1702, 1703 [4th Dept 2016]; *cf. Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 857-858 [4th Dept 2005]).

Finally, we conclude that the court's consideration of an alternative ground for granting summary judgment to defendants, i.e., that they lacked prior written notice of the alleged defect under a prior notification law, was improper because defendants did not seek summary judgment on that ground (*see McDonald v Whitney Highland Homeowners' Assn., Inc.*, 158 AD3d 1229, 1231 [4th Dept 2018]; *Gilberti v Town of Spafford*, 117 AD3d 1547, 1550 [4th Dept 2014]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1038

CA 22-00210

PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

CRAIG J. ZICARI AND ANNE C. COON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

GRAEME R. BUCKLEY, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (KRISTEN DOMBROSKI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

OSBORNE, REED & BURKE, LLP, ROCHESTER (MICHAEL C. PRETSCH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Gail Donofrio, J.), entered January 14, 2022. The order granted the motion of defendant Graeme R. Buckley for summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is modified on the law by denying in part the motion of defendant Graeme R. Buckley and reinstating the first and fifth causes of action against him and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Craig J. Zicari (plaintiff) when he was attacked by a dog owned by defendant Graeme R. Buckley (defendant) and, while retreating from the dog, he fell down the front steps of defendant's home. Defendant moved for summary judgment dismissing the complaint against him, contending, inter alia, that plaintiff's first cause of action, alleging strict liability for the dog attack, should be dismissed on the ground that defendant was not aware that the dog had vicious propensities and that plaintiff's second cause of action, alleging premises liability related to maintenance of the front steps, should be dismissed on the ground that plaintiff's allegations were based on speculation and unsupported as a matter of law. Supreme Court granted the motion. Plaintiffs appeal.

We conclude that defendant failed to meet his initial burden on that part of the motion seeking to dismiss the first cause of action because defendant failed to establish that he neither knew nor should have known that the dog had any vicious propensities (*see Young v Grizanti*, 164 AD3d 1661, 1662 [4th Dept 2018]; *cf. Brady v Contangelo*, 148 AD3d 1544, 1546 [4th Dept 2017]).

In support of the motion, defendant submitted plaintiff's deposition testimony that, while plaintiff was at defendant's door, the dog came running and was barking, pushed the door open, and lunged at plaintiff, biting him in the right thigh. After plaintiff was on the ground, having been knocked to the bottom of the front steps, the dog bit the back of plaintiff's left leg and then his calf. Plaintiff further testified that, immediately after the incident, defendant told plaintiff, who was wearing a winter coat at the time of the attack, that "the dog doesn't like people who wear coats." Plaintiff also testified that defendant told him that "the dog was protective." Defendant further submitted the deposition testimony of defendant Jennifer McMahon, who lived in the home and was familiar with the dog, that the dog was "protective" of the persons who lived in the home and that, when a stranger was present in the house, the dog would get in front of a member of the household to protect him or her. That evidence, combined with the evidence of the unprovoked and vicious nature of the attack and the severity of the injuries sustained by plaintiff, is "sufficient to raise triable issues of fact as to whether the dog[] had vicious propensities and whether. . . defendant[] knew or should have known of them" (*Francis v Becker*, 50 AD3d 1507, 1508 [4th Dept 2008] [internal quotation marks omitted]). We note that "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 v Zambito*, 1 NY3d 444, 447 [2004]).

We thus conclude that defendant failed to meet his initial burden on that part of the motion, and we further conclude that, in any event, plaintiff raised an issue of fact whether defendant knew or should have known of the dog's alleged vicious propensities (*see McLane v Jones*, 21 AD3d 1376, 1377 [4th Dept 2005]). Plaintiff submitted the dog's veterinary records, which indicated that the dog had prior, known "territor[i]al issues," that the dog was "barking a lot at people he [did] not like," and that it was recommended to defendant that he engage in daily "socialization exercises" with the dog.

Contrary to plaintiff's further contention, however, we conclude that defendant met his initial burden on that part of the motion seeking to dismiss the second cause of action by demonstrating that plaintiff could not identify the alleged negligent maintenance of the steps as a cause of his fall without engaging in speculation (*see generally Conners v LMAC Mgt. LLC*, 189 AD3d 2071, 2072 [4th Dept 2020]). In support of his motion, defendant submitted plaintiff's deposition testimony in which he testified that the dog's lunging at him "caused [him] to fall" by "forcing [him] back" and making him turn to avoid the dog. Plaintiff testified that he was "not sure" whether he stepped on the front steps when he turned, but that there was an accumulation of snow or ice on the steps, and that he "could have just stepped on [the steps] and slipped or something like that." Plaintiff's deposition testimony was thus inconclusive and speculative as to whether the condition of the steps was a cause of his fall (*see*

generally id. at 2073).

We further conclude that plaintiff's submissions in opposition to the motion failed to raise a triable issue of fact on the second cause of action. Plaintiff's affidavit submitted in opposition to the motion "merely raised a feigned issue of fact designed to avoid the consequences of [his] earlier deposition testimony" (*Mallen v Dekalb Corp.*, 181 AD3d 669, 670 [2d Dept 2020]). Thus, we conclude that the court properly granted that part of defendant's motion dismissing the second cause of action.

We therefore modify the order by denying in part defendant's motion and reinstating the first and fifth causes of action, for strict liability and loss of consortium, against him.

All concur except PERADOTTO and MONTOUR, JJ., who dissent in part and vote to affirm in accordance with the following memorandum: Craig J. Zicari (plaintiff), who was canvassing for signatures on a political petition in cold weather while wearing a winter coat, approached the house of Graeme R. Buckley (defendant), stepped up onto the front porch, and rang the doorbell, following which defendant answered the door and plaintiff asked to see defendant's tenant to obtain her signature. When the tenant opened the door and plaintiff reached in to hand her something, defendant's dog came running around the tenant from inside the house, barking, and attacked plaintiff, who sustained a bite to his right leg, fell backward down the stairs of the porch, and then sustained two additional bites to his left leg. Plaintiffs commenced this action alleging, as relevant here, that defendant was strictly liable for plaintiff's injuries. Supreme Court granted defendant's motion for summary judgment dismissing the complaint against him, and the majority now modifies the order by denying the motion in part and reinstating the strict liability cause of action and, consequently, a derivative cause of action. We respectfully dissent in part, because, contrary to the majority's determination, defendant established as a matter of law that he lacked actual or constructive knowledge of any vicious propensities on the part of the dog and plaintiffs failed to raise a triable issue of fact. We would therefore affirm the order in its entirety.

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]). Such knowledge "may . . . be established by proof of prior acts of a similar kind of which the owner had notice" (*id.*). "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' " (*id.*, quoting *Dickson v McCoy*, 39 NY 400, 403 [1868]). Thus, even "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—albeit only when such proclivity results in the injury giving rise to the lawsuit" (*id.* at 447; *see Long v Hess*, 162 AD3d 1646, 1646-1647 [4th Dept 2018]).

" 'Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl or snap or bare its teeth, the manner in which the dog was restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm' " (*Christopher P. v Kathleen M.B.*, 174 AD3d 1460, 1460 [4th Dept 2019]; *see Bard v Jahnke*, 6 NY3d 592, 597 [2006]; *Collier*, 1 NY3d at 447). "In contrast, 'normal canine behavior' such as 'barking and running around' does not amount to vicious propensities" (*Brady v Contangelo*, 148 AD3d 1544, 1546 [4th Dept 2017], quoting *Collier*, 1 NY3d at 447; *see Long*, 162 AD3d at 1647; *Bloom v Van Lenten*, 106 AD3d 1319, 1321 [3d Dept 2013]).

Here, defendant's submissions in support of the motion, including the deposition testimony of defendant and the tenant, establish that the dog was a gentle, well-behaved family dog, who was not aggressive, menacing, or intimidating, was not a guard dog, and had never growled at, nipped, or bitten anyone before (*see Collier*, 1 NY3d at 447; *cf. Francis v Becker*, 50 AD3d 1507, 1507 [4th Dept 2008]). Neither defendant nor the tenant had ever observed the dog exhibit any aggressive behavior in the past. In sum, defendant established that the dog had not previously behaved in a threatening or menacing manner (*see Collier*, 1 NY3d at 447).

The majority nonetheless cites evidence in defendant's submissions that defendant and the tenant characterized the dog as protective and having a dislike of people wearing coats, but conspicuously absent from the majority's analysis is any explanation of how these characteristics reflect a " 'propensity to do any act that might endanger the safety of the persons and property of others in a given situation' " (*id.* at 446; *cf. Kidder v Moore*, 77 AD3d 1303, 1303-1304 [4th Dept 2010]; *Grillo v Williams*, 71 AD3d 1480, 1481 [4th Dept 2010]). The tenant explained that the dog was protective to the extent that, in the presence of a stranger inside the house, he would occasionally position himself between people known to him and the stranger. Such behavior, however, was not accompanied by any aggressiveness or growling, and thus the dog's placid mannerism of placing himself between familiar people and strangers is consistent with nothing more than "normal canine behavior" (*Collier*, 1 NY3d at 447; *see Spinosa v Beck*, 77 AD3d 1426, 1427 [4th Dept 2010]; *cf. Kidder*, 77 AD3d at 1303-1304; *Grillo*, 71 AD3d at 1481). Similarly, the dog's reported dislike of people wearing coats did not "reflect[] a proclivity to act in a way that puts others at risk of harm" inasmuch as defendant did not say whether the dog had previously growled at people in coats, the tenant never observed the dog exhibit any behavior toward someone wearing a coat, and the dog had never growled at or acted aggressively toward anyone (*see Collier*, 1 NY3d at 447). Absent any indicia that the dog had vicious propensities, the majority cannot properly rely solely on the evidence of the unprovoked and vicious nature of the attack and the severity of plaintiff's injuries as raising triable issues of fact whether the dog had vicious propensities and whether defendant knew or should have known of them (*cf. Francis*, 50 AD3d at 1507-1508).

Plaintiffs opposed the motion by relying on—along with other evidence that is facially insufficient to raise an issue of fact—a notation in veterinary records recommending daily socialization exercises for the dog when he was nearly 11 months old and a separate notation indicating that, when he was just over one year old, some 3½ years before the subject incident, the dog had exhibited territorial issues by barking at people he did not like. There was no suggestion, however, that such barking was aggressive or threatening or accompanied by any growling or other indicia of vicious propensities, or that the veterinary recommendation to socialize the dog when he was a puppy was the result of any such behavior, and thus the case law relied upon by plaintiffs and the majority is distinguishable (*cf. Grillo*, 71 AD3d at 1481; *McLane v Jones*, 21 AD3d 1376, 1377 [4th Dept 2005]). As the Court of Appeals has stated, "nothing in our case law suggests that the mere fact that . . . a dog previously barked at people is sufficient to raise a triable issue of fact as to whether it had vicious propensities" (*Collier*, 1 NY3d at 447). We thus conclude that plaintiffs failed to raise a triable issue of fact in response to defendant's prima facie showing.

Consequently, contrary to the majority's determination, the court properly concluded that there is no triable issue of fact whether defendant had actual or constructive knowledge of any vicious propensities on the part of the dog and properly granted defendant's motion.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

1040

KA 18-01776

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VERNON ROBERTS, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered May 17, 2018. The judgment convicted defendant upon a jury verdict of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). Defendant contends that he is entitled to a new trial because County Court failed to address a potential taint of the jury pool after certain comments were made by a prospective juror. Although, as defendant correctly concedes, he failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v Rosario*, 184 AD3d 676, 677 [2d Dept 2020], *lv denied* 35 NY3d 1069 [2020]; *People v Owens*, 288 AD2d 930, 930 [4th Dept 2001], *lv denied* 97 NY2d 707 [2002]), we exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). After the prospective juror was excused, defendant did not seek any relief from the court with respect to the purportedly tainted panel and instead "participated in . . . jury selection, during which time the prospective jurors were thoroughly questioned on their . . . potential biases, and [defendant] acquiesced to the selected jurors being sworn without objection" (*People v Hassan*, 159 AD3d 1390, 1390 [4th Dept 2018], *lv denied* 31 NY3d 1148 [2018]). Consequently, "the impartiality of the jurors ultimately chosen to serve was assured by the conduct of the selection process" (*People v Pepper*, 59 NY2d 353, 358 [1983]).

Contrary to defendant's further contention, the court did not abuse its discretion in declining to appoint standby counsel after granting defendant's request to represent himself at trial (*see People*

v Coffee, 151 AD3d 1837, 1838 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]). It is well settled that while the United States and New York State Constitutions "afford a defendant the right to counsel or to self-representation, they do not guarantee a right to both. These are 'separate rights depicted on the opposite sides of the same [constitutional] coin. To choose one obviously means to forego the other' . . . Thus, a defendant who elects to exercise the right to self-representation is not guaranteed the assistance of standby counsel during trial" (*People v Rodriguez*, 95 NY2d 497, 501 [2000]; *see People v Brown*, 6 AD3d 1125, 1126 [4th Dept 2004], *lv denied* 3 NY3d 657 [2004]).

We reject defendant's contention that the police officer who arrested him had stopped him and frisked him in violation of his constitutional rights, and we reject his further contention that the court erred in refusing to suppress the evidence that the officer seized from defendant. To the contrary, we conclude that, based upon the totality of the circumstances, the officer was justified in forcibly detaining defendant momentarily in order to confirm or dispel the officer's reasonable suspicion of defendant's involvement in the reported incident (*see People v Pruitt*, 158 AD3d 1138, 1139 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]; *People v Carson*, 122 AD3d 1391, 1391-1392 [4th Dept 2014], *lv denied* 25 NY3d 1161 [2015]; *People v Evans*, 34 AD3d 1301, 1302 [4th Dept 2006], *lv denied* 8 NY3d 845 [2007]).

Moreover, contrary to defendant's contention, the officer was justified in patting defendant down for weapons to ensure officer safety, given the nature of the dispatch as a burglary, the presence of defendant near the scene, and defendant's inability to explain where he was going to or coming from (*see People v Clinkscales*, 83 AD3d 1109, 1109 [3d Dept 2011], *lv denied* 17 NY3d 815 [2011]; *see generally People v Mack*, 26 NY2d 311, 317 [1970], *cert denied* 400 US 960 [1970]). In any event, the officer did not seize the items that he removed from defendant's vest pocket at that time; rather, he viewed them to ensure that they were not weapons and then put them back in defendant's pocket. The seizure of the items occurred after the victim identified defendant as the perpetrator of the crime and was a valid seizure incident to defendant's lawful arrest based on probable cause (*see generally People v Muldrow*, 222 AD2d 1076, 1076 [4th Dept 1995], *lv denied* 88 NY2d 882 [1996]). Contrary to defendant's contention, the showup identification procedure was not unduly suggestive (*see People v Dogan*, 154 AD3d 1314, 1316 [4th Dept 2017], *lv denied* 30 NY3d 1115 [2018]; *People v Davis*, 48 AD3d 1120, 1122 [4th Dept 2008], *lv denied* 10 NY3d 957 [2008]), and thus the court properly refused to suppress the identification testimony of the victim.

We reject defendant's contention that the evidence is legally insufficient to support the conviction. Viewing the evidence in the light most favorable to the People (*see People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]), we conclude that there is a valid line of reasoning and permissible inferences that could lead the jury to conclude that defendant entered the victim's house with the

intent to steal property (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, 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]), including the evidence that defendant was found in spatial and temporal proximity to the crime scene and that he possessed items stolen from the victim, we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his further contention that the court penalized him for exercising his right to a trial (*see People v Shay*, 85 AD3d 1708, 1709 [4th Dept 2011], *lv denied* 17 NY3d 822 [2011]). In any event, that contention is without merit (*see People v Jurjens*, 291 AD2d 839, 840 [4th Dept 2002], *lv denied* 98 NY2d 652 [2002]). Finally, the sentence is not unduly harsh or severe.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

1041

KA 20-00597

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN BULLOCK, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN R. LEWIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered February 28, 2020. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree, criminally using drug paraphernalia in the second degree, and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]), criminal possession of a controlled substance in the third degree (§ 220.16 [1]), criminally using drug paraphernalia in the second degree (§ 220.50 [3]), and endangering the welfare of a child (§ 260.10 [1]). The conviction arose from an incident in which police officers, while on proactive patrol of an apartment complex located in an area known for drug and gang activity and for which the police had a trespass affidavit on file, pulled alongside a parked vehicle, at which point the front passenger—later identified as defendant—quickly exited the vehicle and advanced toward the officers. About the same time, a six-year-old girl, who was crying and distraught, exited from the back seat of the vehicle, and an adult female—later identified as the codefendant—exited from the driver's seat. One of the officers conducted a frisk search of defendant, which revealed two cell phones and approximately $9,000 in cash; however, that tangible evidence was later suppressed by County Court. The officer also approached the vehicle and, looking through the front passenger window, noticed a white powdery substance on the front passenger seat that appeared—and was later confirmed—to be cocaine. A further search of the vehicle revealed a plastic bag containing a large amount of pressed cocaine, a

glass measuring cup, a large digital scale with white residue on its surface, cash and cell phones, and an additional quantity of pressed cocaine.

Defendant contends that the integrity of the second grand jury proceeding, which was brought by the People to obtain a superseding indictment following suppression of the abovementioned tangible evidence, was impaired because the People presented the suppressed evidence, and that the court thus erred in denying his motion to dismiss the superseding indictment (*see* CPL 210.35 [5]). We reject that contention. It is well established that, during a grand jury presentation, "not every improper comment, elicitation of inadmissible testimony, impermissible question or mere mistake renders an indictment defective. Typically, the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment" (*People v Huston*, 88 NY2d 400, 409 [1996]). Here, although the evidence of defendant's possession of two cell phones and $9,000 in cash on his person was inadmissible given that it had been suppressed, we conclude that the remaining evidence presented at the second grand jury proceeding was sufficient to sustain the superseding indictment (*see People v Cruz-Rivera*, 174 AD3d 1512, 1513 [4th Dept 2019], *lv denied* 34 NY3d 1127 [2020]; *People v Elioff*, 110 AD3d 1477, 1478 [4th Dept 2013], *lv denied* 22 NY3d 1040 [2013]; *People v Peck*, 96 AD3d 1468, 1469 [4th Dept 2012], *lv denied* 21 NY3d 1008 [2013]).

Defendant next contends that the prosecutor's exercise of peremptory challenges with respect to three prospective jurors of color constituted a *Batson* violation because the primary basis for those challenges was pretextual. Initially, inasmuch as the prosecutor offered race-neutral reasons for each challenge and the court thereafter "ruled on the ultimate issue" by determining that those reasons were not pretextual, the issue of the sufficiency of defendant's prima facie showing of discrimination at step one of the *Batson* test is moot (*People v Smocum*, 99 NY2d 418, 423 [2003]; *People v Jiles*, 158 AD3d 75, 78 [4th Dept 2017], *lv denied* 31 NY3d 1149 [2018]; *cf. People v Bridgeforth*, 28 NY3d 567, 575-576 [2016]). With respect to step two, "[t]he burden . . . is minimal, and the explanation must be upheld if it is based on something other than the juror's race, gender, or other protected characteristic" (*People v Smouse*, 160 AD3d 1353, 1355 [4th Dept 2018]; *see Hernandez v New York*, 500 US 352, 360 [1991]; *People v Payne*, 88 NY2d 172, 183 [1996]). "To satisfy its step two burden, the nonmovant need not offer a persuasive or even a plausible explanation but may offer *any facially neutral reason* for the challenge—even if that reason is ill-founded—so long as the reason does not violate equal protection" (*Smouse*, 160 AD3d at 1355 [internal quotation marks omitted]; *see Purkett v Elem*, 514 US 765, 767-768 [1995]; *Payne*, 88 NY2d at 183). "[A]t step three, the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the peremptory strike was pretextual and whether the movant has shown purposeful discrimination" (*Bridgeforth*, 28 NY3d at 571; *see People v Hecker*, 15 NY3d 625, 634-635 [2010], *cert denied* 563 US 947 [2011]).

Here, the People met their burden of offering a facially race-neutral explanation for the challenges. Indeed, defendant does not argue otherwise on appeal. The prosecutor explained that the prospective jurors were originally from out-of-state locations, rather than the community where the crimes occurred, and the prosecutor had found that persons with longer ties to the community were more concerned about drugs in the area (*see People v Stith*, 203 AD3d 1640, 1641 [4th Dept 2022], *lv denied* 38 NY3d 1036 [2022]; *see generally Payne*, 88 NY2d at 185; *People v Feliciano*, 228 AD2d 519, 519 [2d Dept 1996], *lv denied* 88 NY2d 1068 [1996]). The prosecutor also relied on additional reasons, with respect to the prospective jurors in question, supporting the exercise of the peremptory challenges—reasons that, as the People correctly point out, defendant does not address on appeal. After one prospective juror stated to the court during voir dire that he had previously used a baseball bat against someone who was trying to stab him and that a resulting criminal charge against him had been dismissed based on self-defense, but that he did not hold any grudges against law enforcement officers or the District Attorney's Office, the prosecutor subsequently provided a race-neutral explanation for peremptorily striking that prospective juror on the ground that she did not want someone with such experience on the jury (*see People v Bridges*, 185 AD3d 1426, 1427 [4th Dept 2020], *lv denied* 35 NY3d 1111 [2020]). The prosecutor's additional explanations for peremptorily challenging the other two prospective jurors were race-neutral reasons (*see generally Hecker*, 15 NY3d at 663-664).

We reject defendant's contention that the court erred at step three. A "trial court's determination whether a proffered race-neutral reason is pretextual is accorded 'great deference' on appeal" (*Hecker*, 15 NY3d at 656), and we see no reason on this record to disturb the court's determination that the prosecutor's explanations were not pretextual (*see People v Escobar*, 181 AD3d 1194, 1196 [4th Dept 2020], *lv denied* 35 NY3d 1044 [2020]). The record establishes that the prosecutor consistently exercised peremptory challenges against similarly situated prospective jurors, irrespective of color, inasmuch as the prosecutor also challenged two other panelists, who are not subjects of defendant's *Batson* challenge, on the ground that those panelists were originally from out-of-state locations (*see People v Hodges*, 99 AD3d 629, 629 [1st Dept 2012], *lv denied* 20 NY3d 1062 [2013]; *see also Jiles*, 158 AD3d at 79). Defendant also failed to meet his ultimate burden of persuasion that any of the additional reasons provided with respect to each prospective juror were pretextual (*see Hecker*, 15 NY3d at 663-665).

Defendant also contends that his constitutional right to confront witnesses against him was violated at trial when the prosecutor during cross-examination of defendant referenced and elicited testimony that the non-testifying codefendant had pleaded guilty to having acted in concert with defendant. As defendant correctly concedes, that contention is not preserved for our review because defendant failed to raise any objection that the prosecutor's questions and the elicited testimony violated his right of confrontation (*see* CPL 470.05 [2]; *People v Liner*, 9 NY3d 856, 856-857 [2007], *rearg denied* 9 NY3d 941

[2007]; *People v Bullard-Daniel*, 203 AD3d 1630, 1631 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]). 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]; *Bullard-Daniel*, 203 AD3d at 1631).

Relatedly, defendant contends that defense counsel's failure to object to the prosecutor's questions and the elicited testimony about the codefendant's guilty plea and to move for a mistrial on the ground that defendant's right of confrontation was violated constituted ineffective assistance of counsel. We reject that contention. "A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152 [2005]). "To rise to that level, the omission must typically involve an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it, and it must be evident that the decision to forgo the contention could not have been grounded in a legitimate trial strategy" (*People v McGee*, 20 NY3d 513, 518 [2013]). Thus, "[t]o prevail on his ineffective assistance of counsel claim on the basis of this single failure to object, defendant must show both that the objection omitted by trial counsel is a winning argument, here one that would have required a mistrial . . . , and that the objection was one that no reasonable defense lawyer, in the context of the trial, could have thought to be 'not worth raising' " (*People v Brown*, 17 NY3d 742, 743-744 [2011]).

Here, we conclude that defendant has "failed to meet his burden of demonstrating a lack of strategic or other legitimate reasons for his defense lawyer's failure to object" (*id.* at 744). Defendant, against defense counsel's advice, decided to testify on his own behalf in narrative form and therein revealed that he had been charged jointly with the codefendant, who had already admitted her guilt. Defense counsel may therefore have legitimately thought as a matter of strategy that it was best to allow the jury to hear that the codefendant had accepted responsibility via a guilty plea, which was consistent with defendant's defense that the codefendant was entirely to blame for the contraband and that he should be absolved (*see generally id.*). If, alternatively, defense counsel considered that it would be damaging to the defense to allow the jury to hear that the codefendant had pleaded guilty to acting in concert with defendant, we conclude that "[d]efense counsel may have had a strategic reason for failing to object inasmuch as defense counsel may not have wished to call further attention to that very brief testimony" (*People v Basedow*, 207 AD3d 1192, 1193 [4th Dept 2022]).

Finally, defendant contends that he was denied a fair trial by prosecutorial misconduct when the People presented suppressed evidence during the second grand jury proceeding and when the prosecutor referenced and elicited testimony from defendant at trial that the codefendant had pleaded guilty to acting in concert with defendant. Defendant failed to preserve for our review his contention that he was denied a fair trial by the alleged instances of prosecutorial misconduct at trial (*see* CPL 470.05 [2]; *People v Vanalst*, 148 AD3d

1658, 1660 [4th Dept 2017], *lv denied* 29 NY3d 1088 [2017]), and we decline to exercise our power to review defendant's contention with respect to those alleged instances as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We further conclude that any improprieties at the second grand jury proceeding "were not so pervasive or egregious as to deprive defendant of a fair trial" (*Vanalst*, 148 AD3d at 1660 [internal quotation marks omitted]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

1043

KA 17-00344

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. DESMOND, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered October 19, 2016. The judgment convicted defendant upon a jury verdict of burglary in the second degree and robbery in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]) and robbery in the third degree (§ 160.05), defendant contends that the showup identification procedures involving the two victims were unduly suggestive and therefore County Court erred in refusing to suppress identification evidence. To the extent that it is preserved for our review (*see* CPL 470.05 [2]; *People v Ortiz*, 90 NY2d 533, 536-537 [1997]; *People v Johnson*, 192 AD3d 1612, 1613 [4th Dept 2021], *lv denied* 38 NY3d 1071 [2022]), we reject defendant's contention. "The showup procedure[s] w[ere] reasonable under the circumstances because [they were] conducted in geographic and temporal proximity to the crime" (*People v Nance*, 132 AD3d 1389, 1390 [4th Dept 2015], *lv denied* 26 NY3d 1091 [2015] [internal quotation marks omitted]; *see People v Johnson*, 198 AD3d 1320, 1321 [4th Dept 2021]; *People v Santiago*, 83 AD3d 1471, 1471 [4th Dept 2011], *lv denied* 17 NY3d 800 [2011]). Moreover, the visual showup procedure involving one of the victims was not rendered unduly suggestive by the fact that defendant was in handcuffs and was illuminated—in the middle of the night—by the police vehicle's high beams (*see People v Crittenden*, 179 AD3d 1543, 1544 [4th Dept 2020], *lv denied* 35 NY3d 969 [2020]; *Nance*, 132 AD3d at 1390; *cf. People v Cruz*, 129 AD3d 119, 123 [1st Dept 2015], *lv denied* 26 NY3d 971 [2015]).

We also conclude that the voice identification procedure

involving the other victim was not unduly suggestive. A voice identification is governed by the same due process guarantees as other identification procedures (*see People v Greco*, 230 AD2d 23, 30 [4th Dept 1997], *lv denied* 90 NY2d 858 [1997], *reconsideration denied* 90 NY2d 940 [1997]; *People v Shepard*, 162 AD2d 226, 226 [1st Dept 1990], *lv denied* 76 NY2d 944 [1990]). Here, the police did not "convey[ ] their beliefs or otherwise suggest[ ] . . . defendant's guilt to the" victim (*People v Collins*, 60 NY2d 214, 219 [1983]). Although the victim's degree of confidence in his identification of defendant as the intruder increased as defendant continued to talk, until the victim became "definitely sure," at no time did the police pressure the victim into making an identification. Based on the totality of the circumstances, we conclude that the voice identification procedure was not unduly suggestive.

Defendant further contends that the evidence is legally insufficient to support the conviction and that the matter must be remitted for a ruling on his motion for a trial order of dismissal, with respect to the second count of the indictment, i.e., the burglary in the second degree count of which he was convicted. At the close of the People's case, defendant moved for a trial order of dismissal, arguing, inter alia, that the People failed to make a prima facie case with respect to the second count of the indictment. There is no indication in the record that the court ruled on that part of defendant's motion. We lack the power to review defendant's contention that the evidence is legally insufficient to support the conviction of burglary in the second degree because, "in accordance with *People v Concepcion* (17 NY3d 192, 197-198 [2011]) and *People v LaFontaine* (92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]), we cannot deem the court's failure to rule on the . . . motion as a denial thereof" (*People v Moore*, 147 AD3d 1548, 1548 [4th Dept 2017] [internal quotation marks omitted]; *see People v White*, 134 AD3d 1414, 1415 [4th Dept 2015]; *see generally People v Spratley*, 96 AD3d 1420, 1421 [4th Dept 2012]). We therefore hold the case, reserve decision, and remit the matter to County Court for a ruling on that part of the motion (*see Moore*, 147 AD3d at 1548; *White*, 134 AD3d at 1415). In light of our determination, we do not address defendant's remaining contentions.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1044

KA 19-02110

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TREVER E. ANDERSON, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE 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 (Victoria M. Argento, J.), rendered June 27, 2019. The judgment convicted defendant upon a jury verdict of strangulation in the second degree and aggravated family offense (seven counts).

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 one count of strangulation in the second degree (Penal Law § 121.12) and seven counts of aggravated family offense (§ 240.75). Contrary to defendant's contention, viewing the evidence in light of the elements of the crime of strangulation in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's further contention that Supreme Court erred in permitting the People to introduce *Molineux* evidence related to prior incidents of domestic violence between defendant and the complainant. The court properly concluded that the evidence "provided necessary background information on the nature of the relationship and placed the charged conduct in context" (*People v Dorm*, 12 NY3d 16, 19 [2009]; *see People v Swift*, 195 AD3d 1496, 1499 [4th Dept 2021], *lv denied* 37 NY3d 1030 [2021]; *see generally People v Frankline*, 27 NY3d 1113, 1115 [2016]), and was relevant to the issue of defendant's intent (*see Dorm*, 12 NY3d at 19; *People v Cung*, 112 AD3d 1307, 1310 [4th Dept 2013], *lv denied* 23 NY3d 961 [2014]). We further conclude that the court did not abuse its discretion in determining that the probative value of the evidence outweighed its potential for prejudice to defendant (*see Dorm*, 12 NY3d at 19; *see generally People v Alvino*,

71 NY2d 233, 242 [1987]), and that the court's repeated limiting instructions minimized any such prejudice (*see People v Murray*, 185 AD3d 1507, 1508 [4th Dept 2020], *lv denied* 36 NY3d 974 [2020]; *People v Matthews*, 142 AD3d 1354, 1356 [4th Dept 2016], *lv denied* 28 NY3d 1125 [2016]).

Contrary to defendant's contention, we conclude that the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). We have reviewed defendant's remaining contentions and conclude that they do not warrant modification or reversal of the judgment.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

1045

KA 21-01632

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAVION A. PETERS, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Thomas E. Moran, J.), rendered June 28, 2021. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment, entered after a violation of probation hearing, revoking the sentence of probation imposed on his conviction of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]) and sentencing him to a determinate term of incarceration, followed by a period of postrelease supervision. We affirm.

We reject defendant's contention that he was deprived of effective assistance of counsel with respect to sentencing. We conclude that "no statement made by defense counsel at sentencing 'would have had an impact on the sentence imposed' " (*People v Saladeen*, 12 AD3d 1179, 1180 [4th Dept 2004], *lv denied* 4 NY3d 767 [2005]; *see People v Barksdale*, 191 AD3d 1370, 1373 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]; *People v Agee*, 129 AD3d 1559, 1561 [4th Dept 2015]). Based on our review of the entire record, we conclude that " 'the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that [defendant's attorneys] provided meaningful representation' " with respect to sentencing (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Baldi*, 54 NY2d 137, 147 [1981]).

The sentence is not unduly harsh or severe.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1048

KA 18-02057

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES THOMAS, JR., DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE 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 April 25, 2018. The judgment convicted defendant upon a jury verdict of criminal sexual act in the third degree (two counts) and rape 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 two counts of criminal sexual act in the third degree (Penal Law § 130.40 [2]) and one count of rape in the third degree (§ 130.25 [2]). We affirm.

We reject defendant's contention that Supreme Court's *Sandoval* ruling constituted an abuse of discretion (*see generally People v Sandoval*, 34 NY2d 371, 374 [1974]). Contrary to defendant's contention, "an exercise of a trial court's *Sandoval* discretion should not be disturbed merely because the court did not provide a detailed recitation of its underlying reasoning" (*People v Walker*, 83 NY2d 455, 459 [1994]; *see People v Scott*, 189 AD3d 2062, 2063 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]), particularly where, as here, "the basis of the court's decision may be inferred from the parties' arguments" (*Walker*, 83 NY2d at 459). Further, we conclude that the convictions on which the court permitted inquiry were "probative of [defendant's] credibility inasmuch as such acts showed the 'willingness . . . [of defendant] to place the advancement of his individual self-interest ahead of principle or of the interests of society' " (*People v Turner*, 197 AD3d 997, 999 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]; *see Sandoval*, 34 NY2d at 377) and that defendant failed to meet his burden "of demonstrating that the prejudicial effect of the admission of evidence [of those convictions] for impeachment purposes would so far outweigh the probative worth of

such evidence on the issue of credibility as to warrant its exclusion" (*Sandoval*, 34 NY2d at 378; *see People v Green*, 197 AD3d 993, 996 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]). Contrary to defendant's further contention, the fact that defendant was the only possible witness for the defense concerning certain allegations "increased the importance of his credibility and his testimony," and did not require the court to prohibit any inquiry into his past convictions (*People v McLaurin*, 33 AD3d 819, 820 [2d Dept 2006], *lv denied* 7 NY3d 927 [2006]). In any event, we conclude that any error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant failed to preserve for our review his further contention that he was denied a fair trial based upon the cumulative effect of alleged improper comments made by the prosecutor during summation (*see generally People v Britt*, 34 NY3d 607, 616 [2019]; *People v Shire*, 77 AD3d 1358, 1359 [4th Dept 2010], *lv denied* 15 NY3d 955 [2010]). 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]).

Additionally, defendant contends that he was deprived of effective assistance of counsel because defense counsel, in response to defendant's pro se requests for assignment of new counsel, took an adverse position to him by disputing certain of his factual allegations, thereby creating a conflict of interest and undermining his credibility. We reject that contention. "Although an attorney is not obligated to comment on a client's pro se motions or arguments, he [or she] may address allegations of ineffectiveness [raised on a motion for substitution of counsel] 'when asked to by the court' and 'should be afforded the opportunity to explain his [or her] performance' " (*People v Washington*, 25 NY3d 1091, 1095 [2015]). Still, even though "defense counsel need not support a defendant's pro se motion for the assignment of new counsel, a defendant is denied the right to [effective, conflict-free] counsel when defense counsel becomes a witness against the defendant by taking a position adverse to the defendant in the context of such a motion" (*People v Fudge*, 104 AD3d 1169, 1170 [4th Dept 2013], *lv denied* 21 NY3d 1042 [2013]; *see People v Burney*, 204 AD3d 1473, 1475 [4th Dept 2022]). Defense counsel "takes a position adverse to his [or her] client when stating that the defendant's motion lacks merit" (*Washington*, 25 NY3d at 1095; *see People v Mitchell*, 21 NY3d 964, 966-967 [2013]). Here, we conclude that defense counsel did not take a position adverse to defendant on his requests for substitute counsel because, during the relevant colloquy, he merely denied defendant's open-court allegations against him and briefly outlined his efforts in representing defendant (*see Washington*, 25 NY3d at 1095; *People v Nelson*, 7 NY3d 883, 884 [2006]; *Burney*, 204 AD3d at 1475).

We conclude that the sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining contentions, and

conclude that they lack merit.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

1053

CA 21-01211

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

DOUGLAS EVANS AND WENDY EVANS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

OLD FORGE PROPERTIES, INC., DOING BUSINESS AS ENCHANTED FOREST WATER SAFARI AND TIMOTHY J. NOONAN, AS CHIEF EXECUTIVE OFFICER OF OLD FORGE PROPERTIES, INC., DEFENDANTS-RESPONDENTS.

HOGANWILLIG, PLLC, AMHERST (ROBERT P. HAMILTON, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

NASH CONNORS, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered July 27, 2021. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this negligence action to recover damages for injuries sustained by Douglas Evans (plaintiff) when he rode down a water slide at an amusement park. Plaintiffs appeal from an order that granted defendants' motion for summary judgment dismissing the complaint. We affirm.

Initially, we note that plaintiffs' challenge to the qualifications of defendants' expert, a water park safety consultant, is unpreserved inasmuch as plaintiffs failed to object on that ground before Supreme Court, and they may not raise that issue for the first time on appeal (*see Walker v Caruana*, 175 AD3d 1807, 1807 [4th Dept 2019]; *see generally Horton v Smith*, 51 NY2d 798, 799 [1980]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

We further conclude that the court properly granted defendants' motion and dismissed the complaint. Defendants satisfied their "initial burden of establishing that [they] did not create the alleged dangerous condition and did not have actual or constructive notice of it" (*Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1468 [4th Dept 2013] [internal quotation marks omitted]; *see generally Gordon v*

American Museum of Natural History, 67 NY2d 836, 837-838 [1986]; *Britt v Northern Dev. II, LLC*, 199 AD3d 1434, 1435-1436 [4th Dept 2021]). Although defendants concede that there had been an accident on the water slide about a year before plaintiff's accident, that single prior incident is insufficient to put defendants on notice of a purported recurrent, dangerous condition with respect to the water slide (*see Crawford v AMF Bowling Ctrs., Inc.*, 18 AD3d 798, 799 [2d Dept 2005]). In opposition, plaintiffs failed to raise a triable issue of fact with respect to whether defendants created or had notice of the alleged dangerous condition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In light of our determination, plaintiffs' remaining contention is academic.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

1055

CA 21-01237

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, AND OGDEN, JJ.

IN THE MATTER OF RUPP BAASE PFALZGRAF CUNNINGHAM LLC, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, RESPONDENT-RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (KEVIN J. FEDERATION OF COUNSEL), FOR PETITIONER-APPELLANT.

CAVETTE CHAMBERS, CORPORATION COUNSEL, BUFFALO (WILLIAM P. MATHEWSON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 26, 2021 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, denied the request of petitioner for attorney's fees.

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

Memorandum: In this CPLR article 78 proceeding to compel respondent to produce records requested by petitioner under the Freedom of Information Law (Public Officers Law art 6 [FOIL]), petitioner appeals from a judgment that, inter alia, denied its request for attorney's fees and litigation costs. We affirm.

A court may assess reasonable attorney's fees and other litigation costs against an agency in a FOIL proceeding where the requesting party "has substantially prevailed, and . . . the agency failed to respond to a request or appeal within the statutory time" (Public Officers Law § 89 [4] [c] [i]; *see Matter of Maziarz v Western Regional Off-Track Betting Corp.*, 207 AD3d 1065, 1065 [4th Dept 2022], *lv dismissed* 39 NY3d 980 [2023]). "Even if the party meets those requirements, the award of attorney's fees and litigation costs remains discretionary with the court" (*Maziarz*, 207 AD3d at 1065). Additionally, a court "shall assess" reasonable attorney's fees and other litigation costs against an agency where the requesting party "has substantially prevailed and the court finds that the agency had no reasonable basis for denying access" (§ 89 [4] [c] [ii]). "The language of [that part of] the statute is mandatory and not precatory, [and thus the court must award fees and costs] if the statutory requirements are met" (*Matter of Rauh v de Blasio*, 161 AD3d 120, 127 [1st Dept 2018]). Here, even assuming, arguendo, that petitioner has

substantially prevailed, we conclude upon our review of the record that, contrary to petitioner's contentions, Supreme Court did not abuse its discretion in denying its request for attorney's fees and litigation costs under the discretionary assessment provision of the statute (*see* § 89 [4] [c] [i]; *Maziarz*, 207 AD3d at 1066), and the court did not err in denying petitioner's request for such fees and costs under the mandatory assessment provision (*see* § 89 [4] [c] [ii]; *cf. Forsyth v City of Rochester*, 207 AD3d 1236, 1239-1240 [4th Dept 2022]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

3

KA 19-00813

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, BANNISTER, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA S. VANWUYCKHUYSE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 16, 2019. The judgment convicted defendant, upon a plea of guilty, of aggravated family offense.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of aggravated family offense (Penal Law § 240.75 [1]), arising from his violation of a no-contact order of protection in favor of a protected person. In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]), arising from an unrelated incident nearly a year later in which he operated a motor vehicle while intoxicated.

Defendant contends in appeal No. 1 that his plea was not knowingly and voluntarily entered because he negated an essential element in his factual recitation during the plea proceeding and Supreme Court erred in accepting his plea without curing the deficiency through further inquiry. We agree.

Preliminarily, although defendant failed to preserve his contention for our review because “his motion to withdraw his plea was made on grounds different from those advanced on appeal” (*People v Gibson*, 140 AD3d 1786, 1787 [4th Dept 2016], *lv denied* 28 NY3d 1072 [2016]), the narrow exception to the preservation requirement applies in this case (*see People v Lopez*, 71 NY2d 662, 666 [1988]; *People v*

Busch-Scardino, 158 AD3d 988, 988-989 [3d Dept 2018]).

With respect to the merits, "[w]hile 'trial courts are not required to engage in any particular litany during an allocution in order to obtain a valid guilty plea' . . . , 'where a defendant's factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered' " (*People v Worden*, 22 NY3d 982, 984 [2013]; *see Lopez*, 71 NY2d at 666). "Upon further inquiry, the court may accept the plea only if it determines the allocution sufficient" (*Matter of Silmon v Travis*, 95 NY2d 470, 474 n 1 [2000]; *see Lopez*, 71 NY2d at 666; *People v Bovio*, 206 AD3d 1568, 1569 [4th Dept 2022]).

"A person is guilty of aggravated family offense when [that person] commits a misdemeanor defined . . . as a specified offense," including criminal contempt in the second degree, and such person "has been convicted of one or more specified offenses within the immediately preceding five years" (Penal Law § 240.75 [1]; *see* § 240.75 [2]). Defendant's contention in appeal No. 1 is premised on the assertion that his factual recitation negated the mens rea element of criminal contempt in the second degree (§ 215.50 [3]), i.e., the specified offense underlying the aggravated family offense charge (§ 240.75 [1], [2]). A person is guilty of criminal contempt in the second degree pursuant to Penal Law § 215.50 (3) when, as relevant here, the person engages in "[i]ntentional disobedience or resistance to the lawful process or other mandate of a court," including an order of protection (*see generally People v Cajigas*, 19 NY3d 697, 701 [2012]). "A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when [that person's] conscious objective is to cause such result or to engage in such conduct" (§ 15.05 [1]).

Here, the record establishes that defendant "stated during [the] plea allocution that [he] did not intend to violate the underlying order of protection, thus negating an element of criminal contempt in the [second] degree," which, as noted, was charged as the specified offense supporting the aggravated family offense count (*Busch-Scardino*, 158 AD3d at 989). In particular, after acknowledging his awareness of the valid and effective order of protection directing him to have no contact with the protected person, defendant stated that he "didn't intentionally violate" the order of protection by sending the protected person a letter and instead asserted that any violation "was unintentional." Following an off-the-record discussion between defendant and defense counsel, defendant admitted that sending the letter did, in fact, violate the order of protection, but the court did not inquire, and defendant never clarified, whether his conscious objective was to disobey the order of protection (*see id.*; *cf.* Penal Law § 15.05 [1]; *People v Blankenbaker*, 197 AD3d 1353, 1354-1355 [3d Dept 2021]). Contrary to the People's assertion, which "conflates the culpable mental states for acts done 'intentionally' (§ 15.05 [1]) and those done 'knowingly' (§ 15.05 [2])" (*People v Burman*, 173 AD3d 1727, 1728 [4th Dept 2019]), this is not a case in

which defendant's "further statements removed any doubt regarding th[e requisite] intent" (*People v Trinidad*, 23 AD3d 1060, 1061 [4th Dept 2005], *lv denied* 6 NY3d 760 [2005]; *see also Busch-Scardino*, 158 AD3d at 989).

Based on the foregoing, we conclude that the court erred in accepting defendant's guilty plea in appeal No. 1, and we therefore reverse the judgment of conviction, vacate the plea, and remit the matter to Supreme Court for further proceedings on the indictment. In light of our determination, we do not address defendant's remaining challenge to the voluntariness of the plea in appeal No. 1.

Contrary to defendant's contention in appeal No. 2, however, we conclude that reversal of the judgment of conviction and vacatur of that plea in appeal No. 1 does not warrant reversal of the judgment of conviction and vacatur of the separate plea in appeal No. 2 (*see People v Privitere*, 156 AD2d 971, 971 [4th Dept 1989]). Defendant pleaded guilty to the felony driving while intoxicated charge under a superior court information in appeal No. 2 with the express understanding that the sentence on the aggravated family offense charge under the indictment in appeal No. 1 would run consecutively to the sentence imposed on the felony driving while intoxicated conviction (*see id.*). Inasmuch as "defendant's plea [to felony driving while intoxicated in appeal No. 2], therefore, was not induced by the understanding that his sentence would be concurrent with the sentence for the conviction [of aggravated family offense in appeal No. 1], there is no basis for vacating the plea [in appeal No. 2]" (*People v Hemphill*, 229 AD2d 324, 324 [1st Dept 1996], *lv denied* 88 NY2d 1021 [1996]; *see People v Dinkins*, 118 AD3d 559, 559-560 [1st Dept 2014]; *Privitere*, 156 AD2d at 971; *cf. People v Pichardo*, 1 NY3d 126, 129 [2003]). Moreover, contrary to defendant's contention, "[t]he fact that [he] pleaded guilty [under] both the indictment [in appeal No. 1] and the superior court information [in appeal No. 2] as part of a single plea bargain does not change the result" (*People v Walker*, 148 AD3d 1569, 1569 [4th Dept 2017], *lv denied* 29 NY3d 1088 [2017]). " '[T]he pleas are severable, and each should be treated in accordance with its own legal status' " (*id.*; *see Dinkins*, 118 AD3d at 560; *see generally Privitere*, 156 AD2d at 971).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

8

KA 19-00814

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, BANNISTER, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA S. VANWUYCKHUYSE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 16, 2019. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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

Same memorandum as in *People v Vanwuyckhuyse* ([appeal No. 1] — AD3d — [Feb. 10, 2023] [4th Dept 2023]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

28

CAF 22-00138

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

IN THE MATTER OF ASHLEY BONILLA-WRIGHT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE WRIGHT, JR., RESPONDENT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR RESPONDENT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR PETITIONER-RESPONDENT.

JESSICA L. WRIGHT, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered December 10, 2021 in a proceeding pursuant to Family Court Act article 6. The order modified respondent's visitation with respect to the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first ordering paragraph to the extent that it conditions the resumption of unsupervised overnight weekend visitation on the participation of the father and the children in therapeutic counseling and by vacating the second ordering paragraph to the extent that it delegates authority to a supervising agency to determine the father's receipt of weekly supervised visitation, and as modified the order is affirmed and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order that modified the parties' prior order of custody and visitation. The prior order, in relevant part, granted respondent mother sole custody and primary physical residence of the subject children, with the father having weekend overnight visitation. After an argument that escalated to a physical encounter during a visitation exchange, in which the father punched the mother, the mother filed the instant petition seeking to modify the prior order by terminating the father's overnight visitation. Following a hearing, Family Court rendered a bench decision determining that a change in circumstances had occurred but that, despite some indication in the record that the children may have preferred not to see the father, continuation of weekly contact with the father was in the children's best interests. The court decided to reduce the father's visitation

by conditioning the resumption of unsupervised weekend overnight visitation on the participation of the father and the children in therapeutic counseling and, in the interim, providing one hour of supervised visitation per week at a particular supervised visitation agency.

Contrary to the father's contention, the court properly determined that the mother "establish[ed] the requisite change in circumstances warranting an inquiry into the best interests of the child" (*Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 33 NY3d 903 [2019]). The incident of domestic violence in the children's presence (*see Matter of Allen v Boswell*, 149 AD3d 1528, 1529 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]; *Matter of Pecore v Blodgett*, 111 AD3d 1405, 1405-1406 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]) and the deterioration of the father's relationship with the children (*see Rice*, 167 AD3d at 1530) constituted the requisite change in circumstances.

Although we reject the father's contention that the court erred in directing that the interim visitation be supervised (*see Matter of Edmonds v Lewis*, 175 AD3d 1040, 1042 [4th Dept 2019], *lv denied* 34 NY3d 909 [2020]), we agree with the father that the court erred in failing to set an appropriate supervised visitation schedule by implicitly leaving it to the agency to determine whether the father would receive any such visitation (*see Matter of Ordona v Cothern*, 126 AD3d 1544, 1545-1546 [4th Dept 2015]; *see also Rice*, 167 AD3d at 1530-1531). We therefore modify the order accordingly.

The father further contends that the court erred in making participation in therapeutic counseling a prerequisite to the resumption of unsupervised overnight weekend visitation. We agree. Initially, although the first ordering paragraph of the order on appeal does not clearly condition the resumption of unsupervised overnight weekend visitation on participation in therapeutic counseling, the court expressly imposed that condition in its bench decision. Where, as here, "there is a discrepancy between the order and the decision, the decision controls," and we therefore deem the condition included in the order (*see Matter of Sturnick v Hobbs*, 191 AD3d 1375, 1376 [4th Dept 2021]). "Although a court may include a directive to obtain counseling as a *component* of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation" (*Matter of Avdic v Avdic*, 125 AD3d 1534, 1535 [4th Dept 2015]; *see Matter of Lane v Rawleigh*, 188 AD3d 1772, 1773 [4th Dept 2020]; *Matter of Krier v Krier*, 178 AD3d 1372, 1374 [4th Dept 2019]). We therefore further modify the order accordingly, and we remit the matter to Family Court to fashion a specific and definitive schedule for visitation between the father and the children.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

30

CAF 21-01569

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

IN THE MATTER OF JOHN B. BRYANT AND BARBARA A. BRYANT, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TALIA O. KEPLER AND COREY J. KEPLER, RESPONDENTS-APPELLANTS.

KAMAN BERLOVE LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

MICHAEL D. SCHMITT, ROCHESTER, FOR PETITIONERS-RESPONDENTS.

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

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered October 14, 2021 in a proceeding pursuant to Domestic Relations Law article 5-a. The order, inter alia, determined that Florida is the home state of the subject child.

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

Memorandum: Respondents appeal from an order that, inter alia, granted petitioners' application seeking to register a child custody determination entered by a court in Florida and also determined that New York lacks jurisdiction over the parties' custody dispute because Florida is the subject child's home state (*see* Domestic Relations Law § 76 [1]).

We conclude that the appeal must be dismissed because it was not taken from an order of disposition and, therefore, is not appealable as of right (*see* Family Ct Act § 1112; *see generally Matter of Cheyenne C. [James M.]*, 185 AD3d 1517, 1518 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]; *Matter of James L.* [appeal No. 2], 74 AD3d 1775, 1775 [4th Dept 2010]). Specifically, the order on appeal expressly reserves to respondents the right to renew their request for a hearing pursuant to Domestic Relations Law § 77-d challenging petitioners' application to register the order entered in Florida. Consequently, the order is not dispositional—i.e., final (*see Ocasio v Ocasio*, 49 AD2d 801, 801 [4th Dept 1975], *appeal dismissed* 37 NY2d 921 [1975])—inasmuch as it "did not dispose of all the factual and legal issues raised in this action" (*Abasciano v Dandrea*, 83 AD3d 1542, 1544 [4th Dept 2011] [internal quotation marks omitted]; *see Town of*

Coeymans v Malphrus, 252 AD2d 874, 875 [3d Dept 1998]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

32

CAF 21-01551

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

IN THE MATTER OF ANDREW J. FANFARILLO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DAWN A. FANFARILLO, RESPONDENT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR RESPONDENT-APPELLANT.

MICHAEL G. PUTTER, ROME, FOR PETITIONER-RESPONDENT.

STEPHANIE N. DAVIS, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Paul M. Deep, J.), entered June 17, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded primary physical custody of the subject children to petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, modified a prior order entered on stipulation of the parties by awarding petitioner father primary physical custody of the children. Initially, we note that, contrary to the mother's contention, the gaps in the trial transcript resulting from inaudible parts of the audio recording "are not so significant as to preclude meaningful review of the order on appeal" (*Matter of Van Court v Wadsworth*, 122 AD3d 1339, 1340 [4th Dept 2014], *lv denied* 24 NY3d 916 [2015]; *see Matter of Vaccaro v Vaccaro*, 178 AD3d 1410, 1411 [4th Dept 2019]).

Contrary to the mother's contention, we conclude that the father established the requisite change in circumstances (*see Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 33 NY3d 903 [2019]; *Matter of DeJesus v Gonzalez*, 136 AD3d 1358, 1359 [4th Dept 2016], *lv denied* 27 NY3d 906 [2016]). To the extent that the mother challenges the merits of Family Court's best interests determination, we conclude that the children's best interests are served by awarding primary physical custody to the father (*see Matter of Miner v Torres*,

179 AD3d 1490, 1492 [4th Dept 2020]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

50

KA 18-02088

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RITCHY C. BELTRAN, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered July 23, 2018. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal. Supreme Court's oral colloquy mischaracterized the waiver as an absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Davis*, 188 AD3d 1731, 1731 [4th Dept 2020], *lv denied* 37 NY3d 991 [2021]). Although the record establishes that defendant executed a written waiver of the right to appeal, the written waiver did not cure the defects in the oral colloquy (*see Davis*, 188 AD3d at 1732).

Defendant contends that Penal Law § 265.03 (3) is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]). That contention is not preserved for our review (*see People v Wright*, — AD3d —, —, 2023 NY Slip Op 00510 [4th Dept 2023]; *People v Reese*, 206 AD3d 1461, 1462-1463 [3d Dept 2022]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* — US —, 137 S Ct 392 [2016]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Contrary to defendant's further contention, the court properly

refused to suppress the evidence found on his person after he was forcibly detained at gunpoint by the police. Given the totality of the circumstances—which include the short period of time between the 911 call from an identified caller reporting that shots were fired and the police officer's response to the reported location, one-half mile away; the officer's observations that defendant's physical characteristics and clothing matched the description of the suspect as a "short, heavy-set male" wearing dark clothing and traveling on foot; and the officer's report of no other pedestrian foot traffic in the area—the responding officer "was justified in forcibly detaining defendant in order to quickly confirm or dispel [his] reasonable suspicion of defendant's possible [possession of a weapon]" (*People v Pruitt*, 158 AD3d 1138, 1139 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018] [internal quotation marks omitted]; *see People v Wright*, 210 AD3d 1486, 1489 [4th Dept 2022]; *see generally People v De Bour*, 40 NY2d 210, 223 [1976]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

52

KA 14-01238

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATWANN EVERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS M. LEITH 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 (Joseph E. Fahey, J.), rendered June 23, 2014. The judgment convicted defendant upon a jury verdict of assault in the first degree (two counts), attempted robbery in the first degree (two counts) and criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Everson* ([appeal No. 2] — AD3d — [Feb. 10, 2023] [4th Dept 2023]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

53

KA 20-00223

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATWANN EVERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS M. LEITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Stephen J. Dougherty, J.), entered January 2, 2020. The order denied the motion of defendant to vacate a judgment of conviction.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is granted, the judgment of conviction is vacated, and a new trial is granted.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of two counts of assault in the first degree (Penal Law § 120.10 [1], [4]), two counts of attempted robbery in the first degree (§§ 110.00, 160.15 [1], [2]), and one count of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]). In appeal No. 2, defendant appeals by permission of this Court from an order denying, after a hearing, his motion pursuant to CPL 440.10 to vacate the judgment in appeal No. 1.

Defendant’s conviction stems from an attempted robbery that resulted in two victims being shot. Both victims gave statements to law enforcement that two assailants were involved. The first victim identified defendant as the assailant who shot him. The second victim initially told investigators that one assailant was a heavyset black male who was between five feet seven inches and five feet nine inches tall wearing a black hoodie and a black mask and that the other assailant was wearing all black and a mask. A police report reflects that the second victim subsequently became “uncooperative” and asserted that he could not recall anything from the night of the incident. Defendant and a codefendant were indicted for their alleged conduct with respect to only the first victim. At trial, the first

victim testified that defendant was one of the two assailants and the one who shot him. The second victim did not testify. In his defense, defendant presented the testimony of several family members, as well as his own testimony, that he was not present at the scene of the attempted robbery, but rather at his mother's home, during the relevant time. The jury convicted defendant on all counts.

Defendant subsequently moved pursuant to CPL 440.10 to vacate the judgment, alleging, inter alia, that defense counsel was ineffective because she failed to investigate or call the second victim to testify on defendant's behalf at trial. At the hearing on the motion, among other witnesses, two of defendant's family members testified that they told defense counsel that there were rumors that the second victim was publicly denying defendant's involvement in the attempted robbery. The second victim himself testified that defendant was not present during the attempted robbery, that he told the prosecution that defendant was not involved, and that he would have so testified at trial had he been called upon to do so. County Court, finding parts of the testimony proffered by defendant's witnesses not credible, denied the motion.

Defendant contends in appeal No. 1 that the verdict is against the weight of the evidence on the issue of identity. 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 that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different finding would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see id.*). The jury was entitled to disbelieve the testimony of defendant's family members, who attempted to provide defendant with an alibi (*see People v Phong T. Le*, 277 AD2d 1036, 1036 [4th Dept 2000], *lv denied* 96 NY2d 762 [2001]).

We agree with defendant in appeal No. 2, however, that his motion to vacate the judgment in appeal No. 1 should have been granted because he was denied effective assistance of counsel at trial. "To prevail on his claim that he was denied effective assistance of counsel, defendant must demonstrate that his attorney failed to provide meaningful representation" (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]). A defendant claiming ineffective representation "bears the ultimate burden of showing . . . the absence of strategic or other legitimate explanations for counsel's challenged actions" (*People v Lopez-Mendoza*, 33 NY3d 565, 572 [2019] [internal quotation marks omitted]). "It is well settled that '[t]he failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel' " (*People v Borcyk*, 184 AD3d 1183, 1184 [4th Dept 2020]; *see People v Pottinger*, 156 AD3d 1379, 1380 [4th Dept 2017]).

We conclude on the hearing record that, even affording deference to the motion court's credibility determinations given "its opportunity to see the witnesses, hear the testimony, and observe demeanor" (*People v Thibodeau*, 151 AD3d 1548, 1552 [4th Dept 2017],

affd 31 NY3d 1155 [2018]), defendant nonetheless met his burden of establishing that he received less than meaningful representation (*see People v Jackson*, 202 AD3d 1483, 1485 [4th Dept 2022], *lv denied* 38 NY3d 1071 [2022]). Defendant established that, prior to trial, defense counsel possessed the police report with the second victim's statements to law enforcement. In his initial statement, the second victim described one assailant as heavyset, a description that did not match the height and weight of defendant at the time of his arrest, and he described both assailants as wearing masks. Thus, defense counsel was aware prior to trial that the second victim's description of the assailants conflicted with the first victim's asserted ability to identify one of the assailants as defendant. Nonetheless, as the motion court expressly found, defense counsel never interviewed the second victim.

Further, defense counsel testified at the hearing that she had almost no recollection of the pertinent events but nonetheless speculated that she had concluded that the second victim would not have been helpful to the defense (*cf. People v Dombrowski*, 94 AD3d 1416, 1417 [4th Dept 2012], *lv denied* 19 NY3d 959 [2012]). Even assuming, arguendo, that the second victim's purported uncooperativeness with law enforcement and subsequent statement that he "[could] not recall anything from the night of the incident" would have provided a strategic basis for choosing not to present the second victim's testimony at trial, we conclude that "it does not provide an excuse for counsel's failure to investigate [him] as [a] possible witness[ ]" (*People v Davis*, 193 AD3d 967, 971 [2d Dept 2021]; *see People v Williams*, 206 AD3d 1625, 1626 [4th Dept 2022], *lv denied* 38 NY3d 1154 [2022]; *see generally People v Oliveras*, 21 NY3d 339, 348 [2013]). In any event, the fact that a witness, particularly one such as the second victim who has had prior contact with law enforcement, is reluctant, or even refuses, to talk to the prosecution is far from conclusive evidence that the witness would not have cooperated with a defense attorney. Here, the second victim's hearing testimony that defendant was not present during the shooting is consistent with his initial statement to law enforcement, and it is also "wholly consistent with the theory pursued by [defense] counsel [at trial], namely that defendant was not present at the shooting and that the crime was instead committed by [different] individual[s]" (*Williams*, 206 AD3d at 1628). Additionally, although the motion court chose to credit the testimony of the trial prosecutor, and discredit the second victim's testimony, with respect to whether the second victim ever named for him the two individuals that the second victim believed carried out the attempted robbery, there is no evidence in the hearing record contrary to the second victim's testimony that he would have named those individuals at trial had he been called (*cf. People v Cosby*, 82 AD3d 63, 68 [4th Dept 2011], *lv denied* 16 NY3d 857 [2011]).

We therefore agree with defendant that the hearing record discloses no tactical reason for defense counsel's failure to interview the second victim (*see Williams*, 206 AD3d at 1628). Inasmuch as defendant established that defense counsel "did not fully investigate the case and did not collect the type of information that a lawyer would need in order to determine the best course of action"

(*Oliveras*, 21 NY3d at 348), we conclude that defense counsel's deficient conduct was "sufficiently egregious and prejudicial as to compromise [the] right to a fair trial" (*Caban*, 5 NY3d at 152; *see Williams*, 206 AD3d at 1628).

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

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

57

CAF 20-01207

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF JERIMIAH H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KIARRA M., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

ANTHONY CHABALA, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered August 26, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, petitioner moved to revoke a suspended judgment entered upon, inter alia, the admission of respondent mother that she had permanently neglected the subject child. Respondent mother appeals from an order by which Family Court, inter alia, granted petitioner's motion with respect to the subject child and terminated the mother's parental rights with respect to that child. We affirm.

It is well settled that, "[w]here petitioner establishes by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Ramel H. [Tenese T.]*, 134 AD3d 1590, 1592 [4th Dept 2015] [internal quotation marks omitted]; *see* Family Ct Act § 633 [f]; *Matter of Ronald O.*, 43 AD3d 1351, 1352 [4th Dept 2007]). "[L]iteral compliance with the terms of the suspended judgment will not suffice to prevent a finding of a violation. A parent must [also] show that progress has been made to overcome the specific problems which led to the removal of the child[ ]" (*Matter of Joseph M., Jr. [Joseph M., Sr.]*, 150 AD3d 1647, 1648 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017] [internal quotation marks omitted]; *see Matter of Maykayla FF. [Eugene FF.]*, 141 AD3d 898, 899 [3d Dept 2016]). Further, "a hearing on a [motion] alleging that

the terms of a suspended judgment have been violated is part of the dispositional phase of the permanent neglect proceeding, and . . . the disposition shall be based on the best interests of the child" (*Matter of Jenna D. [Paula D.]*, 165 AD3d 1617, 1619 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019] [internal quotation marks omitted]). Contrary to the mother's contention, the record establishes that she failed to verify her income, failed to sign necessary consent forms for the child, and missed several scheduled visits. Again, the failure to comply with "*any of the terms* of the suspended judgment" permits the court to revoke the suspended judgment (*Joseph M., Jr.*, 150 AD3d at 1648 [emphasis added]).

Finally, a preponderance of the evidence supports the court's determination that it was in the child's best interests to terminate the mother's parental rights (*see Jenna D.*, 165 AD3d at 1619; *Matter of Mikel B. [Carlos B.]*, 115 AD3d 1348, 1349 [4th Dept 2014]). "Although [the mother's] breach of the express conditions of the suspended judgment does not compel the termination of [her] parental rights, [it] is strong evidence that termination is, in fact, in the best interests of the child[ ]" (*Jenna D.*, 165 AD3d at 1619 [internal quotation marks omitted]; *see Matter of Michael HH. [Michael II.]*, 124 AD3d 944, 945-946 [3d Dept 2015]). Here, "any progress that [the mother] made was not sufficient to warrant any further prolongation of the child['s] unsettled familial status" (*Matter of Brendan S.*, 39 AD3d 1189, 1190 [4th Dept 2007] [internal quotation marks omitted]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

69

KA 19-01413

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TREVOR MARTIN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN R. HUTCHISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered May 23, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. We agree with defendant that the waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Gordon*, 191 AD3d 1367, 1368 [4th Dept 2021], *lv denied* 36 NY3d 1120 [2021]; *People v Clark*, 191 AD3d 1485, 1485 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

77

KA 19-02333

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM MOWERY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JOHN J. MORRISSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. MATTLE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered January 15, 2019. The judgment convicted defendant upon a plea of guilty of strangulation 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 strangulation in the second degree (Penal Law § 121.12), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Seay*, 201 AD3d 1361, 1361-1362 [4th Dept 2022]), we conclude that the sentence is not unduly harsh or severe.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

102

KA 22-00170

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW C. SMITH, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered October 19, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]), defendant contends that his plea was not knowing, voluntary, and intelligent based on an alleged *Brady* violation (*see generally Brady v Maryland*, 373 US 83, 87 [1963]). Defendant's contention involves matters outside the record on appeal and must therefore be raised by way of a motion pursuant to CPL article 440 (*see People v Jefferson*, 125 AD3d 1463, 1464-1465 [4th Dept 2015], *lv denied* 25 NY3d 990 [2015]; *People v DeJesus*, 110 AD3d 1480, 1482 [4th Dept 2013], *lv denied* 22 NY3d 1155 [2014]; *People v Ellis*, 73 AD3d 1433, 1434 [4th Dept 2010], *lv denied* 15 NY3d 851 [2010]).

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

117

KA 19-00527

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAM SIDES, JR., DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered February 5, 2019. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the second degree (Penal Law § 140.25 [2]). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal inasmuch as County Court "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]; *People v Cole*, 201 AD3d 1360, 1360-1361 [4th Dept 2022]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court

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

121

CAF 21-00990

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF DENISE IANELLO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN COLONOMOS, RESPONDENT-APPELLANT.

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

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

BRIAN P. DEGNAN, BATAVIA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Thomas D. Williams, J.), entered July 6, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded the parties joint legal custody with petitioner having primary physical custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Genesee County, for further proceedings in accordance with the following memorandum: On appeal from an order that, inter alia, awarded the parties joint legal custody of the subject child with primary physical custody to petitioner mother, respondent father contends that Family Court's determination does not have a sound and substantial basis in the record. The court, in the order on appeal, however, failed to make any factual findings whatsoever to support the award of primary physical custody. It is "well established that the court is *obligated* 'to set forth those facts essential to its decision' " (*Matter of Rocco v Rocco*, 78 AD3d 1670, 1671 [4th Dept 2010] [emphasis added]; *see* CPLR 4213 [b]; Family Ct Act § 165 [a]; *Matter of Brown v Orr*, 166 AD3d 1583, 1583 [4th Dept 2018]). Here, the court completely failed to follow that well-established rule when it failed to issue any factual findings to support its initial custody determination (*see Brown*, 166 AD3d at 1583-1584), nor did it make any findings with respect to the relevant factors that it considered in making a best interests of the child determination (*see Matter of Avdic v Avdic*, 125 AD3d 1534, 1536 [4th Dept 2015]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]; *Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]). "Effective appellate review, whatever the case but especially in child visitation, custody or neglect proceedings, requires that appropriate factual findings be made by the trial court—the court best able to

measure the credibility of the witnesses" (*Matter of Jose L. I.*, 46 NY2d 1024, 1026 [1979]). We therefore reverse the order and remit the matter to Family Court to make a determination on the petition and cross petition, including specific findings as to the best interests of the child, following an additional hearing if necessary (*see Brown*, 166 AD3d at 1584; *Avdic*, 125 AD3d at 1536). Pending the court's determination upon remittal, the custody and visitation provisions in the order appealed from shall remain in effect.

Entered: February 10, 2023

Ann Dillon Flynn
Clerk of the Court