SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 30, 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 JUNE 30, 2023

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SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

994

TP 22-01050

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

IN THE MATTER OF KELLY PHILLIPS, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
CITY OF ROCHESTER, RESPONDENTS.

JEFFREY WICKS, PLLC, ROCHESTER (CHARLES D. STEINMAN OF COUNSEL), FOR PETITIONER.

LINDA S. KINGSLEY, CORPORATION COUNSEL, ROCHESTER (YVETTE CHANCELLOR GREEN OF COUNSEL), FOR RESPONDENT CITY OF ROCHESTER.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Sam L. Valleriani, J.], entered June 22, 2022) to review a determination of respondent New York State Division of Human Rights. The determination dismissed the complaint of petitioner.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 and Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) dismissing her complaint alleging unlawful discrimination. Our review of the determination, which adopted the findings of the Administrative Law Judge (ALJ) who conducted the public hearing, " 'is limited to consideration of whether substantial evidence supports the agency determination' " (*Matter of Scheuneman v New York State Div. of Human Rights*, 147 AD3d 1523, 1524 [4th Dept 2017], quoting *Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331 [2003]; *see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). " 'Courts may not weigh the evidence or reject [SDHR's] determination where the evidence is conflicting and room for choice exists. Thus, when a rational basis for the conclusion adopted by [SDHR] is found, the judicial function is exhausted' " (*Matter of Russo v New York State Div. of Human Rights*, 137 AD3d 1600, 1600 [4th Dept 2016], quoting *Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106 [1987]).

Contrary to petitioner's contention, there is substantial evidence to support the determination that she was not discriminated

against based on her gender. To establish a prima facie case of employment discrimination, petitioner was required to demonstrate that she was a member of a protected class, that she was qualified for her position, that she suffered an adverse employment action, and that the adverse action "occurred under circumstances giving rise to an inference of discriminatory motive" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306 [2004]; *see Matter of Lyons v New York State Div. of Human Rights*, 79 AD3d 1826, 1827 [4th Dept 2010], *lv denied* 17 NY3d 707 [2011]). We agree with SDHR that petitioner failed to establish that she suffered an adverse employment action arising out of the refusal of the Rochester Police Department (RPD) to issue a smaller service weapon (*see Matter of Gordon v New York State Dept. of Corr. & Community Supervision*, 138 AD3d 1477, 1478 [4th Dept 2016]; *Lyons*, 79 AD3d at 1827). Petitioner further failed to demonstrate that any allegedly adverse employment action " 'occurred under circumstances giving rise to an inference of discrimination' " (*Gordon*, 138 AD3d at 1478, quoting *Forrest*, 3 NY3d at 308).

Petitioner's contentions concerning other alleged adverse employment actions are not properly before us inasmuch as the adverse action alleged in the complaint filed with SDHR is limited to the RPD's failure to issue petitioner a smaller service weapon (*see generally* 9 NYCRR 465.3 [c] [3]) and there is no evidence that either petitioner or the SDHR amended the complaint to expand the scope of the case (*see* 9 NYCRR 465.4 [a], [c]; *see generally Matter of Niagara Frontier Transp. Auth. v Nevins*, 295 AD2d 887, 887 [4th Dept 2002]; *Matter of Presbyterian Hosp. of City of N.Y. v State Div. of Human Rights*, 241 AD2d 319, 320 [1st Dept 1997]).

Finally, we conclude that the ALJ did not abuse his discretion in denying petitioner's request to reopen the hearing. The evidence adduced provided the ALJ with a sufficient basis to determine that petitioner did not suffer an adverse employment action as a result of discrimination, and the additional evidence that petitioner sought to introduce was beyond the scope of the case (*see* 9 NYCRR 465.12 [f] [3], [13]; *see generally Matter of Mario v New York State Div. of Human Rights*, 200 AD3d 1591, 1592-1593 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022]; *Matter of McGuirk v New York State Div. of Human Rights*, 139 AD3d 570, 571 [1st Dept 2016]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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KA 18-02032

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY L. WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered July 19, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of stolen property in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of stolen property in the fourth degree (§ 165.45 [2]). The victim was defendant's former girlfriend with whom he had lived until shortly before her decomposed body was found in her apartment. The victim's hands and legs had been tied behind her back, and a shirt covering the victim's face had been attached to her ankles such that it would tighten around her mouth the more she struggled to get free. A washcloth had been stuffed in her mouth. The cause of death was determined to be positional asphyxiation and/or suffocation.

When questioned by two investigators at the police station, defendant initially denied having anything to do with the victim's death, stating that he had recently moved out of her apartment and that she was alive when he last saw her. Upon further questioning, however, defendant eventually made incriminating statements, admitting that he tied the victim's hands and feet behind her back and put something in her mouth before leaving her alone in the apartment. Defendant explained that he restrained the victim because she was threatening to hurt herself and he wanted to protect her. He said that he thought that she could breathe through her nose when he left her bound and gagged in the apartment.

Following indictment, defendant filed an omnibus motion in which he sought suppression of the statements that he made to the investigators. After a *Huntley* hearing, at which a video recording of the police interview was admitted in evidence, defendant submitted a letter memorandum in which he contended that his statements were involuntarily made because, at the outset of the interview, the investigators misled him into thinking that they wanted to talk to him about a larceny, which defendant "was told . . . 'was no big deal.' " Defendant further contended in the letter memorandum that the investigators' tactics during the prolonged questioning, which included suggesting theories of guilt to defendant and presenting him with false evidence, rendered his admissions involuntary.

Finally, defendant challenged the admissibility of statements that he made to the police officer who stopped him on the street and transported him to the police station for the interview. The officer testified at the hearing that defendant, when asked for identifying information, provided a false name and date of birth. In his letter memorandum, defendant asserted that "it can hardly be said that these statements were 'pedigree' in nature" and, because the officer did not advise him of the *Miranda* rights, the statements should be suppressed.

County Court refused to suppress any of the challenged statements. In its written decision, the court determined that defendant, after being placed in the interview room and read the *Miranda* warnings, "unambiguously waived his rights and agreed to speak with law enforcement with apparent full knowledge of those rights." The court further determined that no force, coercion or threats thereof were exercised upon defendant to induce him to waive his rights, and that no promises were made to defendant that created a risk that he might falsely incriminate himself. According to the court, defendant was cooperative with the investigators and at no point requested an attorney or asked that questioning cease. On the last page of its decision, after having already concluded that defendant's statements to the investigators were voluntary beyond a reasonable doubt, the court stated that, "to the extent that any questions posed to [d]efendant were of a pedigree nature and/or were posed by [the officer who transported him to the police station], they are admissible as they are not subject to *Miranda* scrutiny or notice under CPL 710.30."

On appeal, defendant contends for the first time that the investigators subjected him to custodial interrogation for five or six minutes before reading him the *Miranda* warnings, and that his subsequent post-*Miranda* admissions should be suppressed because there was not a definite and pronounced break in the interrogation after defendant made his pre-*Miranda* statements. More specifically, with respect to the pre-*Miranda* statements made at the police station, defendant argues that a series of questions posed by the investigators after defendant said that he was homeless when asked for his address—such as, "When did you become homeless?," and, "What happened?"—constituted an improper attempt "to conduct an investigative inquiry without *Miranda* warnings" inasmuch as the questions were not designed to elicit mere pedigree information.

As the dissent acknowledges, defendant failed to preserve his current suppression contentions for our review. Indeed, the only ground raised below by defendant for suppression of the statements he made at the police station was that the investigators essentially tricked him into waiving his *Miranda* rights and later into making admissions; defendant's contention relating to pedigree information was limited to the prior statements that he made to the arresting officer, which were not admitted in evidence at trial in any event.

The dissent nevertheless concludes that defendant's contention relating to pedigree information is properly before us because the motion court "expressly decided the question raised on appeal" (CPL 470.05 [2]; *see People v Prado*, 4 NY3d 725, 726 [2004], *rearg denied* 4 NY3d 795 [2005]). We respectfully disagree. The court did not expressly determine that the questions asked of defendant *by the investigators* prior to the administration of *Miranda* warnings were pedigree in nature, or that any statements defendant made fell within the pedigree exception to the *Miranda* requirement (*see People v Wortham*, 37 NY3d 407, 413 [2021], *cert denied* — US —, 143 S Ct 122 [2022]). Instead, as noted above, the court merely indicated that, "to the extent" that any questions sought pedigree information, defendant's answers to such questions were admissible. It appears that the court, in response to the specific contention advanced by defendant, was referring to the pedigree questions asked by the arresting officer, not the investigators. Thus, the court did not address the appropriateness of the pre-*Miranda* questions challenged by defendant on appeal.

Moreover, it is undisputed that defendant failed to preserve for our review his further contention that his post-*Miranda* admissions, which were made approximately an hour and twenty minutes after he voluntarily waived his rights, must be suppressed because there was no definite and pronounced break between the pre- and post-*Miranda* statements such that defendant had "returned, in effect, to the status of one who is not under the influence of questioning" (*People v Chapple*, 38 NY2d 112, 115 [1975]).

The question becomes whether we should exercise our power to review defendant's unpreserved contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6]). Based on our review of the video recording of defendant's interview, we conclude that the pre-*Miranda* questions asked by the investigators did not render it any more likely that defendant would agree to waive his rights and answer further questions. We also note that "[d]efendant made no statement that was either inculpatory or related to the [homicide] until after the *Miranda* warnings had been properly administered by [the investigators] and after he properly waived his *Miranda* rights" (*People v White*, 10 NY3d 286, 291 [2008], *cert denied* 555 US 897 [2008]). Under the circumstances, and considering that defendant, as a three-time convicted felon, had extensive experience with the police and criminal justice system prior to his interview, we perceive no compelling reason to exercise our power to review defendant's unpreserved contentions as a matter of discretion in the interest of justice.

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

All concur except MONTOUR and OGDEN, JJ., who dissent and vote to hold the case, reserve decision, and remit the matter to Monroe County Court for further proceedings in accordance with the following memorandum: We respectfully dissent. Initially, we agree with the majority that defendant's omnibus motion papers and arguments to County Court were not themselves sufficient to preserve his contentions that he was subjected to a custodial interrogation prior to being read his *Miranda* warnings and that, therefore, both his pre- and post-*Miranda* statements made to investigators at the City of Rochester Public Safety Building (PSB) should have been suppressed (*see generally People v Hightower*, 39 AD3d 1247, 1248 [4th Dept 2007], *lv denied* 9 NY3d 845 [2007]). However, in its written decision, the court found that the investigators who interviewed defendant at the PSB had asked pedigree questions prior to issuing the *Miranda* warnings and then concluded as a matter of law that defendant's answers to the pedigree questions were admissible as an exception to the *Miranda* requirement. Therefore, the court expressly decided the first issue raised on appeal, thereby preserving it for our review (*see* CPL 470.05 [2]; *People v Prado*, 4 NY3d 725, 726 [2004], *rearg denied* 4 NY3d 795 [2005]; *People v Johnson*, 192 AD3d 1612, 1613 [4th Dept 2021]; *People v Curry*, 192 AD3d 1649, 1650 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]).

We agree with defendant that the court erred in concluding that the disputed pre-*Miranda* questions fell within the pedigree exception to the *Miranda* requirement. The Court of Appeals has "recognized an exception to *Miranda* for pedigree questions," which "typically ask a suspect for identifying information such as name, date of birth, and address," despite the fact that even those questions "constitute custodial interrogation when they are posed to a suspect in custody" (*People v Wortham*, 37 NY3d 407, 413 [2021], *cert denied* — US —, 143 S Ct 122 [2022]). The exception will not apply, however, "if the questions, though facially appropriate, are likely to elicit incriminating admissions because of the circumstances of the particular case, or, stated another way, if the question is reasonably likely to elicit an incriminating response from [the] defendant" (*id.* at 414 [internal quotation marks omitted]; *see People v Rodney*, 85 NY2d 289, 293 [1995]). Here, prior to administering the *Miranda* warnings, the investigators asked defendant questions that were likely to elicit an incriminating response and constituted interrogation under the guise of obtaining pedigree information (*see People v Walker*, 129 AD3d 1590, 1591 [4th Dept 2015]; *cf. Rodney*, 85 NY2d at 294).

In light of the court's ruling that the disputed pre-*Miranda* questions were pedigree questions for which no *Miranda* warnings were necessary, it had no reason to address the second issue, i.e., whether defendant's post-*Miranda* statements were admissible despite the pre-*Miranda* interrogation. That specific contention is unpreserved (*see Hightower*, 39 AD3d at 1248), and we conclude that we may not consider

it inasmuch as "we have no power to review issues not ruled upon by the trial court" (*People v Clark*, 171 AD3d 1530, 1532 [4th Dept 2019]; *see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 195 [2011]). We would therefore hold the case and remit the matter to County Court for a ruling on that issue. In light of our determination, it is not necessary to review defendant's remaining contentions.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 17-01339

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JORDAN EVANS, DEFENDANT-APPELLANT.

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 (Joanne M. Winslow, J.), rendered February 28, 2017. The judgment convicted defendant upon a jury verdict of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed to an indeterminate term of incarceration of 20 years to life and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contentions, we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and that the verdict, viewed in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that he was denied a fair trial based on prosecutorial misconduct (*see generally People v Galloway*, 54 NY2d 396, 401 [1981]). Contrary to defendant's additional contention that he was deprived of effective assistance of counsel by several purported failures on the part of defense counsel, we conclude, after viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). We further conclude that, contrary to defendant's contention, he was not deprived of a fair trial by the cumulative effect of the various alleged errors

raised on appeal (*see generally People v Neil*, 188 AD3d 1765, 1767 [4th Dept 2020], *lv denied* 36 NY3d 1058 [2021]).

We agree with defendant, however, that his sentence is unduly harsh and severe. Defendant, who was 17 years old at the time of the crime, was sentenced to an indeterminate term of incarceration of 23 years to life, to run consecutively to two concurrent terms of incarceration imposed on a separate conviction of weapon possession charges, the longer of those terms being a determinate eight-year term. At sentencing, the People requested with respect to the murder conviction in this case that a consecutive indeterminate term of incarceration of 20 years to life be imposed. We conclude that the sentence requested by the People is more appropriate than the one imposed by Supreme Court, and we therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of incarceration of 20 years to life (*see* CPL 470.15 [6] [b]; *People v Delgado*, 80 NY2d 780, 783 [1992]), which will continue to run consecutively to the terms of incarceration imposed on the conviction of the weapon possession charges.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-01606

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

JASON J. MCGIRR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JUSTIN ZURBRICK, DEFENDANT,
AND CANALSIDE HARBOR 2013, LLC,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (NOLAN M. HALE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered October 22, 2021. The order, insofar as appealed from, denied the cross-motion of plaintiff for leave to renew and reargue his motion for sanctions.

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

Same memorandum as in *McGirr v Zurbrick* ([appeal No. 2] — AD3d — [June 30, 2023] [4th Dept 2023]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00485

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

JASON J. MCGIRR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JUSTIN ZURBRICK, DEFENDANT,
AND CANALSIDE HARBOR 2013, LLC,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (NOLAN M. HALE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Daniel Furlong, J.), entered February 2, 2022. The judgment dismissed the second amended complaint against defendant Canalside Harbor 2013, LLC.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle he was in was rear-ended by a vehicle driven by defendant Justin Zurbrick, who had worked as a bartender that evening at a restaurant owned and operated by Canalside Harbor 2013, LLC (defendant). As relevant here, plaintiff asserted causes of action against defendant based on claims of violation of the Dram Shop Act and negligent supervision. Defendant moved for summary judgment dismissing the second amended complaint against it, and Supreme Court granted the motion except with respect to the claim for violation of the Dram Shop Act.

Prior to trial, plaintiff served a notice for discovery and inspection and requested, inter alia, a copy of payroll records to enable plaintiff to identify employees who were working the evening of the incident. After having requested the information on two occasions, plaintiff moved pursuant to CPLR 3126 for sanctions based on defendant's failure to comply and requested an adverse inference charge. In response to the motion, defendant produced Zurbrick's timecard. In reply, plaintiff asserted that defendant's failure to comply was willful and sought to have the court sanction defendant by striking its answer to the second amended complaint (answer) or by rendering a liability determination in plaintiff's favor. The court

granted the motion to the extent of sanctioning defendant $1,000 and directed defendant to search for and produce timecards and payroll records for all employees working on the night of the incident. The court further ordered that if additional records were found that had not already been produced, defendant may be subject to additional sanctions upon a motion by plaintiff. The court denied plaintiff's motion insofar as it sought an adverse inference charge, the striking of defendant's answer, or a determination of liability. Defendant subsequently produced the timecards of additional employees who worked the evening of the incident, and plaintiff cross-moved for leave to renew and reargue his motion for sanctions. The court, inter alia, denied plaintiff's cross-motion and the case proceeded to a jury trial.

In appeal No. 1, plaintiff appeals from that order insofar as it denied his cross-motion for leave to renew and reargue. In appeal No. 2, plaintiff appeals from a judgment dismissing the second amended complaint against defendant upon a jury verdict in favor of defendant.

Initially, we agree with defendant that the appeal from the order in appeal No. 1 insofar as it denied that part of plaintiff's cross-motion seeking leave to reargue must be dismissed because no appeal lies therefrom (*see MidFirst Bank v Storto*, 121 AD3d 1575, 1575 [4th Dept 2014]; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]). Contrary to defendant's contentions, however, the cross-motion also sought leave to renew and was supported by new, relevant facts, i.e., the timecards for the employees who worked at the restaurant the evening of the incident (*see generally* CPLR 2221 [d] [1]; [e] [1]). Nevertheless, we further conclude that the appeal from the order insofar as it denied that part of plaintiff's cross-motion seeking leave to renew must be dismissed because the right to appeal from that intermediate order terminated upon the entry of the judgment in appeal No. 2 (*see Kim v II Yeon Kwon*, 144 AD3d 754, 755 [2d Dept 2016]; *Brown Bark II, L.P. v Weiss & Mahoney, Inc.*, 90 AD3d 963, 964 [2d Dept 2011]; *see generally Matter of Aho*, 39 NY2d 241, 248 [1976]). Contrary to defendant's contention, however, the issue raised by plaintiff with respect to the order in appeal No. 1 may be considered upon the appeal from the judgment in appeal No. 2 (*see Aho*, 39 NY2d at 248; *Simon v Granite Bldg. 2, LLC*, 170 AD3d 1227, 1229 [2d Dept 2019], *lv denied* 34 NY3d 904 [2019]; *see also* CPLR 5501 [a] [1]). That part of the order in appeal No. 1 denying that part of plaintiff's cross-motion for leave to renew "necessarily affect[ed]" the final judgment (CPLR 5501 [a] [1]) inasmuch as reversing that part of the order and granting plaintiff's motion for sanctions insofar as it sought the striking of defendant's answer or a determination of liability in plaintiff's favor "would inescapably have led to a vacatur of the judgment" (*Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023, 1025 [2022], *rearg denied* 38 NY3d 1170 [2022] [internal quotation marks omitted]; *see Aho*, 39 NY2d at 248; *Stanescu v Stanescu*, 206 AD3d 1031, 1033-1034 [2d Dept 2022]).

With respect to plaintiff's contention that the court should have granted that part of the cross-motion seeking leave to renew and struck defendant's answer or rendered a liability determination in

favor of plaintiff based on defendant's discovery violation, we reject defendant's assertion that plaintiff was not aggrieved by the court's August 2021 order on plaintiff's initial motion for sanctions and that he was thus precluded from cross-moving for leave to renew that motion. Plaintiff's motion initially sought an adverse inference charge for the missing timecards. When defendant produced Zurbrick's timecard in response to the motion—after previously representing that the timecard was missing or had been destroyed—plaintiff sought to have the court sanction defendant for the discovery violation by striking defendant's answer or rendering a liability determination in plaintiff's favor. Contrary to defendant's assertion, it was proper for plaintiff to raise that new request for sanctions in his reply papers inasmuch as the request was made in direct response to defendant's production of Zurbrick's timecard, for which an adverse inference charge would no longer be appropriate (*see Studer v Newpointe Estates Condominium*, 152 AD3d 555, 557 [2d Dept 2017]; *see generally Mikulski v Battaglia*, 112 AD3d 1355, 1356 [4th Dept 2013]). In the August 2021 order, the court sanctioned defendant $1,000 but otherwise denied the motion. We conclude that plaintiff was aggrieved by the August 2021 order because the court denied his request to strike defendant's answer or make a liability determination in plaintiff's favor (*see Lobello v New York Cent. Mut. Fire Ins. Co.*, 152 AD3d 1206, 1207 [4th Dept 2017]; *Finocchi v Live Nation Inc.*, 141 AD3d 1092, 1093 [4th Dept 2016]).

Regarding the merits of plaintiff's challenge to the denial of that part of his cross-motion for leave to renew, a motion seeking leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]; *see Ashley M. v Marcinkowski*, 207 AD3d 1093, 1094 [4th Dept 2022]; *Home Insulation & Supply, Inc. v Iskalo 5000 Main, LLC*, 189 AD3d 2118, 2119 [4th Dept 2020]). We agree with plaintiff that his cross-motion was based on new facts not offered on the prior motion, i.e., the timecards for the employees other than Zurbrick who were working on the night of the incident, which defendant did not turn over until after the court's August 2021 order. We further agree that plaintiff had a reasonable justification for his failure to present those facts on the prior motion. We conclude, however, that the court properly denied plaintiff's cross-motion insofar as it sought leave to renew because the new facts would not change the court's prior determination (*see Shaw v Friedly*, 167 AD3d 1490, 1490 [4th Dept 2018]; *Violet Realty, Inc. v Gerster Sales & Serv., Inc.* [appeal No. 2], 128 AD3d 1348, 1350 [4th Dept 2015]). In his cross-motion, plaintiff did not seek additional monetary sanctions but rather requested that the court strike defendant's answer or, in the alternative, reinstate the causes of action previously dismissed on defendant's summary judgment motion and issue a determination of liability in plaintiff's favor. " 'Although the nature and degree of a sanction for a party's failure to comply with discovery generally is a matter reserved to the sound discretion of the trial court, the drastic remedy of striking [a pleading] is inappropriate absent a showing that the failure to comply is willful, contumacious, or in bad faith' " (*Windnagle v Tarnacki*, 184 AD3d 1178, 1179 [4th Dept 2020];

see Pezzino v Wedgewood Health Care Ctr., LLC, 175 AD3d 840, 841 [4th Dept 2019]; *Mosey v County of Erie*, 148 AD3d 1572, 1574 [4th Dept 2017]). Plaintiff's alternative request for relief seeks, in essence, a default judgment, which is an equally inappropriate sanction for a discovery violation absent the requisite showing of willfulness, contumaciousness, or bad faith (*see O'Connor v Root*, 284 AD2d 979, 979 [4th Dept 2001]; *Monaco v Camie-Campbell, Inc.*, 256 AD2d 1214, 1215 [4th Dept 1998], *lv dismissed in part & denied in part* 93 NY2d 887 [1999]). Here, while the court recognized that defendant had no excuse for the discovery violation, it did not abuse its discretion in determining that the striking of defendant's answer or awarding plaintiff a default judgment was not appropriate (*see Lobello*, 152 AD3d at 1207; *O'Connor*, 284 AD2d at 979; *see also Finocchi*, 141 AD3d at 1093).

With respect to the judgment, which dismissed plaintiff's second amended complaint against defendant upon the jury verdict in favor of defendant, plaintiff first contends that the court erred in its response to a note from the jury regarding the jury instructions. On plaintiff's claim for violation of the Dram Shop Act, the court instructed the jury pursuant to Pattern Jury Instruction (PJI) 2:28. It first recited the relevant provisions of General Obligations Law § 11-101 by instructing the jury that "[a]ny person who shall be injured in person, property, means of support, or otherwise by any intoxicated person or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling liquor to such intoxicated person, have caused or contributed to such an intoxication. And in this such action, such person shall have the right to recover damages." Continuing pursuant to PJI 2:28, the court instructed the jury that "unlawful selling occurs when a person sells, delivers, gives away, or causes, permits or procures the sale, delivery, or gift, of any alcoholic beverage to any visibly intoxicated person." The first question on the verdict sheet asked "Did [defendant] sell alcohol to . . . Zurbrick prior to the motor vehicle accident on October 26, 2017?" The jury retired to deliberate and shortly thereafter sent a note asking "[F]or question 1, can sell, also encompass give to . . . Zu[r]brick?" Over plaintiff's objection, the court instructed the jury "[t]he answer is no, there has to be proof of a sale . . . Give does not qualify."

Initially, we reject plaintiff's contention that the court was required to re-read PJI 2:28 to the jury in response to the note because that instruction was "law of the case." The cases relied on by plaintiff to support that assertion do not involve the propriety of the court's response to a note from the jury during deliberations. Plaintiff further contends that the court erred in its response to the note because a claim for violation of the Dram Shop Act against a business involved in the commercial sale of alcohol does not require that there be an actual sale of alcohol and may encompass the business giving alcohol away, including "drinks on the house." We reject that contention. The plain language of General Obligations Law § 11-101 prohibits the unlawful "sale" and "selling" of alcohol (*see D'Amico v Christie*, 71 NY2d 76, 84 [1987]). This is in contrast to General

Obligations Law § 11-100 (1), which prohibits the unlawful "furnishing" of alcohol to a person under the age of twenty-one years and does not require a commercial sale (*see Sherman v Robinson*, 80 NY2d 483, 486-487 [1992]; *McCauley v Carmel Lanes*, 178 AD2d 835, 836 [3d Dept 1991]; *see generally Stewart v Taylor*, 167 AD2d 846, 846 [4th Dept 1990], *lv denied* 77 NY2d 805 [1991]). The Dram Shop Act created an exception to the common-law rule that a person is not liable for selling or furnishing alcohol to an adult who becomes intoxicated and, "[a]s an exception to the common law, the statute must . . . be construed narrowly" (*D'Amico*, 71 NY2d at 83; *see Delamater v Kimmerle*, 104 AD2d 242, 244 [3d Dept 1984]). Had the legislature intended that a sale of alcohol is not required under section 11-101 for a business involved in the commercial sale of alcohol, it could have so stated (*see generally D'Amico*, 71 NY2d at 84).

Plaintiff's reliance on Alcoholic Beverage Control Law § 65 in support of his assertion that the unlawful sale of alcohol includes giving it away is misplaced. That statute provides that "[n]o person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to 1. Any person, actually or apparently, under the age of twenty-one years; [or] 2. Any visibly intoxicated person." Although General Obligations Law § 11-101 and Alcoholic Beverage Control Law § 65 must be read together (*see Mitchell v The Shoals, Inc.*, 26 AD2d 78, 79 [1st Dept 1966], *affd* 19 NY2d 338 [1967]; *Matalavage v Sadler*, 77 AD2d 39, 42-43 [2d Dept 1980]), it is not in the way that plaintiff seeks. Alcoholic Beverage Control Law § 65 does not create an independent statutory cause of action (*see Sherman*, 80 NY2d at 487; *Moyer v Lo Jim Café*, 19 AD2d 523, 523 [1st Dept 1963], *affd* 14 NY2d 792 [1964]; *Parslow v Leake*, 117 AD3d 55, 69 [4th Dept 2014]). "Liability under [General Obligations Law] sections 11-100 and 11-101 attaches only in the event of an *'unlawful'* sale or delivery of alcohol. *That term* is defined in Alcoholic Beverage Control Law § 65" (*Sherman*, 80 NY2d at 487 [emphasis added]). In other words, Alcoholic Beverage Control Law § 65 defines what makes a sale of alcohol to another "unlawful" under General Obligations Law § 11-101, which is the selling of alcohol to a *visibly* intoxicated person (*see generally Jones v Kelly*, 201 AD2d 536, 536 [2d Dept 1994]). Alcoholic Beverage Control Law § 65 does not define what an unlawful "sale" is under General Obligations Law § 11-101.

We therefore conclude that, for liability to be imposed under General Obligations Law § 11-101, plaintiff was required to establish that there was an unlawful sale of alcohol and that it was not merely given away (*see Stevens v Spec, Inc.*, 224 AD2d 811, 813 [3d Dept 1996]; *Carr v Kaifler*, 195 AD2d 584, 585 [2d Dept 1993]; *Custen v Salty Dog*, 170 AD2d 572, 572 [2d Dept 1991]). The court thus properly instructed the jury in response to its note.

Plaintiff next contends that the court erred in denying his request for an adverse inference charge for an alleged missing bar receipt. A party seeking an adverse inference charge based on an opposing party's failure to produce a document "must make a prima facie showing that the document in question actually exists, that it

is under the opponent's control, and that there is no reasonable explanation for failing to produce it" (*Hutchinson v New York City Health & Hosps. Corp.*, 172 AD3d 1035, 1036-1037 [2d Dept 2019]; *see Jae Duk Ahn v Kyong Koo Kang*, 192 AD3d 994, 995 [2d Dept 2021]; *State of New York v 158th St. & Riverside Dr. Hous. Co., Inc.*, 100 AD3d 1293, 1295-1296 [3d Dept 2012], *lv denied* 20 NY3d 858 [2013]). The court properly denied plaintiff's request inasmuch as he failed to make a prima facie showing that the receipt in question actually existed (*see Jae Duk Ahn*, 192 AD3d at 995). Contrary to plaintiff's further contention, we conclude that the court properly precluded him from introducing Zurbrick's statement to the police that he had consumed alcohol at the restaurant as direct evidence against defendant, a coparty to the litigation (*see Morrissey v City of New* York, 221 AD2d 607, 607 [2d Dept 1995]; *Ellis v Allstate Ins. Co.*, 97 AD2d 970, 970 [4th Dept 1983]; *see also Rivera v New York City Tr. Auth.*, 54 AD3d 545, 547 [1st Dept 2008]; *see generally* Jerome Prince, Richardson on Evidence § 8-226 [Farrell 11th ed 1995]).

Finally, we reject plaintiff's contention that the court erred in granting defendant's motion insofar as it sought summary judgment dismissing the claim for negligent supervision against it. As we noted above, "[a]t common law, one who provided intoxicating liquor was not liable for injuries caused by the drinker, who was held solely responsible" (*D'Amico*, 71 NY2d at 83; *see Allen v County of Westchester*, 109 AD2d 475, 476 [2d Dept 1985], *appeal dismissed* 66 NY2d 915 [1985]). "Excessive alcohol consumption was deemed to be the proximate cause of injuries produced by the inebriate; selling or furnishing alcohol to an adult who elected to become intoxicated was not viewed as the root of the resulting harm" (*D'Amico*, 71 NY2d at 83; *see Portaro v Gerber*, 217 AD2d 539, 541 [2d Dept 1995]; *Allen*, 109 AD2d at 476-477). "By the Dram Shop Act, the Legislature created an exception to the common-law rule" (*D'Amico*, 71 NY2d at 83). Another exception exists "where the intoxicated individual, while inside a bar, injures a third party and the individual who served the alcohol had the opportunity to exercise control over the wrongdoer's conduct and was reasonably aware of the necessity of such control" (*Portaro*, 217 AD2d at 541; *see Struebel v Fladd*, 75 AD3d 1164, 1165 [4th Dept 2010]; *Allen*, 109 AD2d at 477; *Wright v Sunset Recreation*, 91 AD2d 701, 701 [3d Dept 1982]).

Here, we conclude that defendant met its initial burden on the motion with respect to the negligent supervision claim by establishing that the incident that caused plaintiff's injuries did not occur inside the bar (*see Place v Cooper*, 35 AD3d 1260, 1261 [4th Dept 2006]; *Lombart v Chambery*, 19 AD3d 1110, 1110-1111 [4th Dept 2005]; *Wright*, 91 AD2d at 701). Plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 21-01236

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHON HERMAN, DEFENDANT-APPELLANT.

RYAN J. MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

TODD J. CASELLA, PENN YAN, FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered May 25, 2021. The judgment convicted defendant upon a nonjury verdict of sexual abuse in the first degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences of incarceration imposed on counts 2 and 3 of the indictment shall run concurrently with each other and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a bench trial of three counts of sexual abuse in the first degree (Penal Law § 130.65 [4]).

Defendant failed to renew his motion for a trial order of dismissal after presenting evidence, and thus he failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). Viewing the evidence in light of the elements of the crime of sexual abuse in the first degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference" (*People v Ghent*, 132 AD3d 1275, 1275 [4th Dept 2015], *lv denied* 26 NY3d 1145 [2016] [internal quotation marks omitted]; *see People v McCoy*, 100 AD3d 1422, 1422 [4th Dept 2012]). The victim's testimony was not incredible as a matter of law (*see People v Ptak*, 37 AD3d 1081, 1082 [4th Dept 2007], *lv denied* 8 NY3d 949 [2007]), and County Court was entitled to credit the testimony of the victim and to reject the testimony of the defense witnesses. Upon our review of the record, we "cannot say that the court failed to give the evidence the weight that it should be

accorded" (*People v Britt*, 298 AD2d 984, 984 [4th Dept 2002], *lv denied* 99 NY2d 556 [2002]).

We reject defendant's contention that he received ineffective assistance of counsel based upon defense counsel's failure to request a *Huntley* hearing with respect to the admissibility of statements that defendant made to the police. A motion seeking to suppress the statements in question would have had little or no chance of success (*see People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Further, defendant failed to demonstrate the absence of a strategic or other legitimate explanation for defense counsel's failure to seek suppression of those statements, particularly given that the statements were consistent with defendant's claim that any contact between him and the victim was accidental or nonsexual in nature (*see generally People v Jurjens*, 291 AD2d 839, 840 [4th Dept 2002], *lv denied* 98 NY2d 652 [2002]).

Defendant failed to preserve for our review his contention that venue in Yates County was not proper with respect to the third count of the indictment (*see People v Cornell*, 17 AD3d 1010, 1011 [4th Dept 2005], *lv denied* 5 NY3d 805 [2005]; *see also People v Sandoz*, 248 AD2d 334, 334 [1st Dept 1998]; *see generally People v Moore*, 46 NY2d 1, 6-7 [1978]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that the court erred in ruling, as part of a *Sandoval* compromise, that the People would be allowed, if defendant chose to testify, to cross-examine him about the existence of a prior felony conviction for grand larceny in the fourth degree (Penal Law § 155.30 [1]). Initially, we conclude that his contention is preserved for our review. Here, defendant "expressly requested, without success on the ground now advanced on appeal, a ruling that the People not be permitted to cross-examine him regarding the prior conviction, and he 'is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule . . . accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered' " (*People v Fuller*, 174 AD3d 1335, 1336 [4th Dept 2019], *lv denied* 34 NY3d 951 [2019], quoting CPL 470.05 [2]; *see generally People v Jackson*, 29 NY3d 18, 23-24 [2017]). Defendant's contention, however, lacks merit. The prior conviction "involved acts of dishonesty and thus w[as] probative with respect to the issue of defendant's credibility" (*People v Thomas*, 165 AD3d 1636, 1637 [4th Dept 2018], *lv denied* 32 NY3d 1129 [2018], *cert denied* — US —, 140 S Ct 257 [2019] [internal quotation marks omitted]), and defendant failed to meet his burden "of demonstrating that the prejudicial effect of the admission of evidence [of that conviction] for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion" (*People v Sandoval*, 34 NY2d 371, 378 [1974]; *see People v Molina*, 208 AD3d 1641, 1642 [4th Dept 2022], *lv denied* 39 NY3d 964 [2022]). Defendant did not preserve for our review his related contention that

the court failed to adequately set forth its reasoning with respect to its balancing of the appropriate *Sandoval* factors (*see* CPL 470.05 [2]; *People v Murad*, 55 AD3d 754, 755 [2d Dept 2008], *lv denied* 12 NY3d 761 [2009]). In any event, "[o]ur law does not require 'the application of any particular balancing process' in *Sandoval* determinations," and "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 . . . , particularly where, as here, the basis of the court's decision may be inferred from the parties' arguments" (*People v Walker*, 83 NY2d 455, 459 [1994]; *see Molina*, 208 AD3d at 1642; *Murad*, 55 AD3d at 755).

To the extent that defendant contends that he was penalized for exercising his right to a trial, that contention is not preserved for our review (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Hendricks*, 214 AD3d 1466, 1467 [4th Dept 2023]). We agree with defendant, however, that the sentence is unduly harsh and severe under the circumstances of this case. This Court "has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range" (*People v Delgado*, 80 NY2d 780, 783 [1992]; *see* CPL 470.15 [6] [b]). Our "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*Delgado*, 80 NY2d at 783). As a result, we may "substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence" (*People v Suitte*, 90 AD2d 80, 86 [2d Dept 1982]; *see People v Patel*, 64 AD3d 1246, 1247 [4th Dept 2009]). We conclude that a reduction of the aggregate sentence of incarceration is appropriate under the circumstances here, and we therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentences of incarceration imposed on counts 2 and 3 of the indictment shall run concurrently with each other, with those sentences of incarceration continuing to run consecutively to the sentence of incarceration imposed on count 1 of the indictment, to be followed by the nine years of postrelease supervision imposed by the court (*see* CPL 470.20 [6]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00442

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

DANIELLE W., AS PARENT AND NATURAL GUARDIAN
OF DOMINIC M., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JENTSCH & CO., INC., DEFENDANT,
AND 290 SOUTH PARK LLC, DEFENDANT-RESPONDENT.
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290 SOUTH PARK LLC, THIRD-PARTY PLAINTIFF,

V

JIM'S ELECTRIC & GENERAL CONTRACTING, INC.,
AND KIMIL CONSTRUCTION, INC., THIRD-PARTY
DEFENDANTS-RESPONDENTS.

THE TARANTINO LAW FIRM, LLP, BUFFALO (JACOB A. PIORKOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MCGIVNEY KLUGER CLARK & INTOCCIA, P.C., SYRACUSE (ROBERT J. CONNOR, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT JIM'S ELECTRIC & GENERAL CONTRACTING, INC.

HURWITZ FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT KIMIL CONSTRUCTION, INC.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Daniel Furlong, J.), entered March 10, 2022. The order and judgment granted the motion of defendant-third-party plaintiff for summary judgment dismissing the complaint and all cross-claims against it, and granted the motions of third-party defendants for, inter alia, summary judgment dismissing the third-party complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries her son sustained when he fell on a sidewalk adjacent to property owned by defendant Jentsch & Co., Inc., and leased to defendant 290 South Park LLC (South Park). At the time of the

accident, South Park was in the process of buying the subject property and renovating it. South Park retained third-party defendant Jim's Electric & General Contracting, Inc. (JEG) as the general contractor on the renovation project, and JEG in turn hired third-party defendant Kimil Construction, Inc. (Kimil) as a plumbing subcontractor. As part of the renovation, Kimil excavated one section of sidewalk in preparation for the tie-in of a new water line to the main lines of the City of Buffalo. At the time of the excavation, however, no permits had been obtained to allow for that tie-in. Thus, Kimil had that section of sidewalk backfilled with "crusher run," a fine granular substance that adheres to create a stable, level surface to permit safe pedestrian traffic. Several months later, the accident occurred. Following the commencement of the first-party action, South Park commenced a third-party action against JEG and Kimil.

During discovery proceedings, Kimil served upon plaintiff a notice to admit with photos that plaintiff took depicting the area of the alleged fall, including a photo on which the son circled the area of his fall (circled area) (*see* CPLR 3123 [a]). Plaintiff neither objected to that notice nor responded to it. The circled area is not the excavated area of the sidewalk. It is a separate and distinct area of the sidewalk, apart from the area where JEG and Kimil performed any work.

Following discovery, South Park moved for summary judgment seeking dismissal of plaintiff's complaint and all cross-claims against it. Although South Park asserted that there was, in general, no dangerous condition on the sidewalk adjacent to the subject property, its motion primarily addressed plaintiff's allegations to the effect that the excavated area of the sidewalk was the area at issue in the action. Kimil thereafter moved for summary judgment seeking, inter alia, dismissal of the third-party complaint and all cross-claims against it. Kimil asserted that, inasmuch as plaintiff failed to respond to the notice to admit, plaintiff was limited to allegations about any potential dangerous condition in the circled area. Inasmuch as Kimil did no construction work in that particular area of the sidewalk, it contended, inter alia, that it had no liability in the third-party action. JEG also moved for, inter alia, summary judgment dismissing the third-party complaint against it, raising similar contentions.

Plaintiff opposed all of the motions in one response, contending that the excavated area of the sidewalk was a dangerous condition and that the first-party and third-party defendants created the condition and had actual or constructive notice of it. Supreme Court granted the motions of South Park, Kimil and JEG, except to the extent that it "denied as moot" that part of JEG's motion seeking common-law or contractual indemnification from Kimil. We now affirm.

Initially, we note that, in her main brief on appeal, plaintiff does not address the effect of her failure to respond to the notice to admit and instead focuses only on the contention that her son fell in the excavated area of the sidewalk and that the excavated portion of the sidewalk constituted a dangerous condition. However, unlike

admissions made during depositions, which are not formal judicial admissions and are not deemed to be conclusive in an action (*see Groeger v Col-Les Orthopedic Assoc.*, 136 AD2d 952, 952 [4th Dept 1988]), an admission obtained through a notice to admit is deemed a formal judicial admission and is conclusive for that action (*see* CPLR 3123 [a]; *Carothers v United Tech.*, 177 AD2d 995, 995 [4th Dept 1991]; *Groeger*, 136 AD2d at 952; *see also* Jerome Prince, Richardson on Evidence § 8-215 [Farrell 11th ed 1995]; *see generally People v Brown*, 98 NY2d 226, 232 n 2 [2002]).

Inasmuch as plaintiff did not object to the notice to admit, move to amend the admission or move to withdraw that admission (*see* CPLR 3123 [b]), or otherwise provide any explanation for why she failed to respond to the notice to admit (*cf. Williams v Kublick*, 42 AD3d 872, 872-873 [4th Dept 2007]), we conclude that her admission is " 'conclusive of the facts admitted in the action' " (*Cornell v County of Monroe*, 158 AD3d 1151, 1153 [4th Dept 2018]; *cf. Riner v Texaco, Inc.*, 222 AD2d 571, 571-572 [2d Dept 1995]; *see generally Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 412 [2014]). Because plaintiff failed to address in her main brief the effect of her judicial admission or the existence of any alleged dangerous condition in the circled area, we conclude that she abandoned any contention that the court erred in granting South Park's motion insofar as it sought summary judgment dismissing plaintiff's complaint against it based on the lack of a dangerous condition in the circled area (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]) and, in light of that judicial admission, we further conclude that her contentions regarding the existence of a dangerous condition in the excavated area lack merit. Although plaintiff addressed her judicial admission for the first time in her reply brief, her contentions raised for the first time in her reply brief are not properly before us (*see Brooks v City of Buffalo*, 209 AD3d 1270, 1272 [4th Dept 2022]; *Murnane Bldg. Contrs., LLC v Cameron Hill Constr., LLC*, 159 AD3d 1602, 1605 [4th Dept 2018]).

To the extent that plaintiff further contends that the court erred in granting the motions of Kimil and JEG insofar as they sought summary judgment dismissing the third-party complaint against them, plaintiff's contention is not properly before us inasmuch as she is not aggrieved by those parts of the order and judgment (*see* CPLR 5511; *Levine v City of New York*, 101 AD3d 419, 420 [1st Dept 2012]; *Bartek v Murphy*, 266 AD2d 865, 866 [4th Dept 1999], *lv denied* 95 NY2d 756 [2000]). Assuming, arguendo, that plaintiff could have sued JEG and Kimil directly, we note that she did not do so (*see Chaitovitz v Lewis*, 222 AD2d 392, 393 [2d Dept 1995]; *see also Sartori v Gregoire*, 259 AD2d 1004, 1004 [4th Dept 1999]).

We have reviewed plaintiff's remaining contentions and conclude that they lack merit.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

124

CA 21-01474

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

JOSE VEGA, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

FNUB, INC., DEFENDANT,
AND LPCIMINELLI, INC.,
DEFENDANT-RESPONDENT-APPELLANT.

FNUB, INC., THIRD-PARTY PLAINTIFF,
AND LPCIMINELLI, INC., THIRD-PARTY
PLAINTIFF-APPELLANT-RESPONDENT,

V

FRANCO ASSOCIATES, L.P., THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (ALEXANDRIA N. ROWEN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT.

PILLINGER MILLER TARALLO, LLP, BUFFALO (KENNETH A. KRAJEWSKI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeals from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered October 4, 2021. The order denied the motion of plaintiff for partial summary judgment, granted in part and denied in part the cross-motion of defendant-third-party plaintiff LPCiminelli, Inc., for summary judgment and denied in part the cross-motion of third-party defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the cross-motion of defendant-third-party plaintiff LPCiminelli, Inc. seeking summary judgment on its cause of action for contractual indemnification against third-party defendant and seeking dismissal of third-party defendant's counterclaim against it and dismissing that counterclaim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action against defendant-third-party plaintiff,

LPCiminelli, Inc. (defendant), seeking to recover damages for injuries he sustained on a construction site. Defendant was the general contractor for a project consisting of the construction of a new building, and third-party defendant, Franco Associates, L.P. (Franco), was the masonry subcontractor. Defendant commenced a third-party action against Franco for, inter alia, contractual indemnification, and Franco asserted a counterclaim for indemnification from defendant.

On the day of the accident, plaintiff was operating a buck hoist, which is an elevator affixed to the outside of a building under construction, and was transporting both workers and materials in the buck hoist. There was a two- to four-inch gap between the building and the buck hoist, and when the buck hoist stopped at a building level, plaintiff was required to place a metal plate over that gap before anything heavy or with wheels was moved on or off the buck hoist. The accident occurred when plaintiff took the buck hoist to the eighth floor of the building, and an employee of Franco attempted to roll an electric pallet jack loaded with mortar and block debris onto the buck hoist without first waiting for plaintiff to put down the metal plate. As a result, the wheels of the pallet jack became stuck in the gap, causing some debris to fall off the pallet jack. Plaintiff used an angle iron as a lever to try and push the pallet jack upward and back out of the buck hoist. When plaintiff attempted to do so, the angle iron "gave way," the pallet jack shifted back down, and plaintiff slipped on some of the fallen debris and was injured.

Plaintiff moved for partial summary judgment on liability on the Labor Law §§ 240 (1) and 241 (6) causes of action. Defendant cross-moved for, inter alia, summary judgment dismissing plaintiff's complaint against it and, in the third-party action, for summary judgment on its cause of action for contractual indemnification and dismissing Franco's counterclaim against it. Franco cross-moved for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action and dismissing the third-party complaint. Supreme Court, inter alia, in the main action denied plaintiff's motion, granted those parts of defendant's and Franco's cross-motions for summary judgment dismissing the Labor Law § 240 (1) cause of action, granted those parts of defendant's cross-motion for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action, and denied those parts of defendant's and Franco's cross-motions for summary judgment dismissing the Labor Law § 241 (6) cause of action to the extent it was predicated upon the violations of 12 NYCRR 23-1.7 (d) and 23-2.1 (b). In the third-party action, the court denied the relief sought by both defendant and Franco. Plaintiff appeals, and defendant and Franco cross-appeal.

Contrary to plaintiff's contention on his appeal, the court properly denied that part of his motion seeking summary judgment on the Labor Law § 240 (1) cause of action and granted those parts of defendant's and Franco's cross-motions for summary judgment seeking dismissal of that cause of action. " '[T]he extraordinary protections of [Labor Law § 240 (1)] apply only to a narrow class of dangers,' " i.e., " 'special hazards' presenting 'elevation-related risk[s]' "

(*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96-97 [2015], *rearg denied* 25 NY3d 1195 [2015]). Thus, "[l]iability may . . . be imposed under [Labor Law § 240 (1)] only where the 'plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' " (*id.* at 97, quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). We conclude as a matter of law that plaintiff's injuries resulted from a routine workplace risk of a construction site and not an elevation-related risk to which the statute applies (*see Branch v 1908 W. Ridge Rd, LLC*, 199 AD3d 1362, 1362-1363 [4th Dept 2021]; *Carr v McHugh Painting Co., Inc.*, 126 AD3d 1440, 1443 [4th Dept 2015]; *see generally Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]).

Contrary to plaintiff's further contention on his appeal, the court properly denied that part of his motion seeking summary judgment on the Labor Law § 241 (6) cause of action and, contrary to defendant's and Franco's contentions on their cross-appeals, the court properly denied those parts of their cross-motions seeking dismissal of that cause of action to the extent it is predicated upon the violation of 12 NYCRR 23-1.7 (d) and 23-2.1 (b). Section 23-1.7 (d) provides that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." The regulation is sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350-351 [1998]; *Kobel v Niagara Mohawk Power Corp.*, 83 AD3d 1435, 1436 [4th Dept 2011]) and, contrary to defendant's and Franco's contentions, the regulation is not limited to elevated surfaces (*see Kobel*, 83 AD3d at 1436; *Cottone v Dormitory Auth. of State of N.Y.*, 225 AD2d 1032, 1033 [4th Dept 1996]). We conclude, however, that a triable issue of fact exists whether the regulation applies to the facts of this case, including whether mortar and block debris constituted a "foreign substance" and caused a "slippery condition" within the meaning of that regulation (*see generally Marino v Manning Squires Hennig Co., Inc.*, 208 AD3d 1020, 1021-1022 [4th Dept 2022]; *Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 730, 732 [2d Dept 2007]; *Ventura v Lancet Arch*, 5 AD3d 1053, 1054 [4th Dept 2004]).

12 NYCRR 23-2.1 (b) provides that "[d]ebris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area." The regulation is sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Finocchi v Live Nation, Inc.*, 141 AD3d 1092, 1094 [4th Dept 2016]). We conclude, however, that there is a triable issue of fact whether the regulation was violated (*see Kvandal v Westminster Presbyt. Socy. of Buffalo*, 254 AD2d 818, 818-819 [4th Dept 1998]; *see also St. John v Westwood-Squibb Pharms., Inc.*, 138 AD3d 1501, 1503 [4th Dept 2016]) and whether the way the mortar and block debris was handled and disposed of on the project was a proximate cause of plaintiff's injuries (*see generally Calderon v*

Walgreen Co., 72 AD3d 1532, 1533-1534 [4th Dept 2010], *appeal dismissed* 15 NY3d 900 [2010]).

Contrary to plaintiff's contention on his appeal and Franco's contention on its cross-appeal, the court properly granted those parts of defendant's cross-motion seeking summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action. Where the alleged defect or dangerous condition arises from the contractor's methods and the owner or general contractor "exercises no supervisory control over the operation, no liability attaches to the owner [or general contractor] under the common law or under section 200 of the Labor Law" (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). Here, plaintiff's injuries arose from the method and manner of performing the work and not a dangerous condition on the worksite. Inasmuch as it was undisputed that defendant did not supervise or control the injury-producing work, it established its entitlement to summary judgment on the Labor Law § 200 and common-law negligence causes of action (*see Anderson v National Grid USA Serv. Co.*, 166 AD3d 1513, 1513-1514 [4th Dept 2018]; *Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1579 [4th Dept 2016]). Plaintiff and Franco failed to raise a triable issue of fact in opposition to those parts of defendant's cross-motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We agree with defendant on its cross-appeal that the court erred in denying those parts of its cross-motion seeking summary judgment on its cause of action for contractual indemnification and dismissing Franco's counterclaim against it. We therefore modify the order accordingly. "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]; *see* General Obligations Law § 5-322.1; *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 180-181 [1990]). In addition, "the right to contractual indemnification depends upon the specific language of the contract" (*Allington v Templeton Found.*, 167 AD3d 1437, 1441 [4th Dept 2018] [internal quotation marks omitted]). The indemnification provision in the subcontract between defendant and Franco provides, inter alia, that Franco agreed to indemnify defendant "from and against any and all losses, claims, actions, demands, damages, liabilities, or expenses . . . by reason of the liability imposed by law or otherwise upon . . . [defendant] . . . for damages because of bodily injuries, including death, at any time resulting therefrom sustained by any person . . . arising out of or resulting from performance of [Franco's] [w]ork, or from any acts or omissions on the part of [Franco], its employees, agents, or representatives." Defendant established as a matter of law that it was not negligent and that plaintiff's injuries arose out of Franco's work (*see Tanksley v LCO Bldg. LLC*, 196 AD3d 1037, 1038 [4th Dept 2021]; *see generally Allington*, 167 AD3d at 1440-1441). Franco failed to raise a triable issue of fact in opposition (*see generally Miller v Rerob, LLC*, 197 AD3d 979, 981 [4th Dept 2021]).

We have considered the parties' remaining contentions on the

appeal and cross-appeals and conclude that they do not require reversal or further modification of the order.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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KA 20-01647

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLAY D. RHODES, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 7, 2019. The judgment convicted defendant upon his plea of guilty of robbery in the second degree and assault 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 robbery in the second degree (Penal Law § 160.10 [2] [a]) and assault in the second degree (§ 120.05 [12]). We agree with defendant that his waiver of the right to appeal was invalid because Supreme Court's "oral colloquy mischaracterized it as an absolute bar to the taking of an appeal" (*People v McCrayer*, 199 AD3d 1401, 1401 [4th Dept 2021]; *see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Although the record establishes that defendant executed a written waiver of the right to appeal, the written waiver does not cure the deficient oral colloquy because the court did not inquire of defendant whether he understood the written waiver or whether he had read the waiver before signing it (*see People v Sanford*, 138 AD3d 1435, 1436 [4th Dept 2016]). We nevertheless reject defendant's contention that the sentence is unduly harsh and severe.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 22-00369

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

FORD MOTOR CREDIT COMPANY LLC, FORMERLY KNOWN AS FORD MOTOR CREDIT COMPANY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MCCARTHY ACQUISITION CORPORATION, DOING BUSINESS AS MCCARTHY FORD, ET AL., DEFENDANTS, AUTOMOTIVE FLEET LEASING SERVICES, INC., DOING BUSINESS AS AUTOMOTIVE FLEET LEASING CO., THOMAS J. PIERONI AND BENTLEY HOLDINGS, INC., DOING BUSINESS AS AUTOMOTIVE FLEET LEASING CO., DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

THOMAS J. PIERONI, BENTLEY HOLDINGS, INC., DOING BUSINESS AS AUTOMOTIVE FLEET LEASING CO., PLAINTIFFS-RESPONDENTS, ET AL., PLAINTIFFS,

V

FORD MOTOR CREDIT COMPANY LLC, FORMERLY KNOWN AS FORD MOTOR CREDIT COMPANY, DEFENDANT-APPELLANT.
(ACTION NO. 2.)
(APPEAL NO. 1.)

MAURO LILLING NAPARTY LLP, WOODBURY (RICHARD J. MONTES OF COUNSEL), FOR PLAINTIFF-APPELLANT AND DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered March 2, 2022. The order, inter alia, denied the motion of Ford Motor Credit Company LLC, formerly known as Ford Motor Credit Company to, inter alia, set aside the jury verdict.

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

Same memorandum as in *Ford Motor Credit Co. LLC v McCarthy Acquisition Corp.* ([appeal No. 2] — AD3d — [June 30, 2023] [4th Dept

2023]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00373

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

FORD MOTOR CREDIT COMPANY LLC, FORMERLY KNOWN AS FORD MOTOR CREDIT COMPANY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MCCARTHY ACQUISITION CORPORATION, DOING BUSINESS AS MCCARTHY FORD, ET AL., DEFENDANTS, AUTOMOTIVE FLEET LEASING SERVICES, INC., DOING BUSINESS AS AUTOMOTIVE FLEET LEASING CO., THOMAS J. PIERONI AND BENTLEY HOLDINGS, INC., DOING BUSINESS AS AUTOMOTIVE FLEET LEASING CO., DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

THOMAS J. PIERONI, BENTLEY HOLDINGS, INC., DOING BUSINESS AS AUTOMOTIVE FLEET LEASING CO., PLAINTIFFS-RESPONDENTS, ET AL., PLAINTIFFS,

V

FORD MOTOR CREDIT COMPANY LLC, FORMERLY KNOWN AS FORD MOTOR CREDIT COMPANY, DEFENDANT-APPELLANT.
(ACTION NO. 2.)
(APPEAL NO. 2.)

MAURO LILLING NAPARTY LLP, WOODBURY (RICHARD J. MONTES OF COUNSEL), FOR PLAINTIFF-APPELLANT AND DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered March 4, 2022. The judgment, among other things, awarded Thomas J. Pieroni, Bentley Holdings, Inc., doing business as Automotive Fleet Leasing Co., and Automotive Fleet Leasing Services, Inc., doing business as Automotive Fleet Leasing Co., damages in the amount of $824,220, plus interest.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the posttrial motion in part and reducing the amount of the award of damages to $739,553, plus interest at the rate of 9% per annum commencing July 21, 2007, and as

modified the judgment is affirmed without costs.

Memorandum: The two actions before us stem from a dispute over entitlement to the value of certain vehicles transferred from a now-defunct automobile dealership (dealership). In appeal No. 1, plaintiff-defendant Ford Motor Credit Company LLC, formerly known as Ford Motor Credit Company (Ford Credit) appeals from an order that denied its motion to, inter alia, set aside the jury verdict. In appeal No. 2, Ford Credit appeals from a subsequent judgment awarding money damages against Ford Credit.

Pursuant to a floor plan financing and security agreement, Ford Credit gave the dealership financing to acquire vehicles in exchange for a security interest in the vehicles. Ford Credit commenced action No. 1 against the dealership and its guarantors after the dealership was "out of trust"; 79 vehicles were missing from the dealership's inventory for which Ford Credit never received payment. Ford Credit then amended the complaint to include, inter alia, defendants Automotive Fleet Leasing Services, Inc., doing business as Automotive Fleet Leasing Co., Bentley Holdings, Inc., doing business as Automotive Fleet Leasing Co. (Bentley) (collectively, Pieroni Companies), and Thomas J. Pieroni (Pieroni). Ford Credit alleged that the Pieroni Companies were the purported buyers or participants in the transfer of some of the vehicles that were missing from the dealership's inventory (vehicles). As relevant to this appeal, Ford Credit asserted against the Pieroni Companies conversion and tortious interference with an existing contract causes of action. The Pieroni Companies asserted counterclaims against Ford Credit, including for conversion and tortious interference. At a consolidated trial, the jury determined that neither the Pieroni Companies nor Ford Credit were liable for conversion. The jury further determined that Ford Credit was liable for tortious interference against the Pieroni Companies and awarded $824,220 in compensatory damages. Ford Credit thereafter moved to, inter alia, set aside the jury verdict (posttrial motion) on various grounds including that the verdict is inconsistent, that Ford Credit is entitled to judgment as a matter of law, that the damage award should be set aside or reduced, and that it is entitled to an offset. Supreme Court denied the posttrial motion, and the court issued a judgment in favor of Pieroni and the Pieroni Companies.

As an initial matter, we note that the appeal from the order in appeal No. 1 must be dismissed inasmuch as it is subsumed in the judgment in appeal No. 2. The appeal from the judgment brings up for review the propriety of the order in appeal No. 1 (*see generally* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d 241, 248 [1976]).

Ford Credit contends that the jury verdict is irreconcilably inconsistent because it was logically impossible for the jury to find that Ford Credit was not liable for conversion without also finding that it was not liable for tortious interference. We reject that contention. "[An] inconsistency exists only when a verdict on one claim necessarily negates an element of another cause of action" (*Barry v Manglass*, 55 NY2d 803, 805 [1981], *rearg denied* 55 NY2d 1039 [1982]). "Where . . . an apparently inconsistent or illogical verdict

can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Skowronski v Mordino*, 4 AD3d 782, 783 [4th Dept 2004] [internal quotation marks omitted]; *see Almuganahi v Gonzalez*, 174 AD3d 1492, 1493 [4th Dept 2019]). Here, the jury could have reasonably found from the evidence that Ford Credit was not liable for conversion against the Pieroni Companies because the Pieroni Companies failed to establish the element of "right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]), i.e., that they had a right to possess the vehicles. Indeed, the evidence demonstrated that the Pieroni Companies were the financiers of the purchase of the vehicles but that the owners were defendants-plaintiffs MPDK, LLC, doing business as Adobe Car & Truck Rental of Tucson, Adobe Car & Van Rental of Tucson or Adobe Car & Van Rentals, LLC (collectively, Adobe) and Winchester Auto Retail, Inc. (Winchester). The jury's verdict on the conversion counterclaim did not negate an element of the tortious interference counterclaim, and we therefore conclude that the verdict is not inconsistent (*see generally Skowronski*, 4 AD3d at 783).

Contrary to the contention of Ford Credit, we further conclude that the evidence is legally sufficient to establish that Ford Credit was liable for tortious interference. To establish legal insufficiency, the moving party must establish that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Mazella v Beals*, 27 NY3d 694, 705 [2016] [internal quotation marks omitted]). Thus, "[i]f there is a question of fact and it would not be utterly irrational for a jury to reach the result it has determined upon . . . the court may not conclude that the verdict is as a matter of law not supported by the evidence" (*Soto v New York City Tr. Auth.*, 6 NY3d 487, 492 [2006] [internal quotation marks omitted]).

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Here, contrary to Ford Credit's contention, the jury could have rationally concluded that the Pieroni Companies had valid contracts with Adobe and Winchester, in the form of master lease agreements, and that Ford Credit intentionally procured the breach by Adobe and Winchester by seizing the vehicles. Although Ford Credit further contends that the evidence established as a matter of law that it did not act "without justification," economic justification is an affirmative defense that must be pleaded and proved by the party asserting it (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]; *Foster v Churchill*, 87 NY2d 744, 750 [1996]), and Ford Credit waived that affirmative defense by not pleading it in response to the tortious interference counterclaim asserted by the Pieroni Companies (*see* CPLR 3018 [b]; *see also Pitts v State of New York*, 166 AD3d 1505, 1506 [4th Dept 2018], *lv denied* 35 NY3d 910 [2020]).

We agree, however, with Ford Credit that the court erred in denying the posttrial motion insofar as it sought to reduce the compensatory damages award. The successful party on a tortious interference claim is entitled to "the full pecuniary loss of the benefits of the contract with which [the defendant] interfered," including lost profits (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 197 [1980]). Here, the evidence established that the Pieroni Companies sustained losses, in the form of the value of the vehicles, in the amount of $739,553, which is the amount the Pieroni Companies requested at trial, and the Pieroni Companies failed to establish any additional damages. We therefore reduce the compensatory damages award to $739,553 and modify the judgment accordingly.

We reject Ford Credit's contention that the court erred in denying that part of the posttrial motion seeking an offset to the damages award. By failing to seek the offset by way of an affirmative defense in response to the tortious interference counterclaim, Ford Credit waived any right to an offset (*see Wooten v State of New York*, 302 AD2d 70, 73-74 [4th Dept 2002], *lv denied* 1 NY3d 501 [2003]).

Finally, we have considered Ford Credit's remaining contentions and conclude that none warrants reversal or further modification of the judgment.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00995

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

CHRISTOPHER SMITH AND MICHAEL SMITH, AS TRUSTEES OF THE JAY AND PATRICIA SMITH IRREVOCABLE TRUST, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANNA J. SMITH, AS TRUSTEE OF THE THEODORE P. SMITH INCOME ONLY IRREVOCABLE TRUST, AND ANNA JANE SMITH, AS EXECUTOR OF THE ESTATE OF THEODORE P. SMITH, DECEASED, DEFENDANT-APPELLANT. (APPEAL NO. 1.)

LAW OFFICES OF ANNA SMITH, HERKIMER (ANNA J. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING PLLC, SYRACUSE (KEVIN G. COPE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Herkimer County (John H. Crandall, A.J.), entered June 21, 2021. The order modified a temporary restraining order.

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

Same memorandum as in *Smith v Smith* ([appeal No. 2] — AD3d — [June 30, 2023] [4th Dept 2023]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-01407

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

CHRISTOPHER SMITH AND MICHAEL SMITH, AS TRUSTEES OF THE JAY AND PATRICIA SMITH IRREVOCABLE TRUST, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANNA J. SMITH, AS TRUSTEE OF THE THEODORE P. SMITH INCOME ONLY IRREVOCABLE TRUST, AND ANNA JANE SMITH, AS EXECUTOR OF THE ESTATE OF THEODORE P. SMITH, DECEASED, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

LAW OFFICES OF ANNA SMITH, HERKIMER (ANNA J. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING PLLC, SYRACUSE (KEVIN G. COPE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Herkimer County (John H. Crandall, A.J.), entered September 28, 2021. The order, among other things, granted that part of plaintiffs' motion seeking a preliminary injunction.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of plaintiffs' motion seeking a preliminary injunction and as modified the order is affirmed without costs.

Memorandum: These appeals involve real property owned by the Jay and Patricia Smith Irrevocable Trust and the Theodore P. Smith Income Only Irrevocable Trust as tenants in common. Pursuant to a verbal lease agreement, defendant, who is the trustee of the Theodore P. Smith Income Only Irrevocable Trust and the executor of the estate of Theodore P. Smith, operates a commercial and tourist mining enterprise on the property for the mining of "Herkimer Diamonds," a variety of quartz crystal, as well as a campground. When the parties were unable to agree on the terms for the continued operation of the mine, plaintiffs, who are trustees of the Jay and Patricia Smith Irrevocable Trust, commenced this action seeking, inter alia, a judgment directing that the property be sold. Plaintiffs also moved for a temporary restraining order and a preliminary injunction halting all mining operations during the pendency of the action. In appeal No. 1, defendant appeals from an order modifying a temporary restraining order. In appeal No. 2, defendant appeals from an order denying her

cross-motion seeking, among other things, to determine the action in accordance with RPAPL 993, granting in part the motion of plaintiffs for a preliminary injunction, and, inter alia, enjoining defendant from conducting commercial mining on the property during the pendency of the action.

In appeal No. 1, we conclude that defendant's appeal must be dismissed as moot inasmuch as "the temporary restraining order has by its very nature expired and has been superseded by the [preliminary] injunction" that was granted in the order in appeal No. 2 (*Stubbart v County of Monroe*, 58 AD2d 25, 29 [4th Dept 1977], *lv denied* 42 NY2d 808 [1977]; *see Sysco Syracuse, LLC v Egan*, 109 AD3d 1214, 1215 [4th Dept 2013]; *see generally Board of Educ. of City School Dist. of City of Buffalo v Pisa*, 55 AD2d 128, 135 [4th Dept 1976]).

In appeal No. 2, defendant contends that Supreme Court erred in denying that part of the cross-motion seeking a determination that the property is heirs property subject to the Uniform Partition of Heirs Property Act (RPAPL 993). We reject that contention. "When presented with a question of statutory interpretation, a court's primary consideration is to ascertain and give effect to the intention of the Legislature" (*Nadkos, Inc. v Preferred Contrs. Ins. Co. Risk Retention Group LLC*, 34 NY3d 1, 7 [2019] [internal quotation marks omitted]). "[T]he statutory text is the clearest indicator of legislative intent and . . . a court should construe unambiguous language to give effect to its plain meaning" (*id.* [internal quotation marks omitted]). Under the RPAPL, "[i]n any action to partition real property, the court shall determine, after notice and a right to be heard afforded to each party, whether the property is heirs property. If the court determines that the property is heirs property, the property shall be partitioned in accordance with this section unless all of the co-tenants otherwise agree in a record" (RPAPL 993 [3] [b]). " 'Heirs property' " is defined as "real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action," including, as relevant here, that "(i) there is no agreement in the record binding all of the co-tenants which governs partition of the property; (ii) any of the co-tenants acquired title from a relative, whether living or deceased; [and] (iii) the property is used for residential or agricultural purposes" (RPAPL 993 [2] [e]). Thus, contrary to defendant's contention, the plain text of the statute restricts its application to property that "is used for residential or agricultural purposes" (RPAPL 933 [2] [e] [iii]). Even assuming, arguendo, that defendant established all of the other requirements of the statute, the court properly denied that part of the cross-motion seeking a determination that RPAPL 993 is applicable because the property is not used for residential or agricultural purposes.

However, we agree with defendant that the court abused its discretion in granting that part of plaintiffs' motion seeking a preliminary injunction, and we therefore modify the order in appeal No. 2 accordingly. "A preliminary injunction is an extraordinary provisional remedy to which a plaintiff is entitled only on a special

showing" (*Margolies v Encounter, Inc.*, 42 NY2d 475, 479 [1977]). "[T]he party seeking the injunction must establish, by clear and convincing evidence . . . , three separate elements: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216 [4th Dept 2009] [internal quotation marks omitted]; *see Doe v Axelrod*, 73 NY2d 748, 750 [1988]). "The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts" (*Doe*, 73 NY2d at 750), and will not be disturbed absent a "showing of an abuse of discretion" (*Destiny USA Holdings, LLC*, 69 AD3d at 216 [internal quotation marks omitted]). Here, plaintiffs failed to establish a likelihood of success on the merits of the action inasmuch as plaintiffs presented no evidence that partition of the property would result in great prejudice to the owners (*see* RPAPL 901 [1]; *Perretta v Perretta*, 143 AD3d 878, 879 [2d Dept 2016]; *Tuminno v Waite*, 110 AD3d 1456, 1457 [4th Dept 2013]; *cf. Lane v Tyson*, 133 AD3d 530, 531 [1st Dept 2015], *lv dismissed* 27 NY3d 1033 [2016]; *Loughran v Cruickshank*, 8 AD3d 799, 800 [3d Dept 2004]).

Nor did plaintiffs establish that irreparable injury would result if provisional relief was withheld. It is well settled "that [i]rreparable injury, for purposes of equity, . . . mean[s] any injury for which money damages are insufficient" (*Eastview Mall, LLC v Grace Holmes, Inc.*, 182 AD3d 1057, 1058 [4th Dept 2020] [internal quotation marks omitted]; *see Mar v Liquid Mgt. Partners, LLC*, 62 AD3d 762, 763 [2d Dept 2009]). Plaintiffs put forward no evidence establishing that the alleged harm caused by continuing the mining operation while the action was pending–i.e., a reduction of the amount of crystals contained within the property prior to a sale or partition–could not be ameliorated by monetary damages. Indeed, any assertion to that end is belied by the fact that the parties had previously agreed to an amount of money meant to compensate plaintiffs for defendant's operation of the mine from 2013 through 2020.

Finally, the balance of the equities weighs in defendant's favor. "In balancing the equities, a court must inquire into whether the irreparable injury to be sustained . . . is more burdensome [to the plaintiff] than the harm caused to [the] defendant through imposition of the injunction" (*Eastview Mall, LLC*, 182 AD3d at 1059 [internal quotation marks omitted]). "[W]here it is demonstrated . . . that the defendant[] would likely suffer more damage than the plaintiff[], a preliminary injunction should not be issued" (*Price Paper & Twine Co. v Miller*, 182 AD2d 748, 750 [2d Dept 1992]). Here, we conclude that the harm defendant will suffer if the preliminary injunction is in place is more burdensome than the harm to plaintiffs in the absence of an injunction inasmuch as defendant established that the temporary restraining order had negatively impacted the business, which had been operating on the property for decades, and defendant was willing to increase the payment made to plaintiffs as "rent," and to memorialize certain mining restrictions in writing shortly before the proceeding

was commenced.

In light of our determination, defendant's remaining contention in appeal No. 2 is academic.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00804

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

XIANLIANG WANG, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN BARBOSA, DEFENDANT-APPELLANT,
AND QUEEN CITY REALTY GROUP, LLC, DEFENDANT.

THE DANZIGER LAW FIRM, BUFFALO (JACK DANZIGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ZDARSKY SAWICKI & AGOSTINELLI LLP, BUFFALO (DANIEL J. BOBBETT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered January 19, 2022. The order denied the motion of defendant Steven Barbosa to dismiss the amended complaint against him.

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

Memorandum: Plaintiff and Steven Barbosa (defendant) entered into a contract for plaintiff to purchase from defendant eight properties consisting of approximately 33 apartment units. Plaintiff commenced this action seeking, inter alia, specific performance of the contract, damages for breach of contract, and a declaration. Defendant moved to dismiss the amended complaint against him for failure to state a cause of action. Supreme Court denied the motion, and we now affirm.

It is well established that "[w]hen a court rules on a CPLR 3211 motion to dismiss, it 'must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Defendant contends that the court erred in denying his motion inasmuch as the contract was cancelled because an addendum to the contract was cancelled. We reject that contention. The contract had an attorney approval contingency, and it is undisputed that attorneys for both parties approved the contract without conditions. The

parties subsequently signed an addendum to the contract, but defendant's attorney purportedly disapproved the addendum. The contract provided that any addendum to the contract was contingent on approval by the parties' respective attorneys. The contract further provided that where a party's attorney disapproves an addendum to the contract, the addendum is deemed cancelled, but the contract "shall remain in full force and effect" with two exceptions, neither of which are applicable here. It is well settled that " 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' " (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 39 [2018]). Thus, the purported disapproval of the addendum by defendant's attorney merely cancelled the addendum, but not the contract, which remained in full force and effect.

We also reject defendant's further contention that the court should have granted his motion inasmuch as the contract was cancelled even before the parties signed the addendum because plaintiff was in breach of the contract. "The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law" (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004], *lv denied* 3 NY3d 607 [2004], *lv dismissed* 3 NY3d 656 [2004]; *see Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 92 [4th Dept 2015]). Further, "one of the essential elements of a cause of action for breach of contract is the performance of its obligations by the party asserting the cause of action for breach" (*County of Jefferson v Onondaga Dev., LLC*, 151 AD3d 1793, 1795-1796 [4th Dept 2017], *amended on rearg* 162 AD3d 1602 [4th Dept 2018]; *see Pearl St. Parking Assoc. LLC v County of Erie*, 207 AD3d 1029, 1031 [4th Dept 2022]).

The allegations in the amended complaint, which must be accepted as true, do not establish that plaintiff was in breach of the contract and that the contract was thereby deemed cancelled. Although plaintiff alleged that he failed to deposit the earnest money and obtain a mortgage commitment within the time required by the contract, he further alleged that defendant waived compliance with or was otherwise estopped from enforcing the time requirements. In addition, plaintiff alleged that defendant never elected to terminate the contract due to plaintiff's failure to meet the deadlines set forth in the contract. Plaintiff alleged that he was ready, willing, and able to perform all the remaining obligations required of him under the contract. Thus, we conclude that the amended complaint, with its attached exhibits, "adequately sets forth causes of action for a declaratory judgment, [specific performance of the contract, and] breach of contract . . . , and defendant's contentions to the contrary raise issues of fact and do not warrant relief under CPLR 3211 (a) (7)" (*Tower Broadcasting, LLC v Equinox Broadcasting Corp.*, 160 AD3d

1435, 1436 [4th Dept 2018]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

187

CA 21-00874

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

CHRISTOPHER SMITH AND MICHAEL SMITH, AS TRUSTEES OF THE JAY AND PATRICIA SMITH IRREVOCABLE TRUST, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

THEODORE P. SMITH INCOME ONLY IRREVOCABLE TRUST, DEFENDANT-APPELLANT.

LAW OFFICES OF ANNA SMITH, HERKIMER (ANNA J. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (KEVIN G. COPE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Herkimer County (John H. Crandall, A.J.), entered May 11, 2021. The order, among other things, granted a temporary restraining order.

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

Memorandum: Defendant appeals from an order insofar as it granted plaintiffs' request for a temporary restraining order prohibiting defendant from conducting mining operations of any kind during the pendency of the proceedings. We conclude that the appeal must be dismissed inasmuch as that order was modified by a subsequent temporary restraining order (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

194

CA 22-01164

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

IN THE MATTER OF LEAGUE OF WOMEN VOTERS OF BUFFALO/NIAGARA, INC., THE 21ST CENTURY PARK IN THE OUTER HARBOR, INC., AND THE WESTERN NEW YORK ENVIRONMENTAL ALLIANCE, INC., PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ERIE CANAL HARBOR DEVELOPMENT CORPORATION, CITY OF BUFFALO AND CITY OF BUFFALO COMMON COUNCIL, RESPONDENTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR RESPONDENT-RESPONDENT ERIE CANAL HARBOR DEVELOPMENT CORPORATION.

CAVETTE A. CHAMBERS, CORPORATION COUNSEL, BUFFALO (CARIN S. GORDON OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CITY OF BUFFALO AND CITY OF BUFFALO COMMON COUNCIL.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 4, 2022, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: In June 2021, petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of respondent Erie Canal Harbor Development Corporation (ECHDC) to issue a negative declaration pursuant to article 8 of the Environmental Conservation Law (State Environmental Quality Review Act [SEQRA]) with respect to a construction project, and to annul the determination of respondent City of Buffalo (City) that the project was consistent with the City's Local Waterfront Revitalization Program and the City's zoning ordinance. Petitioners did not move for preliminary injunctive relief with respect to the project. Respondents moved to dismiss the petition pursuant to CPLR 3211 and 7804 (f). Supreme Court granted the motions and dismissed the petition.

Petitioners filed a notice of appeal from the judgment on July 6, 2022, but did not seek an order from this Court enjoining construction of the project while this appeal was pending. Thereafter, in January 2023, ECHDC moved in this Court to dismiss petitioners' appeal as moot on the ground that the project is substantially complete. We denied that motion without prejudice and with leave to renew any arguments in support of or in opposition to the motion at oral argument.

Now, after oral argument, we conclude that the appeal should be dismissed as moot (*see generally Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 728 [2004]). Litigation over construction is rendered moot when the progress of the work constitutes a change in circumstances that would prevent the court from " 'rendering a decision that would effectively determine an actual controversy' " (*id.* at 728-729; *see Matter of Sierra Club v New York State Dept. of Envtl. Conservation*, 169 AD3d 1485, 1486 [4th Dept 2019]). "In addition to the progress of the construction, other factors relevant to evaluating claims of mootness are whether the party challenging the construction sought injunctive relief, whether the work was undertaken without authority or in bad faith . . . , and whether substantially completed work can be undone without undue hardship" (*Sierra Club*, 169 AD3d at 1486 [internal quotation marks omitted]). Of the "several factors significant in evaluating claims of mootness[, c]hief among them has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation" (*Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 173 [2002]). Generally, a petitioner seeking to halt a construction project must "move for injunctive relief at each stage of the proceeding" (*Matter of Weeks Woodlands Assn., Inc. v Dormitory Auth. of the State of N.Y.*, 95 AD3d 747, 750 [1st Dept 2012], *affd* 20 NY3d 919 [2012]; *see Sierra Club*, 169 AD3d at 1487).

Here, the evidentiary submissions in support of ECHDC's motion to dismiss the appeal as moot establish that work on the construction project began in late 2021 and is now substantially complete. Despite being aware of the construction, it is undisputed that petitioners "never moved for a preliminary injunction, or otherwise sought to preserve the status quo, pending the outcome of the proceeding" (*Matter of 315 Ship Canal Parkway, LLC v Buffalo Urban Dev. Corp.*, 210 AD3d 1395, 1396 [4th Dept 2022]; *see Citineighbors*, 2 NY3d at 729; *Dreikausen*, 98 NY2d at 174; *Sierra Club*, 169 AD3d at 1487). Thus, the "primary factor in the mootness analysis" weighs heavily against petitioners (*Sierra Club*, 169 AD3d at 1486). Moreover, ECHDC established that the construction of the project "was not performed in bad faith or without authority" (*315 Ship Canal Parkway, LLC*, 210 AD3d at 1396; *see Citineighbors*, 2 NY3d at 729; *Sierra Club*, 169 AD3d at 1487). Indeed, the record establishes that respondents "performed no work until 'review pursuant to SEQRA was completed and all necessary approvals and permits were issued' " (*Sierra Club*, 169 AD3d at 1487). Consequently, this is not a case in which respondents "engaged in an unseemly race to completion intended to moot petitioners' lawsuit" (*Citineighbors*, 2 NY3d at 729). Inasmuch as the court properly

determined that petitioners' challenge to the negative declaration under SEQRA is time-barred (*see* CPLR 217 [1]; *Matter of Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 316 [2006]; *Stop-The-Barge v Cahill*, 1 NY3d 218, 222-223 [2003]), there is no viable cause of action upon which petitioners could legitimately claim that their environmental concerns warrant further review (*see generally Matter of Dowd v Planning Bd. of Vil. of Millbrook*, 54 AD3d 339, 339-340 [2d Dept 2008]; *cf. Matter of Friends of Pine Bush v Planning Bd. of City of Albany*, 86 AD2d 246, 248-249 [3d Dept 1982], *affd* 59 NY2d 849 [1983]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

200

KA 22-00042

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. VANDERHOEF, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered November 23, 2021. The judgment convicted defendant upon a plea of guilty of aggravated unlicensed operation of a motor vehicle in the third degree and driving while ability impaired by drugs.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of driving while ability impaired by drugs as a misdemeanor (Vehicle and Traffic Law §§ 1192 [4]; 1193 [1] [b] [i]) and aggravated unlicensed operation of a motor vehicle in the third degree (§ 511 [1] [a]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of falsifying business records in the first degree (Penal Law § 175.10). In appeal No. 3, defendant appeals from a judgment convicting him upon his plea of guilty of driving while ability impaired by drugs as a class E felony (Vehicle and Traffic Law §§ 1192 [4]; 1193 [1] [c] [i] [A]) and aggravated unlicensed operation of a motor vehicle in the third degree (§ 511 [1] [a]).

In appeal No. 2, defendant contends that his agreed-upon sentence of an indeterminate term of imprisonment of two to four years is unduly harsh and severe. The fact that defendant "received the bargained-for sentence . . . does not preclude him from seeking our discretionary review of his sentence pursuant to CPL 470.15 (6) (b)" (*People v Hettig*, 210 AD3d 1508, 1509 [4th Dept 2022], *lv denied* 39 NY3d 1073 [2023] [internal quotation marks omitted]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

We likewise reject defendant's contention in appeal Nos. 1 and 3,

respectively, that the imposition of a $500 fine upon his conviction of misdemeanor driving while ability impaired by drugs and a $1,000 fine upon his conviction of felony driving while ability impaired by drugs is unduly harsh and severe (*see People v Hawkins*, 179 AD3d 1547, 1549 [4th Dept 2020], *lv denied* 35 NY3d 942 [2020]; *People v Schena*, 59 AD3d 986, 986-987 [4th Dept 2009]).

With respect to appeal No. 3, defendant further contends that County Court improperly enhanced his sentence upon his conviction of felony driving while ability impaired by drugs by imposing the $1,000 fine. Although defendant failed to preserve his contention for our review because he did not object to the imposition of the fine or move to withdraw his plea or to vacate the judgment of conviction (*see People v Wilson*, 201 AD3d 1354, 1354 [4th Dept 2022]; *People v Fortner*, 23 AD3d 1058, 1058 [4th Dept 2005]), we exercise our power to review the issue as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). As the People correctly concede, the court improperly enhanced defendant's sentence "by imposing a fine that was not part of the negotiated plea agreement" (*Wilson*, 201 AD3d at 1354 [internal quotation marks omitted]). We therefore modify the judgment in appeal No. 3 by vacating the $1,000 fine "so as to conform the sentence imposed to the promise made to the defendant in exchange for his plea of guilty" (*id.* [internal quotation marks omitted]; *see People v Lester*, 49 AD3d 1183, 1183 [4th Dept 2008]; *see also People v Days*, 150 AD3d 1622, 1625 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]).

We have reviewed defendant's remaining contention in appeal No. 1 and conclude that it does not warrant modification or reversal of the judgment in that appeal.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

201

KA 22-00043

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. VANDERHOEF, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered November 23, 2021. The judgment convicted defendant upon a plea of guilty of falsifying business records in the first degree.

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

Same memorandum as in *People v Vanderhoef* ([appeal No. 1] – AD3d – [June 30, 2023] [4th Dept 2023]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

202

KA 22-00044

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. VANDERHOEF, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

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

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered November 23, 2021. The judgment convicted defendant upon a plea of guilty of aggravated unlicensed operation of a motor vehicle in the third degree and driving while ability impaired by drugs.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the fine imposed on count one of the indictment and as modified the judgment is affirmed.

Same memorandum as in *People v Vanderhoef* ([appeal No. 1] – AD3d – [June 30, 2023] [4th Dept 2023]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

203

KA 18-02213

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDRICK N. COLON, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD 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 October 22, 2018. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on count one of the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). During a traffic stop, defendant, a passenger in the vehicle, fled from the police, allegedly revealing a handgun in his waistband as he ran. Subsequently, a police officer discovered a handgun in the general area where defendant had been apprehended.

Defendant contends that the evidence is legally insufficient to support the conviction. We reject defendant's contention. One officer testified at trial that he observed a handgun in defendant's waistband as defendant fled. Although the image was blurry, the officer was also able to identify the handgun in a still frame taken from body camera footage. A handgun and defendant's identification card were discovered in the general area of police pursuit. 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 possessed the handgun (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Curry*, 120 AD3d 1576, 1576-1577 [4th Dept 2014], *lv denied* 25 NY3d 1162 [2015]). 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]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495; *People v Habeeb*, 177 AD3d 1271, 1272 [4th Dept 2019], *lv denied* 34 NY3d 1159 [2020]).

We further reject defendant's contention that Supreme Court erred in denying his motion to suppress statements and physical evidence allegedly obtained as the result of an unlawful police encounter. Giving due deference to the trial court's credibility determinations (*see People v Layou*, 134 AD3d 1510, 1511 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016], *reconsideration denied* 28 NY3d 932 [2016]), we conclude that the officers lawfully stopped the vehicle in which defendant was a passenger upon the observation of a traffic violation (*see generally People v Ross*, 185 AD3d 1537, 1537-1538 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020]), the officers lawfully requested that defendant exit the vehicle (*see generally People v Binion*, 100 AD3d 1514, 1515 [4th Dept 2012], *lv denied* 21 NY3d 911 [2013]), and the odor of marijuana, at the time of the encounter, provided the officers with probable cause to search the vehicle's occupants (*see People v Black*, 59 AD3d 1050, 1051 [4th Dept 2009], *lv denied* 12 NY3d 851 [2009]). We further conclude, based on testimony credited at the suppression hearing that the officers saw a handgun on defendant's person when he fled, that the police pursuit was justified (*see People v Daniels*, 147 AD3d 1392, 1393 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]).

We agree with defendant, however, that the court's *Sandoval* ruling, which, as relevant here, permitted the People to cross-examine defendant, should he elect to testify, regarding a prior conviction of attempted criminal possession of a weapon in the second degree and to elicit, inter alia, the name of that crime, constitutes reversible error. A court's *Sandoval* determination is reviewed for an abuse of discretion (*see People v Davis*, 198 AD3d 1355, 1356 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022]), and will generally be affirmed on appeal where the record reflects that the court properly considered the parties' arguments and "weighed the probative value of [the] defendant's prior conviction against its potential for undue prejudice" (*People v Micolo*, 171 AD3d 1484, 1485 [4th Dept 2019], *lv denied* 35 NY3d 1096 [2020]; *see People v Haynes*, 97 NY2d 203, 208 [2002]; *People v Lewis*, 192 AD3d 1532, 1534 [4th Dept 2021], *lv denied* 37 NY3d 993 [2021]). The record before us, however, reflects that the court did not exercise independent discretion and instead erroneously concluded that it was "bound" by this Court's precedent to allow cross-examination as to the prior conviction.

Although defense counsel argued before the court that it would be unduly prejudicial to permit questioning regarding a prior conviction of attempted criminal possession of a weapon in the second degree where the offense charged was criminal possession of a weapon in the second degree, the record reflects that the court did not exercise its discretion in weighing the probative value of defendant's conviction against its potential for undue prejudice. Instead, the court cited this Court's decision in *People v Stanley* (155 AD3d 1684 [4th Dept

2017], *lv denied* 30 NY3d 1120 [2018]) and advised defense counsel that she "may want to discuss [her arguments] with the Fourth Department," explaining that *Stanley* was "their ruling, not my ruling" and that it was "bound by [the Fourth Department's] rulings." Consistently, when making its final determination on the issue, the court stated that its ruling was based "upon the *Stanley* case." In light of the above, we conclude that the court's *Sandoval* ruling with respect to the conviction for attempted criminal possession of a weapon in the second degree was not the result of the court's independent discretion based on the circumstances of the case before it, but rather the result of what, in the court's estimation, was binding precedent that dictated a specific ruling.

Stanley, however, stands for the proposition that "[c]ross-examination of a defendant concerning a prior crime is not prohibited solely because of the similarity between that crime and the crime charged" (*Stanley*, 155 AD3d at 1685 [internal quotation marks omitted]). That means that a *Sandoval* application by the People should not be *automatically denied* merely because a prior conviction is similar in nature to the present offense, and certainly does not mean that a court must *automatically grant* the People's application. There was nothing in *Stanley* that "bound" the court in this case and, to the contrary, the court was required to make its own discretionary balancing of the probative value of defendant's prior conviction against its potential for undue prejudice (*see Micolo*, 171 AD3d at 1485). Although "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 . . . , particularly where . . . the basis of the court's decision may be inferred from the parties' arguments" (*People v Wertman*, 114 AD3d 1279, 1281 [4th Dept 2014], *lv denied* 23 NY3d 969 [2014] [internal quotation marks omitted]; *see People v Flowers*, 166 AD3d 1492, 1494 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]), the record must reflect that independent discretion was exercised (*see generally People v Graham*, 107 AD3d 1421, 1422 [4th Dept 2013], *affd* 25 NY3d 994 [2015]). Rather than independent discretion, however, the record here reflects that the court's reasoning was based on an erroneous belief that it was "bound" by *Stanley*.

We further conclude that the error is not harmless. "Under the standard applicable to nonconstitutional errors, an error is harmless if the proof of [the] defendant's guilt is overwhelming and there is no significant probability that the jury would have acquitted [the] defendant had the error not occurred" (*People v Williams*, 25 NY3d 185, 194 [2015]). Here, we note that one of the officers who pursued defendant testified that he did not see a weapon in defendant's waistband and that the officer who testified that he saw the weapon conceded that he never saw defendant holding the weapon because he and defendant were running and "[i]t happened so fast." Although that officer identified what he believed to be a handgun in defendant's waistband from a still image taken from body camera footage, that image, taken during the pursuit, is blurry and does not depict a readily identifiable object. Although defendant's identification card

was located on the ground after the pursuit, it was located away from the handgun. Further, officers testified that the handgun was recovered in a high crime area and that an unidentified person could be seen in police body camera footage in the general area where the handgun was found. We conclude that it cannot be said that the proof of defendant's guilt is overwhelming (*see People v Mountzouros*, 206 AD3d 1706, 1708 [4th Dept 2022]; *see generally People v Crimmins*, 36 NY2d 230, 241 [1975]). We therefore reverse the judgment and grant a new trial on count one of the indictment.

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

208

CA 22-00230

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

MICHAEL SANFILIPPO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. BOHME, MICHAEL CANNAN, ALSO KNOWN AS MICHAEL CANNON, RICHARD M. BOHME, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

DAVIDSON FINK LLP, ROCHESTER (RICHARD N. FRANCO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE LAW OFFICE OF WALTER R. CAPELL, ROCHESTER (WALTER R. CAPELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Victoria M. Argento, J.), entered February 7, 2022. The order, insofar as appealed from, denied defendants' cross-motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross-motion is granted, and the complaint is dismissed against defendants-appellants.

Memorandum: In 2004, defendant David J. Bohme executed a note and mortgage in favor of nonparty Sunshine State Produce, Inc. (Sunshine Produce). In 2010, Sunshine Produce filed articles of dissolution. In 2019, Sunshine Produce commenced a foreclosure action against the current owners of the mortgaged property, alleging a default on the note. That action was dismissed on the ground that, inter alia, Sunshine Produce lacked standing because the action was not commenced during the corporation's winding up (*see* Business Corporation Law § 1005 [a] [1]).

Plaintiff thereafter commenced the instant foreclosure action against the same defendants upon the same note and mortgage. In this action, plaintiff submitted an allonge, which was allegedly attached to the original note and mortgage. The allonge did not identify an assignee, but was indorsed by Sunshine Produce. As relevant on appeal, defendants-appellants (defendants) cross-moved for, inter alia, summary judgment dismissing the complaint on the ground that plaintiff lacked standing. Defendants appeal from an order that, insofar as appealed from, denied the cross-motion. We reverse the order insofar as appealed from.

Where, as here, an indorsement "specifies no particular indorsee," the instrument "becomes payable to bearer and may be negotiated by delivery alone until specifically indorsed" (UCC 3-204 [2]). "Negotiation is the transfer of an instrument in such form that the transferee becomes a holder" and, if the instrument is payable to bearer, "it is negotiated by delivery" (UCC 3-202 [1]). "Delivery" of an instrument requires the "voluntary transfer of possession" (UCC 1-201 [15]). Consistent with those provisions, "[a] plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action" (*Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888 [2d Dept 2011]; *see U.S. Bank Trust, N.A. v Pieri*, 197 AD3d 930, 931 [4th Dept 2021]; *Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 685 [2d Dept 2016]). Here, it is undisputed that Sunshine Produce did not execute a written assignment, and plaintiff instead relies, for the purposes of standing, upon the alleged physical delivery to him of the note and mortgage with the blank allonge (*see Citimortgage*, 89 AD3d at 888).

We agree with defendants, however, that they established that Sunshine Produce never validly delivered the note and mortgage to plaintiff. Upon dissolution, a "corporation shall carry on no business except for the purpose of winding up its affairs" (Business Corporation Law § 1005 [a] [1]). Among other things, this winding up period allows the corporation to dispose of its assets (*see* § 1005 [a] [2], [3]), which may include the assignment of mortgages (*see Cenlar FSB v Glauber*, 188 AD3d 1141, 1143 [2d Dept 2020]). Here, defendants met their initial burden on their summary judgment motion by submitting plaintiff's own affidavit in this action, which established that Sunshine Produce never transferred, assigned, or delivered the note and mortgage during its winding up period. Specifically, plaintiff swore in the affidavit that the note had been in his possession "since October 21, 2020," and that it had purportedly been provided to him "during [Sunshine Produce's] foreclosure [action, commenced in 2019] for the purpose of concluding that action as [a] party plaintiff." Thus, plaintiff's own affidavit established that Sunshine Produce did not attempt to deliver the note and mortgage to plaintiff until a decade after it filed articles of dissolution, which themselves represented that all corporate assets had already been distributed after winding up, and plaintiff's affidavit further established that the purported delivery was not for the purpose of winding up, but rather part of Sunshine Produce's own foreclosure action, which was dismissed for being commenced well beyond the winding up period. Because the alleged transfer occurred beyond Sunshine Produce's winding up, it was invalid pursuant to Business Corporation Law § 1005 (a) (1), and failed to confer standing on plaintiff to commence the instant action (*cf. Cenlar*, 188 AD3d at

1143). Plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

251

CA 22-00060

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

IN THE MATTER OF VICTOR O. IBHAWA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
DIOCESE OF BUFFALO, RESPONDENTS-APPELLANTS.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (AARON M. WOSKOFF OF COUNSEL), FOR RESPONDENT-APPELLANT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

BOND, SCHOENECK & KING, PLLC, BUFFALO (ERIN S. TORCELLO OF COUNSEL), FOR RESPONDENT-APPELLANT DIOCESE OF BUFFALO.

DONNA A. MILLING, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered November 23, 2021. The order, insofar as appealed from, granted the petition in part.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is dismissed in its entirety, and the determination of respondent New York State Division of Human Rights to the extent it dismissed the hostile work environment claim is reinstated.

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) dismissing his administrative discrimination complaint against his former employer, respondent Diocese of Buffalo (Diocese), for lack of jurisdiction, based upon the ministerial exception to employment discrimination claims (*see generally Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*, 565 US 171, 188-189 [2012]). Supreme Court granted the petition in part by annulling the determination insofar as it dismissed the claim of hostile work environment and remanding the matter to SDHR. Respondents each appeal from the order to the extent that it granted the petition and remanded the matter, and we reverse the order insofar as appealed from.

Respondents contend that the court applied an incorrect standard of review and failed to give the requisite deference to SDHR's determination. We agree. The standard of review here is whether the

determination was arbitrary and capricious or affected by an error of law (*see Matter of LeTray v New York State Div. of Human Rights*, 181 AD3d 1296, 1297-1298 [4th Dept 2020], *lv denied* 35 NY3d 915 [2020]; *Matter of Malcolm v New York State Dept. of Labor*, 122 AD3d 1318, 1319 [4th Dept 2014], *lv denied* 25 NY3d 903 [2015]; *Matter of Stoudymire v New York State Div. of Human Rights*, 36 Misc 3d 919, 920-921 [Sup Ct, Cayuga County 2012], *affd for reasons stated* 109 AD3d 1096 [4th Dept 2013]). "The SDHR's determination is entitled to considerable deference given its expertise in evaluating discrimination claims" (*Matter of Meyer v Foster*, 187 AD3d 918, 919 [2d Dept 2020]; *see Matter of McDonald v New York State Div. of Human Rights*, 147 AD3d 1482, 1482 [4th Dept 2017]).

Here, SDHR determined that it lacked jurisdiction over petitioner's complaint inasmuch as petitioner had been a priest serving as the pastor of a church and the ministerial exception barred his claims. Inasmuch as there is no controlling United States Supreme Court or New York precedent and the federal courts that have addressed the issue are divided on the extent to which the ministerial exception applies to claims of a hostile work environment (*compare e.g. Demkovich v St. Andrew the Apostle Parish, Calumet City*, 3 F4th 968, 979 [7th Cir 2021] *with e.g. Elvig v Calvin Presbyterian Church*, 375 F3d 951, 964 [9th Cir 2004]), we conclude that SDHR's determination with respect to the hostile work environment claim is not arbitrary and capricious or affected by an error of law (*see generally LeTray*, 181 AD3d at 1297-1298).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

262

KA 18-01624

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHAN HALL, DEFENDANT-APPELLANT.

JULIE A. CIANCA, PUBLIC DEFENDER, ROCHESTER (GUY A. TALIA 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 June 25, 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 guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, we conclude that Supreme Court properly refused to suppress tangible evidence. The court correctly determined that defendant failed to establish standing to challenge the legality of the search that resulted in the recovery of the subject handgun (*see generally People v Smith*, 155 AD3d 1674, 1675 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018]; *People v Gonzalez*, 45 AD3d 696, 696 [2d Dept 2007], *lv denied* 10 NY3d 811 [2008]). The evidence at the suppression hearing established that defendant had placed the handgun inside of a jacket, which he then left on a shelf in a convenience store in an area that was open to the public. Although defendant occasionally assisted the store owner, defendant was not an employee of the store and was merely a "casual visitor having relatively tenuous ties" to the premises (*Smith*, 155 AD3d at 1675 [internal quotation marks omitted]; *see Gonzalez*, 45 AD3d at 696; *People v Aquart*, 86 AD2d 616, 616 [2d Dept 1982]). Defendant failed to demonstrate that he had a legitimate expectation of privacy in the place where the jacket and handgun were found (*see People v Fall*, 205 AD3d 482, 483 [1st Dept 2022], *lv denied* 38 NY3d 1133 [2022]; *People v Johnson*, 209 AD2d 721, 721 [2d Dept 1994], *lv denied* 84 NY2d 1033 [1995]; *see generally People v Sweat*, 159 AD3d 1423, 1423 [4th Dept 2018]).

Defendant further contends that Penal Law § 265.03 is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]). Inasmuch as defendant failed to raise a constitutional challenge before the trial court, any such challenge is not preserved for our review (*see People v Jacque-Crews*, 213 AD3d 1335, 1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]; *People v Reese*, 206 AD3d 1461, 1462-1463 [3d Dept 2022]; *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, his "challenge to the constitutionality of a statute must be preserved" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

268

CA 22-00814

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

PHILIP E. GRACZYK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTINA M. ALLEN, DEFENDANT-RESPONDENT.

CANTOR, WOLFF, NICASTRO & HALL LLC, BUFFALO (RICHARD HALL, IV, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RIVKIN RADLER LLP, UNIONDALE (CHERYL F. KORMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered February 2, 2022. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained when the motorcycle he was operating collided with defendant's vehicle while defendant was in the process of making either a left-hand turn or a U-turn. Prior to the collision, plaintiff had been traveling behind defendant's vehicle, in the same direction. Defendant moved for summary judgment dismissing the complaint. Supreme Court granted the motion, and plaintiff appeals. We reverse.

Defendant failed to meet her initial burden on the motion because her own submissions raise triable issues of fact (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In particular, we conclude that there are triable issues of fact whether defendant was negligent in manifesting an intent to turn right by activating her right blinker and pulling to the right side of the lane before abruptly beginning to turn left and whether defendant thereby caused plaintiff to strike defendant's vehicle as defendant attempted to complete her turn (*see Gawera v Scrogg*, 4 AD3d 760, 760 [4th Dept 2004]; *Karram v Cirillo*, 281 AD2d 946, 946 [4th Dept 2001]; *see also Amerman v Reeves*, 148 AD3d 1632, 1634 [4th Dept 2017]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

271

CA 22-01418

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

VAUGHAN J. MARTIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, DEFENDANT-APPELLANT.

BOND SCHOENECK & KING, PLLC, SYRACUSE (ADAM P. MASTROLEO OF COUNSEL), FOR DEFENDANT-APPELLANT.

VAUGHAN J. MARTIN, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered August 16, 2022. The order denied defendant's motion for summary judgment.

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

Memorandum: Plaintiff was formerly an employee of defendant, Niagara Mohawk Power Corporation, doing business as National Grid (National Grid), where he worked as a revenue management associate. National Grid is a regulated utility that provides electrical service to residential, commercial, and industrial customers throughout upstate New York. During his employment with National Grid, plaintiff formally complained to, inter alia, the New York State Public Service Commission (PSC)—National Grid's state regulator—alleging that National Grid unlawfully failed to inspect electrical meters before they were energized, thereby creating a substantial risk of electrical smoke and fire events that could injure or kill members of the public. Shortly after plaintiff informed National Grid about his formal complaint, National Grid suspended plaintiff's employment, ostensibly due to allegations that he frequently engaged in inappropriate behavior in the workplace. Following an investigation that purportedly substantiated those allegations, National Grid terminated plaintiff's employment. Plaintiff commenced this action asserting a single cause of action against National Grid for unlawful retaliation under Labor Law § 740 (2), the "whistle-blowers' statute," and we note that the action was commenced prior to the effective date of significant amendments to that statute (*see* L 2021, ch 522, § 1) that are not applicable here (*see Clendenin v VOA of Am.—Greater N.Y. Inc*, 214 AD3d 496, 497 [1st Dept 2023]). National Grid now appeals from an order denying its motion for summary judgment dismissing the

complaint.

We agree with National Grid that Supreme Court erred in denying its motion. As relevant here, to prevail on his cause of action, plaintiff had the burden of proving that National Grid retaliated against him because he "disclose[d], or threaten[ed] to disclose to a supervisor or to a public body an activity, policy or practice of [National Grid] that [was] in violation of law, rule or regulation which violation creat[ed] and present[ed] a substantial and specific danger to the public health or safety" (Labor Law former § 740 [2] [a]). A plaintiff's protection under Labor Law former § 740 (2) was triggered only by an *actual* violation of a law, rule, or regulation and not by the belief that such a violation had occurred (*see Bordell v General Elec. Co.*, 88 NY2d 869, 871 [1996]; *Young v Madison-Oneida Bd. of Coop. Educ. Servs.*, 156 AD3d 1352, 1353 [4th Dept 2017]). "An employee's good-faith reasonable belief that an actual violation of a law, rule, or regulation occurred [was] insufficient; there must [have been] an actual violation" (*Khan v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, 288 AD2d 350, 350 [2d Dept 2001]; *see Bordell*, 88 NY2d at 871).

Here, in support of its motion, National Grid submitted evidence establishing as a matter of law that the conduct that plaintiff alleged was unlawful did not amount to an actual violation of law, rule, or regulation for purposes of Labor Law former § 740 (2) (*see Young*, 156 AD3d at 1353). Specifically, National Grid submitted letters that it received from the New York State Department of Public Service establishing that, following an inquiry into plaintiff's complaints, PSC determined that National Grid had not violated any law or regulations. That determination, from National Grid's regulator, and a recipient of plaintiff's complaint, was sufficient to meet National Grid's initial burden of demonstrating that it had not actually violated any law, rule, or regulation (*see Kamdem-Ouaffo v Pepsico, Inc.*, 133 AD3d 825, 827 [2d Dept 2015]; *Khan*, 288 AD2d at 350-351; *see generally Bordell*, 88 NY2d at 871). In opposition, plaintiff failed to raise a triable issue of fact whether there was an actual violation of any law, rule, or regulation (*see Ulysse v AAR Aircraft Component Servs.*, 188 AD3d 760, 761-762 [2d Dept 2020]; *Kamdem-Ouaffo*, 133 AD3d at 827; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

272

CA 22-00263

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

HOWARD HANNA WNY, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE KROG GROUP, LLC, WALDEN DEVELOPMENT GROUP, LLC, ELMWOOD BRYANT, LLC, AND PYRAMID BROKERAGE COMPANY OF BUFFALO, INC., DEFENDANTS-RESPONDENTS.

COLLIGAN LAW LLP, BUFFALO (ERICK KRAEMER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DUKE HOLZMAN PHOTIADIS & GRESENS, LLP, BUFFALO (CHRISTOPHER M. BERLOTH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS THE KROG GROUP, LLC AND ELMWOOD BRYANT, LLC.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GUY J. AGOSTINELLI OF COUNSEL), FOR DEFENDANT-RESPONDENT WALDEN DEVELOPMENT GROUP, LLC.

COLUCCI & GALLAHER, P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR DEFENDANT-RESPONDENT PYRAMID BROKERAGE COMPANY OF BUFFALO, INC.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered January 11, 2022. The order, inter alia, granted the motions of defendants for summary judgment.

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

Memorandum: Plaintiff, a real estate broker, commenced this action for, inter alia, breach of contract alleging that it was owed commissions on a sale of property from defendant Elmwood Bryant, LLC (Elmwood), a subsidiary of defendant The Krog Group, LLC (collectively, Elmwood defendants), to defendant Walden Development Group, LLC (Walden). Walden entered into a 180-day exclusive buyer representation agreement (representation agreement) with a salesperson for plaintiff (plaintiff's salesperson). After the representation agreement expired without an agreement between Walden and Elmwood, Walden engaged defendant Pyramid Brokerage Company of Buffalo, Inc. (Pyramid), who was able to negotiate an agreement with Elmwood for the sale of the property to Walden. The Elmwood defendants, Walden, and Pyramid moved separately for summary judgment dismissing the complaint against them. Supreme Court, inter alia, granted those motions. Plaintiff appeals, and we affirm.

We reject plaintiff's contention that there is a triable issue of fact whether it was the "procuring cause" of the sale of the property (*Greene v Hellman*, 51 NY2d 197, 206 [1980]). Defendants submitted evidence in support of their respective motions establishing that, in late 2015, plaintiff's salesperson was representing an unrelated third party for the purchase of the property. Elmwood provided financials for the property to plaintiff's salesperson, and plaintiff's salesperson calculated the value of the property at $3.01 million. Elmwood indicated that it would be willing to sell the property and pay plaintiff a 5% commission only if the selling price were closer to $3.4 to $3.5 million. The property did not sell at that time. After entering the representation agreement with Walden in January 2017, plaintiff's salesperson provided Elmwood with Walden's signed nondisclosure agreement. With Elmwood's approval, plaintiff's salesperson provided Walden with the same financials for the property that she had obtained a year earlier in connection with her representation of the other potential buyer. She also informed Walden that the property was valued at between $3.1 and $3.4 million.

Plaintiff's salesperson then recommended that Walden offer a $3.2 million "firm" purchase price for the property. She prepared a letter of intent for Walden to purchase the property from Elmwood for $3.2 million, which was signed by Walden's representative. Plaintiff's salesperson presented the offer to Elmwood with an explanation that the purchase price was firm. Elmwood's representative responded to plaintiff's salesperson that, while the offer was under consideration, a sale at that price seemed to have "marginal upside." Shortly thereafter, plaintiff's salesperson accompanied Walden's representatives on a tour of the property. Despite inquiries from plaintiff's salesperson, however, Elmwood's representative never gave any further feedback on the offer, and plaintiff's salesperson eventually stopped working on the deal in April 2017.

Defendants further submitted evidence establishing that Walden's representative spoke with a broker with Pyramid about a month before the representation agreement with plaintiff's salesperson expired. Walden's representative testified that he advised Pyramid's broker that the broker could not talk to anyone regarding Walden's interest in the property until the representation agreement expired. After the representation agreement expired, Pyramid provided Elmwood with a nondisclosure agreement signed by Walden and requested updated financials from Elmwood. Elmwood proposed a $3.6 million purchase price for the property. After several months of negotiations that included concessions of the broker's commission, Pyramid's broker was able to negotiate a sale of the property for $3.43 million. Elmwood's representative testified at his deposition that the offer presented by plaintiff's salesperson was never accepted because the price was too low, and Pyramid's broker averred that he did not utilize or rely on any information prepared or work done by plaintiff's salesperson.

We conclude, based on that evidence, that defendants met their initial burden on their motions of establishing that there was no "direct and proximate link . . . between the bare introduction and the consummation" (*id.* at 205; *see Mollyann, Inc. v Demetriades*, 206 AD2d

415, 415-416 [2d Dept 1994]). Inasmuch as plaintiff did not "bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made," it had no right to commissions (*Sibbald v Bethlehem Iron Co.*, 83 NY 378, 382 [1881]; *see Cushman & Wakefield v 214 E. 49th St. Corp.*, 218 AD2d 464, 466 [1st Dept 1996], *appeal dismissed* 88 NY2d 951 [1996], *lv denied* 88 NY2d 816 [1996]; *Bob Howard, Inc. v Baltis*, 178 AD2d 740, 741 [3d Dept 1991], *lv denied* 79 NY2d 757 [1992]). Indeed, plaintiff's salesperson acknowledged at her deposition that the parties "still had a little way to go to hit a meeting of the minds," and that she had only "the beginnings of a deal that could have been negotiated." There were no negotiations that occurred with Elmwood after plaintiff's salesperson submitted the letter of intent with the "firm" purchase offer that was not acceptable to Elmwood. The burden thus shifted to plaintiff to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and plaintiff failed to meet that burden. In particular, plaintiff failed to raise a triable issue of fact whether plaintiff's salesperson " 'created an amicable atmosphere in which negotiations went forward or that [she] generated a chain of circumstances which proximately led to the sale' " (*Cappuccilli v Krupp Equity Ltd. Partnership*, 269 AD2d 822, 823 [4th Dept 2000]).

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

276

CA 22-00687

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

EXIT 52 E. TRUCK STOP, INC., HASSELBACK EQUIPMENT, INC., AND WHITE ARROW SERVICE STATIONS, INC., PLAINTIFFS-APPELLANTS,

V ORDER

JOE LEGNO'S RIVERSIDE SERVICE, INC., AND ANTHONY J. LEGNO, DEFENDANTS-RESPONDENTS.

MICHAEL P.J. MCGORRY, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

VAHEY LAW OFFICES, PLLC, ROCHESTER (JARED K. COOK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 7, 2022. The order granted the motion of defendants to dismiss the amended complaint and dismissed the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

289

CA 22-00109

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

HENRY THOROYAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALEX PALUMBO, ET AL., DEFENDANTS,
AND VILLAGE OF FRANKFORT POWER AND LIGHT,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

RALPH W. FUSCO, UTICA, FOR PLAINTIFF-APPELLANT.

GERBER CIANO KELLY BRADY LLP, GARDEN CITY (BRENDAN T. FITZPATRICK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered January 19, 2022. The order granted the motion of defendant Village of Frankfort Power and Light for summary judgment and dismissed the plaintiff's amended complaint against it.

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

Memorandum: Plaintiff commenced this negligence action seeking to recover damages for injuries he sustained when he tripped on a grounding rod and attached wire, which were located in the parking lot of his apartment building and concealed at the time of the accident by snow. In appeal No. 1, plaintiff appeals from an order granting the motion of defendant Village of Frankfort Power and Light seeking, inter alia, summary judgment dismissing the amended complaint against it. In appeal No. 2, plaintiff appeals from an order granting the motion of defendant Verizon New York, Inc. seeking, inter alia, summary judgment dismissing the amended complaint against it. We affirm in both appeals.

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). " 'Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of [the] premises . . . The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property' " (*Clifford v Woodlawn Volunteer Fire Co., Inc.*, 31 AD3d

1102, 1103 [4th Dept 2006]; *see Knight v Realty USA.COM, Inc.*, 96 AD3d 1443, 1444 [4th Dept 2012]). With respect to both appeals, defendants met their initial burdens on their respective motions insofar as they sought summary judgment dismissing the amended complaint against them by establishing that none of those elements was present (*see Beck v City of Niagara Falls*, 202 AD3d 1463, 1464 [4th Dept 2022]). In opposition, plaintiff failed to raise a triable issue of fact (*see generally Alvarez*, 68 NY2d at 324).

We have considered plaintiff's remaining contentions in both appeals, and we conclude that they do not require reversal or modification of the orders.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

290

CA 22-00110

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

HENRY THOROYAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALEX PALUMBO, ET AL., DEFENDANTS,
AND VERIZON NEW YORK, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

RALPH W. FUSCO, UTICA, FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (AARON M. SCHIFFRIK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered January 19, 2022. The order granted the motion of defendant Verizon New York, Inc. for summary judgment and dismissed the plaintiff's amended complaint against it.

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

Same memorandum as in *Thoroyan v Palumbo* ([appeal No. 1] — AD3d — [June 30, 2023] [4th Dept 2023]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

311

CA 21-01647

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

GARRETT J. WAGNER, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

CASSIE C. WAGNER, DEFENDANT-RESPONDENT-APPELLANT.

LAW OFFICE OF DAVID TENNANT PLLC, ROCHESTER (DAVID H. TENNANT OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-RESPONDENT-APPELLANT.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

Appeal and cross-appeal from a judgment of the Supreme Court, Monroe County (Edward C. Gangarosa, R.), entered October 15, 2021. The judgment, inter alia, directed plaintiff to pay spousal maintenance and child support.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts and the law by reducing plaintiff's imputed income for the period from April 16, 2021, onward to $76,000 annually, vacating the ninth through thirteenth decretal paragraphs, awarding defendant post-divorce maintenance in the amount of $623 per month for a period of 15 months, vacating the fourteenth decretal paragraph and substituting therefor the provision that plaintiff shall be the legally responsible relative to maintain health insurance for the benefit of the unemancipated child and the parties shall pay the child's health care plan and uncovered medical and dental expenses in the following pro rata shares: 70% by the plaintiff and 30% by the defendant, awarding plaintiff credit for 50% of the amount of the loan for new windows for the marital residence, and dividing the responsibility for paying the outstanding debt to the neutrals between the parties equally, and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: In this matrimonial action, plaintiff appeals and defendant cross-appeals from a judgment of divorce that, inter alia, established a custody schedule, granted child support and spousal maintenance, and distributed marital property. Plaintiff contends on his appeal that he is entitled to summary reversal on the ground that he has been denied his right to effective appellate review because portions of the trial testimony could not be transcribed due to malfunctions of the audio recording system (*see generally People v Rivera*, 39 NY2d 519, 522-523 [1976]). We reject

that contention. We previously reversed an order denying plaintiff's motion for a reconstruction hearing and remitted the matter for such a hearing to "reconstruct[ ], if possible, those portions of the testimony of plaintiff and defendant that could not be transcribed" (*Wagner v Wagner*, 210 AD3d 1515, 1515 [4th Dept 2022]). On this appeal, the parties have submitted a statement of settlement by Supreme Court purporting to reconstruct the missing testimony. In light of the availability of that "alternative method[ ] to provide an adequate record," summary reversal is not warranted (*People v Yavru-Sakuk*, 98 NY2d 56, 60 [2002] [internal quotation marks omitted]).

Contrary to plaintiff's contention on his appeal, "this proceeding involves an initial court determination with respect to custody and, [a]lthough the parties' informal arrangement is a factor to be considered, [defendant] is not required to prove a substantial change in circumstances in order to warrant a modification thereof" (*Matter of Timothy MYC v Wagner*, 151 AD3d 1731, 1732 [4th Dept 2017] [internal quotation marks omitted]). Contrary to plaintiff's further contention, we conclude that a sound and substantial basis in the record supports the court's determination that the best interests of the child would be served by the custody schedule established by the court (*see Matter of Fanfarillo v Fanfarillo*, 213 AD3d 1292, 1292 [4th Dept 2023]; *Timothy MYC*, 151 AD3d at 1732).

Plaintiff further contends on his appeal that the court erred in imputing to him as income for the period from April 16, 2021, onward a sum of money he paid pursuant to a contractual obligation. We agree. "The proper amount of support is not determined by a spouse's current economic situation but by a spouse's ability to provide" (*Matter of Fries v Price-Yablin*, 209 AD2d 1002, 1003 [4th Dept 1994]). Thus, the court "possess[es] considerable discretion to impute income in fashioning a child support award . . . [, and such an] imputation of income will not be disturbed so long as there is record support for [it]" (*Matter of Muok v Muok*, 138 AD3d 1458, 1459 [4th Dept 2016] [internal quotation marks omitted]; *see Scoppo v Scoppo*, 188 AD3d 1632, 1632 [4th Dept 2020]). Here, although plaintiff's ability to make the contractual payment was some evidence that income should be imputed to him beyond the account he gave of his own finances (*see Anastasi v Anastasi*, 207 AD3d 1131, 1132 [4th Dept 2022]), the record does not support the court's conclusion that the payment was itself income. This Court's discretion to make findings of fact from the record, however, is as broad as that of the trial court (*see Franz v Franz*, 107 AD2d 1060, 1061 [4th Dept 1985]). Here, we conclude that the record is sufficient for us to determine that, based on plaintiff's employment history and earning capacity, an annual income of $76,000 should be imputed to him for the period from April 16, 2021, onward, and we therefore modify the judgment accordingly.

We agree with defendant on her cross-appeal that the court erred in deviating from the presumptive child support award pursuant to the Child Support Standards Act (CSSA). A court must calculate the basic child support obligation under the CSSA and then must order the noncustodial parent to pay his or her "pro rata share of the basic child support

obligation, unless it finds that amount to be 'unjust or inappropriate' " (*Bast v Rossoff*, 91 NY2d 723, 727 [1998]; *see* Domestic Relations Law § 240 [1-b] [f], [g]). Here, although the court deviated from the presumptive child support award in part on the ground that the child shared the residences of the parents, the shared custody arrangement was not a proper basis for downward deviation from the presumptive support obligation (*see Matter of Jerrett v Jerrett*, 162 AD3d 1715, 1716 [4th Dept 2018]; *Matter of Ryan v Ryan*, 110 AD3d 1176, 1180 [3d Dept 2013]; *see generally Bast*, 91 NY2d at 730-732). The remaining grounds on which the court relied in granting the variance lack support in the record (*see Matter of Livingston County Dept. of Social Servs. v Hyde*, 196 AD3d 1071, 1072 [4th Dept 2021]). We therefore further modify the judgment by vacating the child support award, and we remit the matter to Supreme Court to recalculate the respective child support obligations of the parties.

We also agree with defendant on her cross-appeal that the court erred in failing, in effect, to award both temporary and post-divorce maintenance. Inasmuch as this action was commenced on March 19, 2019, the maintenance guidelines set forth in Domestic Relations Law § 236 (B) (5-a) and (6) apply, and the court erred in considering instead the factors set forth in section 236 (B) (6) (former [a]). Moreover, the court conflated the temporary and post-divorce maintenance calculations and thus denied defendant the full extent of maintenance she is entitled to under the statute. Defendant does not otherwise contest the amount or duration of the maintenance award, and we therefore further modify the judgment by awarding her post-divorce maintenance in the amount of $623 per month for a period of 15 months.

As to the equitable distribution of marital assets, we agree with plaintiff on his appeal that the court erred in ordering that he pay all of the child's health insurance premiums, and we therefore further modify the judgment by ordering that plaintiff and defendant each pay their pro rata share of the premiums (*see Musacchio v Musacchio*, 107 AD3d 1326, 1329 [3d Dept 2013]). We also agree with plaintiff that he is entitled to a credit for half the amount of the loan used to purchase new windows for the marital residence inasmuch as the loan was a marital debt subject to equitable distribution (*see Wagner v Wagner*, 136 AD3d 1335, 1336 [4th Dept 2016]), and we further modify the judgment accordingly. We further modify the judgment with respect to the outstanding debt the parties incurred for neutrals—an issue that plaintiff raised at trial but that the court did not address—and we conclude that each party should pay 50% of the debt.

We have reviewed the remaining contentions of the parties and conclude that none warrants reversal or further modification of the judgment.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

318

CA 22-01090

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

CHAUTAUQUA PATRONS INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V ORDER

RYAN STYLES AND JEFF B. GUSTAFSON,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

HURWITZ & FINE, P.C., BUFFALO (SCOTT D. STORM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF ANDREW J. STIMSON, AMHERST (ANDREW J. STIMSON OF COUNSEL), FOR DEFENDANT-RESPONDENT RYAN STYLES.

STEVE BOYD, P.C., WILLIAMSVILLE (LEAH COSTANZO OF COUNSEL), FOR DEFENDANT-RESPONDENT JEFF B. GUSTAFSON.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 2, 2022, in a declaratory judgment action. The order and judgment, among other things, declared that plaintiff is obligated to defend and/or indemnify defendant Ryan Styles in an underlying action.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 2, 2023,

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

319

CA 22-01403

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

CHAUTAUQUA PATRONS INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V ORDER

RYAN STYLES AND JEFF B. GUSTAFSON,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

HURWITZ & FINE, P.C., BUFFALO (SCOTT D. STORM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF ANDREW J. STIMSON, AMHERST (ANDREW J. STIMSON OF COUNSEL), FOR DEFENDANT-RESPONDENT RYAN STYLES.

STEVE BOYD, P.C., WILLIAMSVILLE (LEAH COSTANZO OF COUNSEL), FOR DEFENDANT-RESPONDENT JEFF B. GUSTAFSON.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 29, 2022. The order, among other things, granted plaintiff's motion seeking leave to reargue and, upon reargument, adhered to a prior determination.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 2, 2023,

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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TP 22-01897

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

IN THE MATTER OF ROBERT BAKER, DECEASED,
ANN MARIE BAKER, PETITIONER,

V MEMORANDUM AND ORDER

DANIEL W. TIETZ, AS COMMISSIONER OF NEW YORK
STATE OFFICE OF TEMPORARY AND DISABILITY
ASSISTANCE, MARY T. BASSETT, AS COMMISSIONER OF
THE DEPARTMENT OF HEALTH OF THE STATE OF NEW YORK,
AND ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENTS.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (ELLEN G. SPENCER OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN LUSIGNAN OF COUNSEL), FOR RESPONDENTS DANIEL W. TIETZ, AS COMMISSIONER OF NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, AND MARY T. BASSETT, AS COMMISSIONER OF THE DEPARTMENT OF HEALTH OF THE STATE OF NEW YORK.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Donna M. Siwek, J.], entered October 19, 2022) to review a determination that denied as untimely petitioner's request for review of the denial of her decedent's application for Medicaid benefits.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, issued following a fair hearing, that denied as untimely her request for review of the denial of her decedent's application for Medicaid benefits. We confirm that determination.

A request for a fair hearing must be made "within sixty days after the date of the action or failure to act complained of" (Social Services Law § 22 [4] [a]; *see* 18 NYCRR 358-3.5 [b] [1]), and the failure to do so deprives an agency of authority to review any challenge thereto (*see Matter of Notman v New York State Dept. of Health*, 162 AD3d 1704, 1705 [4th Dept 2018]). Here, it is undisputed that decedent's Medicaid application was denied on February 4, 2021, but decedent did not request a fair hearing until June 7, 2021, which

was beyond the 60-day limitation period. Contrary to the only explanation for the untimely request offered by petitioner at the fair hearing, the record establishes that the notice of denial properly advised both petitioner, who was designated to receive decedent's Medicaid notices, and decedent's recognized representative, who was processing the application on his behalf, of the deadline and method by which decedent could obtain a fair hearing (*see* Social Services Law § 22 [12]; 18 NYCRR 358-3.1 [a]; *Matter of Breier v New York State Dept. of Social Servs.*, 168 AD3d 933, 934 [2d Dept 2019]). Consequently, the determination of the Administrative Law Judge (ALJ) that the Department of Health of the State of New York lacked jurisdiction to review the denial of decedent's Medicaid application because the request for a fair hearing was untimely and no sufficient basis was offered for tolling the limitation period is supported by substantial evidence (*see Breier*, 168 AD3d at 934; *Matter of Fieldston Lodge Nursing Home v DeBuono*, 261 AD2d 543, 544 [2d Dept 1999]; *see also Notman*, 162 AD3d at 1704-1705). Petitioner's remaining contentions in support of tolling the limitation period were not raised at the fair hearing and are therefore not properly before us because "new contention[s] may not be raised for the first time before the courts in [a CPLR] article 78 proceeding" (*Notman*, 162 AD3d at 1705 [internal quotation marks omitted]; *see Matter of Peckham v Calogero*, 12 NY3d 424, 430 [2009]), and we have no discretionary authority to review those contentions (*see Matter of Onondaga Ctr. for Rehabilitation & Healthcare v New York State Dept. of Health*, 211 AD3d 1514, 1516 [4th Dept 2022]; *see generally Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]).

Further, the record does not support petitioner's contention that the ALJ deprived her of a fair hearing (*see* 18 NYCRR 358-5.6 [b] [3]; *cf. Matter of Feliz v Wing*, 285 AD2d 426, 427 [1st Dept 2001], *lv dismissed* 97 NY2d 693 [2002]).

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

321

KA 17-02102

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN CLEVELAND, DEFENDANT-APPELLANT.

JULIE CIANCA, 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 Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 24, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the fourth degree and aggravated unlicensed operation of a motor vehicle in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]) and aggravated unlicensed operation of a motor vehicle in the second degree (Vehicle and Traffic Law § 511 [2] [a] [iv]), defendant contends that Supreme Court erred in denying his request to suppress crack cocaine that he threw to the ground while being pursued on foot by the police. According to defendant, the pursuit was unlawful because the officers did not reasonably suspect that he had committed, was committing, or was about to commit a crime. We conclude that the pursuit was justified and that the court therefore properly refused to suppress the cocaine.

On the night in question, two uniformed officers were on patrol in an unmarked police car when they observed a woman throw a glass bottle at a motor vehicle. The bottle struck the vehicle and shattered, whereupon the vehicle came to a sudden stop in the middle of the street. The driver, later identified as defendant, exited the vehicle and approached the woman in an aggressive manner, yelling at her with his fists clenched. Suspecting that defendant was going to attack the woman, the officers identified themselves and directed defendant to stop. At the suppression hearing, one of the officers testified that defendant “looked in [their] direction, began to back away, and then quickly turned and began digging in the front of his

waistband and running in a southward direction," leaving the vehicle with the driver's door open. Because defendant had turned his back to them, the officers could not see what defendant was doing with his hands, but they "could . . . see his arms moving in the front of his body." The officers gave chase and observed defendant, while running, discard what appeared to be a small plastic bag. Defendant eventually surrendered to the officers, who recovered the bag and determined that it contained crack cocaine.

It is well settled that "the police may forcibly stop or pursue an individual if they have information which, although not yielding the probable cause necessary to justify an arrest, provides them with a reasonable suspicion that a crime has been, is being, or is about to be committed" (*People v Martinez*, 80 NY2d 444, 447 [1992]). "[A] defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion" (*People v Sierra*, 83 NY2d 928, 929 [1994]; *see People v Woods*, 98 NY2d 627, 628 [2002]). We have repeatedly held, however, that the fact that a defendant "reached for his waistband, absent any indication of a weapon such as the visible outline of a gun or the audible click of the magazine of a weapon, does not establish the requisite reasonable suspicion" (*People v Cady*, 103 AD3d 1155, 1156 [4th Dept 2013]; *see People v Williams*, 191 AD3d 1495, 1498 [4th Dept 2021]; *People v Ingram*, 114 AD3d 1290, 1293 [4th Dept 2015], *appeal dismissed* 24 NY3d 1201 [2015]; *People v Riddick*, 70 AD3d 1421, 1422-1423 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]).

Here, defendant contends that his flight and "innocuous" arm movements did not provide the reasonable suspicion of criminality required for police pursuit. As defendant points out, although the officers saw that defendant was grabbing at his front waistband, they did not observe an indication of a weapon such as a bulge in his clothing or the outline of a gun. We agree with defendant that his arm movements directed at his waistband and his flight would not, without more, justify police pursuit. As the court determined, however, it was reasonable for the officers to suspect that defendant was about to commit a crime because he approached the woman in an aggressive manner with clenched fists while yelling at her. The officers thus properly ordered defendant to stop and could have lawfully frisked him had he not run away. Because the stop was supported by reasonable suspicion, we conclude that the subsequent pursuit was also supported by reasonable suspicion, especially considering that, immediately following the stop, defendant turned his back to the officers, grabbed at his waistband, and then fled on foot, leaving his vehicle in the middle of the street with its driver's door open.

Although it is true, as defendant points out, that he was no longer an immediate threat to the woman once he started to run away, that fact does not alter our conclusion that the officers had reasonable suspicion to believe that defendant was about to commit a crime and therefore they were justified in "forcibly detaining [him], or pursuing [him] for the purpose of detaining [him]" (*Martinez*, 80

NY2d at 447). The officers' reasonable suspicion justifying the detention of defendant did not cease to exist when defendant turned and ran. In our view, it cannot be said that defendant's actions, viewed in totality, were " 'at all times innocuous and readily susceptible of an innocent interpretation' " (*Riddick*, 70 AD3d at 1422; *cf. People v Johnson*, — NY3d —, 2023 NY Slip Op 02734 [2023]). Although "[a] suspect's action in grabbing at his or her waistband, *standing alone*, is insufficient to establish reasonable suspicion of a crime" (*Williams*, 191 AD3d at 1498 [emphasis added]), defendant did far more than just grab at his waistband.

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

All concur except OGDEN, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent and would reverse the judgment, grant that part of the omnibus motion seeking to suppress evidence, and dismiss the indictment inasmuch as I do not believe that the reasonable suspicion that justified the officers' stop of defendant as he approached the woman remained extant after he ceased his approach and retreated. Contrary to the conclusion reached by the majority, once defendant was running away, he was no longer about to commit a crime against the woman.

With respect to police pursuit, "it is well settled that the police may pursue a fleeing defendant if they have a reasonable suspicion that defendant has committed or is about to commit a crime" (*People v Riddick*, 70 AD3d 1421, 1422 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010] [internal quotation marks omitted]). "[A] defendant's flight in response to an approach by the police, *combined with other specific circumstances indicating that the suspect may be engaged in criminal activity*, may give rise to reasonable suspicion, the necessary predicate for police pursuit" (*id.* [internal quotation marks omitted]). It was certainly reasonable for the officers to suspect that defendant was about to commit a crime as he approached the woman in an "aggressive manner." However, once officers directed defendant to stop and he stopped approaching the woman, the reasonable suspicion that defendant was about to commit a crime ceased to exist at that point. Although the majority concludes the reasonable suspicion that existed earlier continued after defendant turned and ran, the majority does not identify any specific circumstances indicative of criminal activity justifying that conclusion (*see id.*).

In particular, defendant's digging at his waistband, flight, and leaving his car in the street "do not provide additional specific circumstances indicating that defendant was engaged in criminal activity" (*People v Williams*, 191 AD3d 1495, 1498 [4th Dept 2021]; *see Riddick*, 70 AD3d at 1422). While defendant's actions, "viewed as a whole, [may have been] suspicious, . . . there is nothing in this record to establish that the officers had a reasonable suspicion" that defendant had committed, was committing, or was about to commit a

crime (*Williams*, 191 AD3d at 1498). Therefore, I would reverse.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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KA 06-02078

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THURMAN J. MACK, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered May 10, 2006. The judgment convicted defendant upon a jury verdict of criminal sexual act in the first degree (two counts), sexual abuse in the second degree (three counts), attempted rape in the second degree, sexual abuse in the third degree (three counts), rape in the third degree (three counts) and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, two counts of criminal sexual act in the first degree (Penal Law § 130.50 [4]), defendant contends that the verdict is against the weight of the evidence. We affirm.

Contrary to defendant's contention, while there were some inconsistencies in the testimony of the victim, her testimony was not incredible as a matter of law (*see People v O'Neill*, 169 AD3d 1515, 1515-1516 [4th Dept 2019]; *People v Smith*, 73 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

329

CA 22-00889

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

IN THE MATTER OF ARBITRATION BETWEEN COUNTY OF ONONDAGA, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ONONDAGA COUNTY LOCAL 834, RESPONDENT-APPELLANT.

DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY (STEVEN M. KLEIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

BOLANOS LOWE, PLLC, PITTSFORD (KYLE W. STURGESS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 12, 2022. The order, insofar as appealed from, granted in part the petition to vacate an arbitrator's award.

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

Memorandum: Petitioner, County of Onondaga, commenced this proceeding to vacate an arbitrator's award pursuant to CPLR 7511 (b) (1) (iii) on the ground that it was issued in excess of the arbitrator's power. During the underlying arbitration, the arbitrator determined a grievance to be arbitrable and concluded, among other things, that the grievant was entitled to claim benefits under an applicable New York law for November 17-18, 2020. Supreme Court granted the petition in part, vacating that portion of the arbitrator's award with regard to November 17-18, 2020, on the ground that the arbitrator "erroneously" found the matter to be arbitrable and thus exceeded his authority in interpreting the application of statutory entitlements. Respondent, Civil Service Employees Association, Inc., Onondaga County Local 834, now appeals from the order to that extent, and we reverse the order insofar as appealed from and deny the petition in its entirety.

"[J]udicial review of arbitration awards is extremely limited" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]). Generally, courts " 'may vacate an arbitration award only if it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on

the arbitrator's power' " (*Matter of Syracuse City Sch. Dist. [Gilbert]*, 192 AD3d 1643, 1644 [4th Dept 2021], quoting *Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534 [2010]).

We agree with respondent that the arbitrator did not exceed his authority when he determined the matter to be arbitrable. The parties' collective bargaining agreement (CBA) defines a grievance as a "claimed violation, misinterpretation or an inequitable application of a specific and express term of [the CBA]." Here, the grievance dealt with an alleged inequitable application of the grievant's leave accruals. We conclude that a reasonable relationship exists between the subject matter of the grievance and the general subject matter of the CBA and the matter is arbitrable (*see Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 143 [1999]). Notably, the parties included a Conformity to Law provision in the CBA, whereby the CBA and its provisions "are subordinate to any present *or future* Federal or New York State laws and regulations" (emphasis added).

We conclude that the arbitrator's review of relevant state law did not exceed "a specifically enumerated limitation on [his] power" (*Syracuse City Sch. Dist.*, 192 AD3d at 1644).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

335

CA 21-01596

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

JEAN SENYCIA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PHILIP VOSSELER, ET AL., DEFENDANTS,
GREGORY NAGY AND GREN NAGY,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JEFFREY C. SENDZIAK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 15, 2021. The judgment dismissed the complaint against defendants Gregory Nagy and Gren Nagy upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in a multi-vehicle collision. Plaintiff was the front-seat passenger in a motor vehicle operated by defendant Gregory Nagy (Nagy) and owned by defendant Gren Nagy (collectively, Nagy defendants). In November 2014, Nagy was driving the vehicle across Grand Island during a snowfall. As Nagy crested the north Grand Island Bridge, he observed multiple vehicles stopped ahead in the right lane; Nagy maneuvered his vehicle into the left lane, where it struck the guardrail and came to a stop. Nagy's vehicle was pinned against the guardrail by a tractor trailer, and was then struck from behind after a vehicle operated by defendant Philip Vosseler failed to stop and a chain-reaction accident occurred involving two vehicles that had come to a stop between Vosseler's car and Nagy's. At the conclusion of her proof at trial, plaintiff moved for a directed verdict on the ground that Nagy and Vosseler were not paying attention or driving at a reasonable speed under the conditions. Supreme Court denied the motion and the jury returned a verdict finding that neither Nagy nor Vosseler had acted negligently. Plaintiff moved to set aside the verdict as against the weight of the evidence, but the court denied that motion as well.

In appeal No. 1, plaintiff appeals from a judgment that, inter alia, dismissed the complaint against the Nagy defendants, upon the jury verdict. In appeal No. 2, plaintiff appeals from a judgment that, inter alia, dismissed the complaint against Vosseler, upon the jury verdict. In each appeal, plaintiff contends that the court committed reversible error in denying her motion for a directed verdict, in denying her motion to set aside the verdict, and in failing to instruct the jury on Vehicle and Traffic Law § 1180 (e). We reject plaintiff's contentions.

"[A] directed verdict is appropriate where the . . . court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*A & M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1287 [4th Dept 2014] [internal quotation marks omitted]). In determining whether to grant such a motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*id.*). In appeal No. 1, affording the Nagy defendants every inference that may properly be drawn from the evidence presented and considering the evidence in a light most favorable to them, we conclude that there is a rational process by which the jury could have found that Nagy did not act negligently.

In appeal No. 2, plaintiff contends that the court erred in denying her motion for a directed verdict with respect to Vosseler. "[T]he rearmost driver in a chain-reaction collision bears a presumption of responsibility . . . , and . . . a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, [nonnegligent] explanation for the accident" (*Gustke v Nickerson*, 159 AD3d 1573, 1574-1575 [4th Dept 2018], *lv denied in part & dismissed in part* 32 NY3d 1048 [2018] [internal quotation marks omitted]; *see Zanghi v Doerfler*, 158 AD3d 1275, 1276 [4th Dept 2018]). Here, Vosseler proffered a nonnegligent explanation for the accident (*cf. Topczij v Clark*, 28 AD3d 1139, 1139-1140 [4th Dept 2006]; *see generally Miller v Steinberg*, 164 AD3d 492, 493 [2d Dept 2018]; *Orcel v Haber*, 140 AD3d 937, 937-938 [2d Dept 2016]) and we conclude that there is a rational process by which the jury could have found that Vosseler did not act negligently.

A motion to set aside a verdict rendered in favor of a defendant as against the weight of the evidence (*see* CPLR 4404 [a]) may be granted "only when the evidence so preponderated in favor of the plaintiff that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Tozan v Engert*, 188 AD3d 1659, 1660 [4th Dept 2020]; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). With respect to appeal No. 1, in light of the conflicting testimony regarding the speed of Nagy's vehicle, it cannot be said that the evidence so preponderated in favor of plaintiff that the jury's verdict could not have been reached on any fair interpretation

of the evidence (*see Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391, 1392 [4th Dept 2011]; *see generally Berner v Little*, 137 AD3d 1675, 1676 [4th Dept 2016]). Similarly, with respect to appeal No. 2, we conclude that the jury's finding that Vosseler was not negligent was "not palpably irrational or wrong" (*Clark v Loftus*, 162 AD3d 1643, 1644 [4th Dept 2018] [internal quotation marks omitted]; *see Lesio v Attardi*, 121 AD3d 1527, 1528 [4th Dept 2014]).

Further, even assuming, arguendo, that the court erred in failing to instruct the jury on Vehicle and Traffic Law § 1180 (e), any error was harmless inasmuch as "a substantial right of a party [was] not prejudiced" (CPLR 2002; *see Nestorowich v Ricotta*, 97 NY2d 393, 400-401 [2002]; *Solecki v Oakwood Cemetery Assn.*, 192 AD3d 1606, 1607 [4th Dept 2021]; *Murdoch v Niagara Falls Bridge Commn.*, 81 AD3d 1456, 1457-1458 [4th Dept 2011], *lv denied* 17 NY3d 702 [2011]). In addition to charging the jury on Vehicle and Traffic Law § 1180 (a), the court charged the jury regarding negligence, foreseeability, and the general duties of motorists to one another, including the duty to operate a motor vehicle "with reasonable care, having regard to the actual and potential hazards existing from the weather, road traffic and other conditions," as well as the "duty to maintain a reasonably safe rate of speed." Accordingly, " 'the charge as a whole adequately explain[ed] [applicable] negligence principles' such that we are 'confident in concluding that [any error] . . . did not affect the jury's verdict' " (*Solecki*, 192 AD3d at 1607, quoting *Reis v Volvo Cars of N. Am.*, 24 NY3d 35, 43 [2014], *rearg denied* 24 NY3d 949 [2014]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01325

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

JEAN SENYCIA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PHILIP VOSSELER, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered August 13, 2022. The judgment dismissed the complaint against defendant Philip Vosseler upon a jury verdict.

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

Same memorandum as in *Senycia v Vosseler* ([appeal No. 1] – AD3d – [June 30, 2023] [4th Dept 2023]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CAF 22-00947

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

IN THE MATTER OF MARIATERESA CERAVOLO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID LEFEBVRE, RESPONDENT-APPELLANT.
(PROCEEDING NO. 1.)

IN THE MATTER OF MITCHEL LICHTMAN,
PETITIONER-APPELLANT,

V

MARIATERESA CERAVOLO, RESPONDENT-RESPONDENT,
AND DAVID LEFEBVRE, RESPONDENT.
(PROCEEDING NO. 2.)
(APPEAL NO. 1.)

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILDREN.

Appeals from an amended order of the Family Court, Ontario County (Brian D. Dennis, J.), entered June 1, 2022, in proceedings pursuant to Family Court Act article 6. The amended order, inter alia, granted sole legal and primary physical custody of the subject children to petitioner-respondent.

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

Memorandum: Petitioner-respondent in appeal No. 1, Mariateresa Ceravolo (mother), who is also a respondent in appeal Nos. 2 and 3, filed a petition pursuant to Family Court Act article 6 against David Lefebvre (father), a respondent in appeal Nos. 1 through 3, seeking, inter alia, modification of a judgment of divorce that incorporated but did not merge a separation agreement between the mother and the father providing for joint custody and shared residency of the subject children. Thereafter, a petitioner in appeal No. 1, Mitchel Lichtman, who adopted the father as an adult and who is also the petitioner in

appeal Nos. 2 and 3, filed a petition seeking visitation with the children. The father and Lichtman now appeal, in appeal No. 1, from an amended order that, inter alia, granted sole legal and primary physical custody of the subject children to the mother, ordered that the mother and the father must ensure that Lichtman has no contact with the children, and denied Lichtman's petition. In appeal No. 2, Lichtman appeals from an order of protection requiring him to, inter alia, stay away from the subject children and, in appeal No. 3, Lichtman appeals from an order that denied his motion to vacate the order of protection.

Addressing first the amended order in appeal No. 1, we reject the contention of the father that the mother failed to establish that there had been the requisite change of circumstances warranting an inquiry into whether modification of the existing custody arrangement would be in the best interests of the children (*see Matter of Chromczak v Salek*, 173 AD3d 1750, 1751 [4th Dept 2019]). Contrary to the father's further contention, Family Court's determination that it is in the best interests of the children to award the mother sole legal and primary physical custody is supported by a sound and substantial basis in the record (*see generally Matter of Thillman v Mayer*, 85 AD3d 1624, 1625 [4th Dept 2011]). "The court's determination following a hearing that the best interests of the child[ren] would be served by such an award is entitled to great deference . . . , particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses . . . We will not disturb that determination inasmuch as the record establishes that it is the product of the court's careful weighing of [the] appropriate factors" (*Matter of Timothy MYC v Wagner*, 151 AD3d 1731, 1732 [4th Dept 2017] [internal quotation marks omitted]; *see Matter of Frederick v Heidemann*, 208 AD3d 1644, 1644 [4th Dept 2022]).

We also reject the contention of the father that the court erred in determining that the mother and the father must ensure that Lichtman has no contact with the children (*see Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1755 [4th Dept 2020]; *Chromczak*, 173 AD3d at 1751-1752). Here, the evidence in the record establishes that Lichtman is a convicted sex offender, that Lichtman and the father concealed that fact from the mother when Lichtman had contact with the children, that the contact with Lichtman continued against the mother's wishes, and that the disclosure of Lichtman's criminal history caused substantial disruption in the relationship between the mother and the father. Consequently, the court's determination that allowing Lichtman to have contact with the children created an unnecessary risk to their health and well-being, and thus that it is in the children's best interests to have no contact with Lichtman, has a sound and substantial basis in the record (*see Tartaglia*, 188 AD3d at 1755; *Chromczak*, 173 AD3d at 1752; *see generally Matter of Schram v Nine*, 193 AD3d 1361, 1362 [4th Dept 2021], *lv denied* 37 NY3d 905 [2021]). For the same reasons, we conclude that there is a sound and substantial basis in the record for the court's determination that visitation with Lichtman is not in the children's best interests (*see Matter of Wendy KK. v Jennifer KK.*, 160 AD3d 1059, 1061 [3d Dept

2018]; *Matter of Macri v Brown*, 133 AD3d 1333, 1334 [4th Dept 2015]).

We reject Lichtman's further contention in appeal No. 2 that the court exceeded its authority in granting the order of protection, and his contention in appeal No. 3 that the court therefore erred in refusing to vacate that order. Contrary to his contentions, Lichtman was on notice that the mother opposed his contact with the children, and the court had the authority to issue an order of protection "set[ting] forth reasonable conditions of behavior to be observed for a specific time by any petitioner" pursuant to Family Court Act § 656 (*Matter of Kristian J.P. v Jeannette I.C.*, 87 AD3d 1337, 1338 [4th Dept 2011] [internal quotation marks omitted]). We likewise reject Lichtman's contentions with respect to appeal Nos. 2 and 3 that the duration of the order of protection is excessive and conclude that there is a sound and substantial basis in the record for the court's determination that the order of protection continue until the younger child's 18th birthday (*see* Family Ct Act § 656; *Matter of Thomas v Osborne*, 51 AD3d 1064, 1069 [3d Dept 2008]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CAF 22-01163

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

IN THE MATTER OF MITCHEL LICHTMAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARIATERESA CERAVOLO, RESPONDENT-RESPONDENT,
AND DAVID LEFEBVRE, RESPONDENT.
(APPEAL NO. 2.)

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PETITIONER-APPELLANT.

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

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered May 27, 2022, in a proceeding pursuant to Family Court Act article 6. The order granted an order of protection against petitioner.

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

Same memorandum as in *Matter of Ceravolo v Lefebvre* ([appeal No. 1] — AD3d — [June 30, 2023] [4th Dept 2023]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

347

CAF 22-01715

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

IN THE MATTER OF MITCHEL LICHTMAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARIATERESA CERAVOLO, RESPONDENT-RESPONDENT,
AND DAVID LEFEBVRE, RESPONDENT.
(APPEAL NO. 3.)

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PETITIONER-APPELLANT.

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

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered September 27, 2022, in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, denied the motion of petitioner to vacate the order of protection.

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

Same memorandum as in *Matter of Ceravolo v Lefebvre* ([appeal No. 1] — AD3d — [June 30, 2023] [4th Dept 2023]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

358

CA 22-00381

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

IN THE MATTER OF MARTIN DOWNEY, KIMBERLY DOWNEY, GARY HOWARTH, BERNADETTE HOWARTH, PAUL GORMAN, LESLIE GORMAN, GEORGE SIRADAS, DAVID FRIEDER, BEVERLY DIPALMA, JIM DIPALMA, BRIAN MCKENNA, LINDA MCKENNA, LOU SZYMANSKI, JEANETTE TACKETT, KEN TACKETT, MARK DREISS, JENNIFER STACHNIC, SUSAN FOX, WALTER DONALDSON, DAVID MILLER, MERLE SCHRECKENGOST, MARK COOPER, PHIL GRALNIK, NANCY GRALNIK, SHARON DOLL, PAT OGDEN, MARY MARTIN, TIM MARTIN, DEEDEE SOLMAN, JAY SOLMAN AND OLGA MELKOZEROVA, PETITIONERS-APPELLANTS,

V ORDER

CITY OF NORTH TONAWANDA, THE PLANNING BOARD OF THE CITY OF NORTH TONAWANDA, AND MCW CONSTRUCTION, INC., RESPONDENTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONERS-APPELLANTS.

MICHAEL G. PUTZAK, NORTH TONAWANDA, FOR RESPONDENT-RESPONDENT MCW CONSTRUCTION, INC.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered February 1, 2022, in a proceeding pursuant to CPLR article 78. The judgment, inter alia, dismissed the third amended petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated at Supreme Court.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

367

KA 22-00864

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER MONTGOMERY, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (GARY T. KELDER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered September 29, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

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]).

In January 2020, the victim of a shooting identified defendant's brother as the shooter. Officers obtained a search warrant for the residence of defendant's brother. The warrant authorized officers to search "any person(s) found in said premise." Surveillance units observing the target residence saw defendant exit the residence prior to the execution of the search warrant. A nearby SWAT team was directed to take defendant into custody pursuant to the warrant. The SWAT team intercepted defendant as he was walking in the roadway approximately two blocks away from the target residence and ordered him to stop. Although defendant ran, he was quickly apprehended and a discarded firearm was discovered along the route on which defendant had fled. Defendant was indicted on a single count of criminal possession of a weapon in the second degree and that part of his omnibus motion seeking to suppress the physical evidence was denied. Defendant pleaded guilty without waiving his right to appeal.

Defendant contends that County Court erred in refusing to

suppress the physical evidence because he was unlawfully seized. We agree. "In reviewing a determination of the suppression court, great weight must be accorded its decision because of its ability to observe and assess the credibility of the witnesses, and its findings should not be disturbed unless clearly erroneous" (*People v Robles-Pizarro*, 198 AD3d 1379, 1379 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022] [internal quotation marks omitted]; *see People v Stokes*, 212 AD2d 986, 987 [4th Dept 1995], *lv denied* 86 NY2d 741 [1995]). However, where the issue presented is whether the People have demonstrated "the minimum showing necessary" to establish the legality of police conduct, "a question of law is presented for [our] review" (*People v McRay*, 51 NY2d 594, 601 [1980]; *see People v Dortch*, 186 AD3d 1114, 1115 [4th Dept 2020]). Here, the court refused to suppress the physical evidence on the ground that the officers' observation of defendant walking in the roadway provided probable cause for them to believe that defendant had violated the Vehicle and Traffic Law, which justified the initial stop and the subsequent pursuit of defendant. Vehicle and Traffic Law § 1156 (a) requires that, "[w]here sidewalks are provided and they may be used with safety it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway." Here, when asked at the suppression hearing if he had seen defendant "doing anything illegal," the testifying police officer responded, "[o]ther than walking down the center of the road, no." Even assuming, arguendo, that we can infer the presence of a sidewalk based on the officer's response, we conclude that the People failed to establish that a sidewalk was available *and* that it could "be used with safety" (*id.*), especially when considering that defendant was stopped in January in central New York. Nor did the People establish that defendant, by walking "down the center of the road," violated section 1156 (b), which requires a pedestrian, where sidewalks are not provided, to "walk only on the left side of the roadway or its shoulder facing traffic" inasmuch as a pedestrian is only required to do so "when practicable." Thus, we agree with defendant that, under the circumstances of this case, the People failed to meet their burden of establishing the legality of the police conduct. The court therefore erred in refusing to suppress the physical evidence obtained as a result of the unlawful seizure (*see People v Suttles*, 214 AD3d 1313, 1314 [4th Dept 2023]; *Dortch*, 186 AD3d at 1116; *People v Lopez*, 206 AD2d 894, 894 [4th Dept 1994], *lv denied* 84 NY2d 937 [1994]). Because our determination results in the suppression of all evidence supporting the crime charged, the indictment must be dismissed (*see Suttles*, 214 AD3d at 1314).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

381

CA 22-01578

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

HOUSING OPPORTUNITIES MADE EQUAL,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DASA PROPERTIES LLC, PENINSULA WHOLESALE HOLDINGS CORP. AND LISA SMITH,
DEFENDANTS-RESPONDENTS.

CIVIL RIGHTS & TRANSPARENCY CLINIC, BUFFALO (JARED WALDRON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (NICHOLAS M. HRICZKO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 26, 2022. The order granted the motion of defendants to dismiss the amended complaint and dismissed the amended complaint.

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

Memorandum: Plaintiff, Housing Opportunities Made Equal, commenced this action against defendants, owners and a property manager of certain rental properties, seeking, among other relief, compensatory and punitive damages for defendants' alleged discriminatory conduct based on potential renters' lawful source of income. Supreme Court granted defendants' motion to dismiss the amended complaint pursuant to, inter alia, CPLR 3211 (a) (7). As limited by its brief, plaintiff appeals from the ensuing order to the extent that it granted the motion with respect to the second cause of action, for a violation of Executive Law § 296 (5), and we reverse the order insofar as appealed from.

We reject at the outset defendants' contention that plaintiff lacks standing with respect to the second cause of action. In their pre-answer motion to dismiss, defendants argued that plaintiff lacked standing on the first cause of action, but they explicitly stated that they were not arguing that plaintiff lacked standing on the second cause of action. We thus conclude that any objection by defendants to plaintiff's standing with respect to the second cause of action is waived (*see generally Matter of Fossella v Dinkins*, 66 NY2d 162, 167-

168 [1985]; *Matter of Lebron v McGinnis*, 26 AD3d 658, 658 [3d Dept 2006], *lv denied* 7 NY3d 704 [2006]).

We agree with plaintiff that the court erred in granting the motion with respect to the second cause of action. On a motion to dismiss pursuant to CPLR 3211 (a) (7), we "must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . 'the benefit of every possible favorable inference' " (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005], quoting *Leon v Martinez*, 84 NY2d 83, 87 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]).

Executive Law § 296 (5) (a) (2) provides in relevant part that it "shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof . . . [t]o discriminate against any person because of . . . lawful source of income . . . in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith." Plaintiff alleged in its amended complaint that it sent two testers to defendants' properties seeking to rent the properties. The testers asked defendants if they accepted security agreements, which are issued by the Erie County Department of Social Services to landlords in the amount of one month's rent in lieu of a cash deposit. Defendants responded that they accepted those agreements, but that they also required tenants to put down a cash deposit of one-half of a month's rent for the security deposit.

Plaintiff contends that the amended complaint stated a cause of action under Executive Law § 296 (5) (a) (2). Although we agree with defendants that plaintiff's contention is raised for the first time on appeal, we address it inasmuch as it involves "question[s] of law appearing on the face of the record . . . [that] could not have been avoided by [defendants] if brought to [their] attention in a timely manner" (*Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]; *see Capretto v City of Buffalo*, 124 AD3d 1304, 1307 [4th Dept 2015]). We conclude that the amended complaint states a cause of action under Executive Law § 296 (5) (a) (2) (*see generally Pilipovic v Laight Coop. Corp.*, 137 AD3d 710, 711-712 [1st Dept 2016]). The allegations in the amended complaint support the inference that, for a person whose lawful source of income is public assistance (*see* § 292 [36]), defendants imposed a different term or condition for the rental than for a person whose lawful source of income was not public assistance. In particular, for a person on public assistance, defendants required one-half's month rent, in cash, as a security deposit in addition to the security agreements.

In light of our determination, we do not address plaintiff's further contention that the second cause of action also stated a claim

under Executive Law § 296 (5) (a) (1).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

385

KA 19-01375

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGGORY FRAISER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 29, 2019. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of sexual abuse in the first degree (Penal Law § 130.65 [3]). We agree with defendant, and the People correctly concede, that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We are therefore not precluded from reviewing defendant's challenge to the severity of his sentence. Nevertheless, we reject defendant's contention that the period of postrelease supervision is unduly harsh and severe.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

390

KA 19-00963

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL JACKSON, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (CLEA WEISS 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 (Thomas E. Moran, J.), rendered March 25, 2019. The judgment convicted defendant upon a jury verdict of criminal possession of stolen property in the third degree, criminal possession of stolen property in the fourth degree, unauthorized use of a vehicle in the third degree and endangering the welfare of a child.

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 criminal possession of stolen property in the third degree (Penal Law § 165.50), criminal possession of stolen property in the fourth degree (§ 165.45 [5]), unauthorized use of a vehicle in the third degree (§ 165.05 [1]), and endangering the welfare of a child (§ 260.10 [1]).

Viewing the evidence in light of the elements of the criminal possession counts as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict with respect to those counts is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that Supreme Court violated his right to counsel when it failed to conduct a sufficient inquiry into defendant's complaint that his assigned counsel accepted payment from his family. "Under our State and Federal Constitutions, an indigent defendant in a criminal case is guaranteed the right to counsel" (*People v Medina*, 44 NY2d 199, 207 [1978]; *see* US Const 6th Amend; NY Const, art I, § 6; *People v Linares*, 2 NY3d 507, 510 [2004]). Consistent with that guarantee, trial courts have the "ongoing duty" to " 'carefully evaluate serious complaints about counsel' " (*Linares*,

2 NY3d at 510, quoting *Medina*, 44 NY2d at 207; *see People v Sides*, 75 NY2d 822, 824 [1990]).

"Whether counsel is substituted is within the 'discretion and responsibility' of the trial judge . . . , and a court's duty to consider such a motion is invoked only where a defendant makes a 'seemingly serious request[]' " (*People v Porto*, 16 NY3d 93, 99-100 [2010]). "[I]t is incumbent upon a defendant to make specific factual allegations of 'serious complaints about counsel' " (*id*. at 100; *see People v Gibson*, 126 AD3d 1300, 1301-1302 [4th Dept 2015]). If such a showing is made, "the court must make at least some minimal inquiry to determine whether the defendant's claims are meritorious" (*People v Tatum*, 204 AD3d 1400, 1401 [4th Dept 2022], *lv denied* 38 NY3d 1074 [2022]; *see Porto*, 16 NY3d at 100).

Here, defendant sent a letter to the court alleging, inter alia, that his assigned counsel was being paid by his family, which is a serious complaint involving unethical and illegal conduct (*see generally* County Law § 722-b [4]). Although the court began to engage defense counsel in a discussion concerning defendant's letter, before defense counsel was able to address the concerns raised by defendant in the letter, the court interjected and said, "You are going to represent [defendant] at trial." The court then addressed defendant directly and concluded its comments to him by stating, inter alia, "You are not going to get another attorney." At no time did the court make any inquiry into defendant's allegation that his family had paid defense counsel to represent him. Under the circumstances here, we conclude that the court violated defendant's right to counsel by failing to make a minimal inquiry concerning his serious complaint (*see generally Sides*, 75 NY2d at 825).

Contrary to the People's assertion, we cannot conclude on this record that defendant abandoned his request for new counsel (*cf. People v Molina*, 208 AD3d 1641, 1642-1643 [4th Dept 2022], *lv denied* 39 NY3d 964 [2022]; *see also People v Rodriguez*, 46 AD3d 396, 397 [1st Dept 2007], *lv denied* 10 NY3d 844 [2008]; *see generally People v Mezon*, 80 NY2d 155, 161 [1992]).

We therefore reverse the judgment and grant a new trial (*see Gibson*, 126 AD3d at 1301; *People v Bryan*, 31 AD3d 295, 295 [1st Dept 2006]). In light of our determination, we do not address defendant's remaining contentions.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

402

KA 20-01124

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM C. SHRUBSALL, ALSO KNOWN AS ETHAN MACLEOD,
DEFENDANT-APPELLANT.

WILLIAM C. SHRUBSALL, DEFENDANT-APPELLANT PRO SE.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered July 29, 2020. The judgment convicted defendant, upon his plea of guilty, of bail jumping in the first degree and criminal contempt 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 bail jumping in the first degree (Penal Law § 215.57) and criminal contempt in the second degree (§ 215.50 [3]). The charges arose after defendant, who was released on bail while on trial in May 1996 under an indictment charging him with the class B felony of sodomy in the first degree (Penal Law former § 130.50 [2]) and the class D felony of sexual abuse in the first degree (§ 130.65 [2]), failed to appear on the final day of trial, left an ostensible suicide note in which he suggested that he intended to kill himself by plunging over Niagara Falls, and instead absconded to Canada. The trial proceeded in defendant's absence. The jury rendered a verdict finding defendant guilty of, as relevant here, sexual abuse in the first degree (§ 130.65 [2]), and defendant was sentenced in absentia in November 1996 to, inter alia, an indeterminate term of 2a to 7 years of imprisonment.

Defendant was subsequently charged in a March 1997 indictment with bail jumping in the first degree (Penal Law § 215.57). In the meantime, defendant assumed various aliases while living in Canada, and Canadian law enforcement later arrested defendant after he committed several violent physical and sexual attacks against women. The People obtained a superseding indictment in May 2000 charging defendant with bail jumping in the first degree (§ 215.57) and criminal contempt in the second degree (§ 215.50 [3]). In December

2001, following his convictions for various crimes in Canada, including robbery, possession of a weapon, aggravated sexual assault, and aggravated assault, defendant was declared a dangerous offender and sentenced to an indeterminate period of detention in a Canadian penitentiary up to life imprisonment, subject to periodic review for parole.

Eventually, defendant was granted parole and, in late January 2019, defendant was turned over by Canadian authorities to Niagara County law enforcement at the United States-Canada border. Defendant was arraigned the following day on the superseding indictment and Supreme Court reiterated that defendant was required to serve the sentence imposed on the sex offenses conviction following the trial from which defendant had absconded. The court subsequently denied defendant's motion insofar as it sought to dismiss the bail jumping count as defective, granted the People's motion to amend the superseding indictment and, following a hearing, denied defendant's motion insofar as it sought to dismiss the superseding indictment on the ground that the People violated his constitutional right to a speedy trial.

Defendant thereafter pleaded guilty to the counts in the superseding indictment. The court, consistent with the agreed-upon sentencing cap, sentenced defendant, in relevant part, to an indeterminate term of two to six years of imprisonment on the bail jumping count, which was to run consecutively to the sentence imposed on the prior sex offenses conviction. Defendant appeals, and we now affirm.

Defendant contends that the bail jumping count in the superseding indictment is jurisdictionally defective, and the court thus erred in granting the People's motion to amend. We reject that contention.

"An indictment is jurisdictionally defective only if it does not effectively charge the defendant with the commission of a particular crime—for instance, if it fails to allege that the defendant committed acts constituting every material element of the crime charged" (*People v D'Angelo*, 98 NY2d 733, 734-735 [2002]; *see People v Iannone*, 45 NY2d 589, 600 [1978]). In that regard, "incorporation [in an indictment] by specific reference to the statute [defining the crime charged] operates without more to constitute allegations of all the elements of the crime" (*D'Angelo*, 98 NY2d at 735; *see People v Sanford*, 148 AD3d 1580, 1581 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]).

Here, the superseding indictment provided that defendant was charged with the crime of bail jumping in the first degree in violation of Penal Law § 215.57, and alleged that defendant committed acts constituting every material element of the crime charged—i.e., that defendant, having been released by court order on bail, upon condition that he would subsequently appear personally in connection with an indictment pending against him, which charged him with the commission of a class B felony, did not appear personally on the required date or voluntarily within 30 days thereafter (*see* § 215.57).

Contrary to defendant's contention, although the superseding indictment later incorrectly specified that the class D felony of sexual abuse in the first degree (§ 130.65 [2]), rather than the class B felony of sodomy in the first degree (Penal Law former § 130.50 [2]), was the class B felony on the pending indictment, that error constituted a mere "misnomer in the designation of the crime" that "d[id] not render [the superseding] indictment jurisdictionally defective" with respect to the bail jumping count (*People v Rodriguez*, 97 AD3d 246, 252 [1st Dept 2012], *lv denied* 19 NY3d 1028 [2012]; *see People v Bishop*, 115 AD3d 1243, 1244 [4th Dept 2014], *lv denied* 23 NY3d 1018 [2014], *reconsideration denied* 24 NY3d 1082 [2014]).

Defendant further contends that the People's extraordinary postindictment delay in prosecuting the case deprived him of his constitutional right to a speedy trial, and the court thus erred in denying his motion insofar as it sought to dismiss the superseding indictment on that ground. We reject that contention.

"By statute and constitutional law, New York guarantees criminal defendants the right to a speedy trial and prompt prosecution" (*People v Regan*, — NY3d —, —, 2023 NY Slip Op 01353, *3 [2023]; *see* NY Const, art I, § 6; CPL 30.20; *People v Vernace*, 96 NY2d 886, 887 [2001]; *People v Staley*, 41 NY2d 789, 791 [1977]). Courts "analyze constitutional speedy trial claims using the five factors set forth in *People v Taranovich* (37 NY2d 442 [1975]): '(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay' " (*People v Wiggins*, 31 NY3d 1, 9-10 [2018]). "The *Taranovich* framework is a holistic one—that is, 'no one factor or combination of the factors . . . is necessarily decisive or determinative of the speedy trial claim' " (*People v Johnson*, 39 NY3d 92, 96 [2022]; *see Wiggins*, 31 NY3d at 10; *People v Romeo*, 12 NY3d 51, 55 [2009], *cert denied* 558 US 817 [2009]). "[T]he factors must be evaluated 'on an *ad hoc* basis,' " which "mean[s] that the analysis must be tailored to the facts of each case" (*Johnson*, 39 NY3d at 96; *see Romeo*, 12 NY3d at 55).

With respect to the first factor, "the extent of the delay[] is of critical importance because 'all other factors being equal, the greater the delay the more probable it is that the accused will be harmed thereby' " (*Romeo*, 12 NY3d at 56). "Where the delay is lengthy, an examination of the other factors is triggered, and the length of delay becomes one factor in that inquiry" (*id.*). Here, we agree with defendant that the delay between the superseding indictment and his arraignment thereon was an extraordinary period of 18½ years (*see id.*). Thus, "[a]lthough not in itself decisive, the [18½]-year delay requires close scrutiny of the other factors, especially the question of why the delay occurred" (*id.*; *see Wiggins*, 31 NY3d at 10-11).

Regarding the second factor, the record establishes that the genesis of the extraordinary delay here was defendant's decision to

absent himself from his ongoing sex offenses trial, leave a false suicide note, and abscond to Canada where, while using various aliases, he committed several violent physical and sexual attacks against women, thereby resulting in his convictions for various crimes, designation as a dangerous offender, and corresponding lengthy term of imprisonment in Canada (*cf. Romeo*, 12 NY3d at 56). Thus, contrary to defendant's assertion, the court properly concluded that the initial reason for the delay was attributable solely to defendant (*see People v Keating*, 183 AD3d 595, 596 [2d Dept 2020], *lv denied* 35 NY3d 1113 [2020]; *People v Lara*, 165 AD3d 563, 563 [1st Dept 2018], *lv denied* 32 NY3d 1206 [2019]).

Nonetheless, "[t]he fact that a defendant is incarcerated outside of the state makes it incumbent upon the People to make diligent, good faith efforts to secure [the defendant's] presence in the state for arraignment and trial" (*Romeo*, 12 NY3d at 57). "Where[, as here,] the defendant is incarcerated in another country, failing to make an extradition request has been one factor that courts have viewed as evidencing a lack of diligent efforts on the part of the prosecution in bringing defendant to trial promptly" (*id.*). If, however, "the foreign country demonstrates its clear intention to deny an extradition request, the People are under no obligation to make a futile gesture" (*id.*; *see People v Barba*, 135 AD3d 950, 951 [2d Dept 2016], *lv denied* 27 NY3d 1065 [2016]).

Contrary to defendant's assertion, we conclude that the People demonstrated that they made diligent, good faith efforts to secure defendant's presence in the state for arraignment and trial on the superseding indictment (*see Keating*, 183 AD3d at 596; *People v Turner*, 286 AD2d 514, 515 [2d Dept 2001], *lv denied* 97 NY2d 658 [2001]; *cf. Romeo*, 12 NY3d at 56-57). The evidence presented at the hearing establishes that the People for several years made diligent efforts in good faith to secure defendant's presence in New York by preparing and revising, in consultation with the Office of International Affairs of the United States Justice Department (OIA), i.e., the agency responsible for securing the return of international fugitives, the requisite paperwork to request defendant's extradition under the subject treaty with Canada. The record also establishes that, even after a change in the treaty that allowed for a temporary surrender of a fugitive for prosecution in the requesting country, the People subsequently reached "a reasoned conclusion that [submitting a formal extradition request to Canada] would be futile" based on, inter alia, OIA's advisements and the People's assessment of the low likelihood that Canada would extradite defendant for a bail jumping prosecution (*United States v Khan*, 575 F Supp 3d 490, 502 [SD NY 2021]; *see Turner*, 286 AD2d at 515; *cf. Romeo*, 12 NY3d at 57; *see generally United States v Diacolios*, 837 F2d 79, 83 [2d Cir 1988]). In our view, under the circumstances of this case, "a formal request for extradition" was not required "before due diligence c[ould] be found to have existed" (*Diacolios*, 837 F2d at 83). Consequently, we conclude that, even after the change in the treaty, the People acted reasonably and in good faith by continuing to revise the extradition paperwork and consult with OIA but ultimately deciding to maintain the

arrest warrant for bail jumping and await defendant's deportation while "operating under the assumption that he [w]ould not be extradited" (*Lara*, 165 AD3d at 564; *cf. Romeo*, 12 NY3d at 56-57).

Next, "[t]he third *Taranovich* factor requires us to consider the nature of the underlying charges against defendant" (*Wiggins*, 31 NY3d at 16). The nature of the underlying crime "can refer to both its severity and, relatedly, the complexity and challenges of investigating the crime and gathering evidence to support a prosecution" (*Johnson*, 39 NY3d at 97; *see Regan*, — NY3d at —, 2023 NY Slip Op 01353, *6). Here, although we agree with defendant that preparation for prosecution on the superseding indictment was not complex and the bail jumping count was, as the People and the court acknowledged, less significant than the undoubtably serious crimes committed in Canada, we note that defendant correctly concedes that bail jumping in the first degree, a class D felony (Penal Law § 215.57), is not trivial. Moreover, tailoring our analysis of this factor to the particular facts of the case (*see Johnson*, 39 NY3d at 96; *Romeo*, 12 NY3d at 55), we cannot ignore that the bail jumping count arose from defendant's attempt to avoid being held accountable and sentenced for the undoubtably serious sex offenses he committed against a 17-year-old female (*see generally Johnson*, 39 NY3d at 97). We thus reject defendant's assertion that the third factor favors him.

We agree with the parties that "[t]he fourth factor, whether there has been an extended period of pretrial incarceration, is not significant in this case" inasmuch as defendant was held at all times pursuant to the Canadian charges and defendant did not face any relevant pretrial incarceration on the superseding indictment (*Romeo*, 12 NY3d at 58; *see Johnson*, 39 NY3d at 98).

"The fifth and final *Taranovich* factor requires us to consider prejudice to the defendant" (*Wiggins*, 31 NY3d at 17). In analyzing that factor, courts consider whether "there is any indication that the defense has been impaired by reason of the delay, such as difficulty in gathering evidence and locating witnesses" (*Romeo*, 12 NY3d at 58). Generally, "[s]uch concerns are exacerbated where the defendant is incarcerated in a foreign jurisdiction" (*id.*).

Here, however, we conclude that "there is no indication that . . . defendant was prejudiced in any way by the delay that he himself caused by his fugitivity" (*People v Rodriguez*, 199 AD3d 838, 839 [2d Dept 2021], *lv denied* 38 NY3d 953 [2022] [internal quotation marks omitted]; *see Lara*, 165 AD3d at 564). Contrary to defendant's assertion that he "factually[ ]demonstrated" actual prejudice in the form of a lost opportunity for concurrent sentences, we conclude on this record that there was "no demonstrated possibility of a concurrent sentence being available to defendant by an earlier disposition of the [bail jumping] matter" (*People v Allende*, 206 AD2d 640, 642 [3d Dept 1994], *appeal dismissed* 84 NY2d 921 [1994]; *see generally* Penal Law § 70.25 [2-c]). We further conclude that, contrary to defendant's assertion, he was not prejudiced by the death of a potential witness inasmuch as she was a noncritical witness whose

loss cannot have contributed to any inadequacy in defendant's defense (*see People v Mann*, 200 AD2d 910, 910-911 [3d Dept 1994]). Moreover, although "a demonstration of specific prejudice is not necessarily required" inasmuch as " 'excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify' " (*Wiggins*, 31 NY3d at 17), that presumption is undermined here inasmuch as it is unlikely that any defense to the superseding indictment that defendant may have had was impaired by the passage of time given that the evidence of bail jumping would largely be documentary in nature, coupled with other evidence regarding the indisputable fact that defendant failed to appear at trial (*see United States v Lainez-Leiva*, 957 F Supp 390, 392 [ND NY 1997], *affd* 129 F3d 89 [2d Cir 1997]; *cf. Wiggins*, 31 NY3d at 17-19; *Romeo*, 12 NY3d at 58).

Based on the foregoing, upon balancing the *Taranovich* factors, we conclude that the People did not violate defendant's constitutional right to a speedy trial under the aforementioned circumstances of this case (*see e.g. Rodriguez*, 199 AD3d at 839; *Lara*, 165 AD3d at 563-564; *Barba*, 135 AD3d at 950-951; *cf. Wiggins*, 31 NY3d at 19; *Romeo*, 12 NY3d at 58).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

409

CAF 22-00543

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

IN THE MATTER OF DEQUOYA C. KELLY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RENALDO J. NAPIER, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Monroe County (Julie M. Hahn, A.J.), entered March 10, 2022, in a proceeding pursuant to Family Court Act article 4. The order, inter alia, confirmed an order of the Support Magistrate.

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

Memorandum: In this proceeding pursuant to Family Court Act article 4, respondent appeals from an order confirming the order of the Support Magistrate, which, inter alia, determined that he had willfully violated a prior order of child support. We affirm.

Initially, respondent failed to preserve for our review his contention that the Support Magistrate erred in admitting into evidence uncertified documents submitted by petitioner because respondent did not raise that contention in his written objection to the Support Magistrate's order (*see Matter of Foley v Dwyer*, 192 AD3d 1652, 1653 [4th Dept 2021], *lv denied* 37 NY3d 907 [2021]; *Matter of White v Knapp*, 66 AD3d 1358, 1359 [4th Dept 2009]; *see generally* Family Ct Act § 439 [e]).

Contrary to respondent's contention, Family Court did not err in confirming the Support Magistrate's determination that respondent willfully violated the prior child support order. Parents are presumed to have sufficient means to support their minor child (*see* Family Ct Act § 437; *Matter of Monroe County Child Support Enforcement Unit v Hemminger*, 186 AD3d 1093, 1093 [4th Dept 2020]; *Matter of Wayne County Dept. of Social Servs. v Loren*, 159 AD3d 1504, 1504-1505 [4th Dept 2018]). Thus, evidence that a respondent has failed to pay child support as ordered constitutes "prima facie evidence of a willful violation" (*Matter of Movsovich v Wood*, 178 AD3d 1441, 1441 [4th Dept 2019], *lv denied* 35 NY3d 905 [2020] [internal quotation marks omitted]; *see* § 454 [3] [a]).

Here, petitioner established that respondent failed to pay the amount directed in the prior order, and the burden thus shifted to respondent to submit "some competent, credible evidence of his inability to make the required payments" (*Matter of Powers v Powers*, 86 NY2d 63, 70 [1995]; *see Matter of Jelks v Wright*, 96 AD3d 1488, 1489 [4th Dept 2012]). Respondent failed to meet that burden inasmuch as he failed to present evidence establishing that he made reasonable efforts to obtain gainful employment to meet his support obligation (*see Matter of Roshia v Thiel*, 110 AD3d 1490, 1492 [4th Dept 2013], *lv dismissed in part & denied in part* 22 NY3d 1037 [2013]; *Matter of Hunt v Hunt*, 30 AD3d 1065, 1065 [4th Dept 2006]). Additionally, we note that the Support Magistrate was "in the best position to assess the credibility of the witnesses and the evidence proffered," and properly found that respondent was not credible and failed to demonstrate his inability to pay child support (*Matter of Manocchio v Manocchio*, 16 AD3d 1126, 1128 [4th Dept 2005] [internal quotation marks omitted]). We perceive no basis to disturb the Support Magistrate's determination in that regard (*see generally Matter of Natali v Natali*, 30 AD3d 1010, 1012 [4th Dept 2006]).

Finally, we note that the order and conditions of probation contains a clerical error that must be corrected—i.e., it inaccurately states that respondent was placed on probation for a period of 24 months. The order on appeal, however, imposed only a one-year term of probation. The order and conditions of probation must therefore be amended to correctly reflect that the court placed respondent on probation for a period of a year.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

410

CA 22-00639

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

BETSEY H. EMERSON AND DOUGLAS E. EMERSON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, ALSO KNOWN AS BUFFALO
GENERAL HOSPITAL, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CONNORS LLP, BUFFALO (BRYAN P. KROETSCH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 31, 2022. The order granted the motion of defendant for summary judgment.

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

Memorandum: These appeals arise from two consolidated medical malpractice actions in which plaintiffs seek damages under several legal theories for, inter alia, injuries allegedly arising after Kenneth A. Krackow, M.D. (Dr. Krackow) performed a double knee replacement surgery upon Betsey H. Emerson (plaintiff). Unbeknownst to plaintiff, Dr. Krackow had been diagnosed with Alzheimer's disease prior to the surgery. In appeal No. 1, plaintiffs appeal from an order in action No. 2 that granted the motion of defendant Kaleida Health, also known as Buffalo General Hospital (Kaleida), for summary judgment dismissing the complaint and any cross-claims against it. In appeal No. 2, plaintiffs appeal from an order in action No. 1 that granted in part the motion of defendant Gretchen Krackow, as attorney in fact for Dr. Krackow, and defendant University Orthopaedic Services, Inc. (University Orthopaedic) (collectively, defendants) for summary judgment dismissing the complaint and any cross-claims against them and, inter alia, dismissed the cause of action for lack of informed consent and the claims of medical malpractice premised on Dr. Krackow's Alzheimer's diagnosis.

Taking appeal No. 2 first, we reject plaintiffs' contention that Supreme Court erred in granting defendants' motion with respect to the medical malpractice claim against them premised on Dr. Krackow's

Alzheimer's disease. Defendants had " 'the burden of establishing, prima facie, that [Dr. Krackow] did not deviate from [the] good and accepted standard[] of . . . care, or that any such deviation was not a proximate cause of the plaintiff's injuries' " (*Culver v Simko*, 170 AD3d 1599, 1600 [4th Dept 2019]). Here, defendants met their initial burden on their motion with respect to claims premised on Dr. Krackow's Alzheimer's disease by submitting the affirmation of an expert who opined that, even assuming that Dr. Krackow was impaired physically or mentally as a result of Alzheimer's disease, such impairment did not affect the outcome of the surgery and did not result in any injury to plaintiff. Contrary to plaintiffs' contention, the affirmation of defendants' expert is not wholly conclusory or speculative, or without any basis in the record (*see generally Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]).

Thus, because defendants met their burden on proximate cause relating to the allegations of Dr. Krackow's Alzheimer's condition, the burden shifted to plaintiffs to raise triable issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]). Here, the affidavit of plaintiffs' expert in opposition to the motion failed to establish that Dr. Krackow's Alzheimer's condition impacted the surgery and caused plaintiff's injuries. Thus, the court properly granted defendants' motion with respect to that claim (*cf. Thompson v Hall*, 191 AD3d 1265, 1267 [4th Dept 2021]).

We also reject plaintiffs' contention that the court erred in granting defendants' motion with respect to the cause of action for lack of informed consent for the surgical procedure. It is well settled that, in order "[t]o succeed in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must demonstrate that (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment" (*Orphan v Pilnik*, 15 NY3d 907, 908 [2010]). Here, defendants met their initial burden of establishing their entitlement to judgment as a matter of law with respect to the claim of lack of informed consent by submitting deposition testimony and medical records demonstrating that Dr. Krackow informed plaintiff of the reasonably foreseeable risks associated with the surgery, confirmed that she understood those risks, and obtained her written consent (*see Thompson*, 191 AD3d at 1266). Plaintiffs failed to raise an issue of fact in opposition (*see id.*; *see generally Abram v Children's Hosp. of Buffalo*, 151 AD2d 972, 972 [4th Dept 1989], *lv dismissed* 75 NY2d 865 [1990]).

In appeal No. 1, we reject plaintiffs' contention that the court erred in granting Kaleida's motion for summary judgment dismissing the complaint against it. Kaleida met its prima facie burden with respect to whether Dr. Krackow's Alzheimer's condition was a cause of plaintiff's injuries by submitting an expert affidavit and incorporating by reference the expert affirmation submitted by defendants in support of their motion, both of which established that there was no indication that Dr. Krackow's Alzheimer's disease

impacted the surgery in any way or caused plaintiff's injuries. Moreover, Kaleida's expert averred that, based on his review of the post-operative notes, he saw no indication that Dr. Krackow lacked competency to practice medicine. Thus, Kaleida met its prima facie burden of establishing that Dr. Krackow's Alzheimer's condition did not cause plaintiff's injuries, thereby shifting the burden to plaintiffs to demonstrate a triable issue of fact (*see generally Ziemendorf v Chi*, 207 AD3d 1157, 1157-1158 [4th Dept 2022]; *Isensee v Upstate Orthopedics, LLP*, 174 AD3d 1520, 1521 [4th Dept 2019]). We conclude that plaintiffs failed to raise a triable issue of fact (*see generally Alvarez*, 68 NY2d at 325).

We further conclude that Kaleida met its prima facie burden with respect to the cause of action for lack of informed consent inasmuch as Kaleida established that Dr. Krackow was not an employee of Kaleida, but a private retained doctor performing a previously scheduled surgery, and " 'where a private physician attends his or her patient at the facilities of a hospital, it is the duty of the physician, not the hospital, to obtain the patient's informed consent' " (*Doria v Benisch*, 130 AD3d 777, 778 [2d Dept 2015]; *see generally Pasek v Catholic Health Sys., Inc.*, 195 AD3d 1381, 1381-1382 [4th Dept 2021]). Plaintiffs failed to raise a question of fact with respect to that issue (*see generally Alvarez*, 68 NY2d at 325).

We conclude that plaintiffs' remaining contentions are without merit.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

411

CA 22-00708

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

BETSEY H. EMERSON AND DOUGLAS E. EMERSON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

GRETCHEN KRACKOW, AS ATTORNEY IN FACT FOR
KENNETH A. KRACKOW, M.D., AND UNIVERSITY
ORTHOPAEDIC SERVICES, INC.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

EAGAN & HEIMER, PLLC, BUFFALO (JAMES E. EAGAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 2, 2022. The order granted in part the motion of defendants for summary judgment.

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

Same memorandum as in *Emerson v Kaleida Health* ([appeal No. 1] — AD3d — [June 30, 2023] [4th Dept 2023]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

426

KA 17-00900

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. MCCRACKEN, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 (Judith A. Sinclair, J.), rendered March 13, 2017. The judgment convicted defendant upon a plea of guilty of murder in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). Initially, we agree with defendant that the waiver of the right to appeal is invalid and unenforceable. Although Supreme Court informed defendant that the waiver of the right to appeal was "separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]), the court also stated that defendant would be "waiving any and all rights to appeal from the judgment of conviction," including any pre-trial rulings and "all post-conviction challenges." Such overbroad and inaccurate statements render waivers of the right to appeal invalid (*see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Zabko*, 206 AD3d 1642, 1642-1643 [4th Dept 2022]; *People v Hughes*, 199 AD3d 1332, 1333 [4th Dept 2021]). The written waiver did not cure the court's inaccurate statements. Rather, "it perpetuated the oral colloquy's mischaracterization of the waiver of the right to appeal as an absolute bar to the taking of an appeal by stating that defendant was '[waiving] any and all rights to appeal from the judgment' and that 'the plea agreement [and appeal waiver] . . . [would] be a complete and final disposition of this matter' " (*People v Josue F.*, 191 AD3d 1483, 1484 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]; *see Thomas*, 34 NY3d at 566; *Hughes*, 199 AD3d at 1333).

Inasmuch as the waiver of the right to appeal is invalid, we

address defendant's contention that the court erred in refusing to hold a hearing to address a suppression issue (*see generally People v Kemp*, 94 NY2d 831, 833 [1999]). In his omnibus motion, defendant sought to suppress his statements to the police and tangible evidence seized from his home, contending that he was improperly arrested in his residence in violation of *Payton v New York* (445 US 573 [1980]). Defendant was the subject of an outstanding parole warrant that had been issued at least nine days before the instant crime was committed. Although the court initially determined that defendant was entitled to a hearing on the *Payton* issue, it subsequently denied defendant's hearing request on the ground that one was not required in light of our holding in *People v Johnson* (140 AD3d 1630, 1631 [4th Dept 2016], *lv denied* 28 NY3d 1028 [2016]). Specifically, the court determined that, based on *Johnson*, the parole warrant was enough, by itself, to justify the entry of police officers into defendant's residence to arrest him. The court further determined, without conducting a hearing but having reviewed the conditions of defendant's parole, that the parole warrant was "facially sufficient [due to] [d]efendant absconding from parole supervision." However, although not specifically stated in our memorandum decision, the trial court in *Johnson* reached its decision *after* holding a combined *Payton* and *Huntley* hearing, and " '[w]e can and do take judicial notice of the record on appeal' in that case" (*People v Flanders*, 111 AD3d 1263, 1265 [4th Dept 2013], *affd* 25 NY3d 997 [2015]). We thus conclude that *Johnson* does not stand for the proposition that a defendant is limited solely to a facial challenge whenever the defendant is arrested in their residence under the authority of a parole warrant, nor does it stand for the proposition that a hearing is always required even if unsupported by a defendant's motion papers. Nevertheless, the case does inform our analysis.

In *Johnson*, we recognized that, " '[u]nder the Federal Constitution, it is clear that a parolee or a probationer may be arrested in [their] home without a judicial warrant' . . . A parole violation warrant by itself justifies the entry of the residence for the purposes of locating and arresting the defendant therein . . . provided that, as here, the officers 'reasonably believe[d] the defendant to be present' in the premises (CPL 120.80 [4])" (140 AD3d at 1631). In that case, however, the People had established at the hearing the validity of and the grounds for the parole warrant. Here, the court declined to hold a hearing on the validity of the parole warrant, despite making a factual determination that defendant had absconded from parole. Inasmuch as defendant challenged the factual basis for and the continued validity of the parole violation warrant at the time of his arrest, which he alleged was executed solely by police officers unaccompanied by parole officers, that was error.

Pursuant to 9 NYCRR 8004.2 (a), a parole violation warrant cannot be issued without "probable cause to believe that [the parolee] has violated one or more of the conditions of their release." "Probable cause exists when evidence or information which appears reliable discloses facts or circumstances that would convince a person of ordinary intelligence, judgment and experience that it is more probable than not that the subject releasee has committed the acts in

question" (9 NYCRR 8004.2 [b]). If a parole officer believes that there is probable cause that the parolee has violated a condition of release "in an important respect," that parole officer is required to report that to the parole board "or a designated officer," such as a senior parole officer (9 NYCRR 8004.2 [a]), at which time "a notice of violation may be approved" (9 NYCRR 8004.2 [c]) and a warrant for "retaking and temporary detention may [be] issue[d]" by, among others, a designated officer (9 NYCRR 8004.2 [d]). Notably, a parole violation warrant may be administratively canceled "[a]t any time" after it is issued (9 NYCRR 8004.11 [a]).

Here, inasmuch as defendant sufficiently raised the *Payton* issue in his omnibus motion, and the People's opposition papers did not resolve the issue as a matter of law, the court should have afforded defendant the opportunity to put the People to their proof regarding the alleged probable cause for the warrant, i.e., absconding, and whether the warrant was still active at the time defendant was arrested (*see generally People v Searight*, 162 AD3d 1633, 1635 [4th Dept 2018]). Under these circumstances, we hold the case and remit the matter for an evidentiary hearing with respect to the *Payton* issues raised by defendant (*see People v Kuberka*, 215 AD2d 592, 593 [2d Dept 1995]).

In light of our determination, we do not address defendant's remaining contention.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

433

CA 22-00273

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND GREENWOOD, JJ.

IN THE MATTER OF VLADIMIR JEANTY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

UTICA POLICE DEPARTMENT, MELISSA SCIORTINO,
CITY CLERK/RECORDS ACCESS OFFICER, AND
WILLIAM BORRILL, RECORDS ACCESS APPEALS
OFFICER, RESPONDENTS-RESPONDENTS.

VLADIMIR JEANTY, PETITIONER-APPELLANT PRO SE.

WILLIAM BORRILL, CORPORATION COUNSEL, UTICA (SARAH C. HUGHES OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered January 27, 2022, in a proceeding pursuant to CPLR article 78. The order denied the motion of petitioner seeking to hold respondents in civil contempt.

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

Memorandum: Petitioner, pro se, appeals from an order that denied his motion seeking to hold respondents in civil contempt for violating Supreme Court's prior order directing them to fully respond to petitioner's outstanding requests for records under the Freedom of Information Law ([FOIL] Public Officers Law art 6) by either providing the requested records or articulating a "particularized and specific justification" for not providing records that are exempt from FOIL disclosure. We affirm.

To prevail on a motion for civil contempt, the moving party must establish, by clear and convincing evidence, "four elements: (1) a lawful order of the court, clearly expressing an unequivocal mandate, was in effect; (2) [i]t must appear, with reasonable certainty, that the order has been disobeyed; (3) the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party; and (4) prejudice to the right of a party to the litigation must be demonstrated" (*Dotzler v Buono*, 144 AD3d 1512, 1513-1514 [4th Dept 2016] [internal quotation marks omitted]; *see generally El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]; *Belkhir v Amrane-Belkhir*, 128 AD3d 1382, 1382 [4th Dept 2015]). " 'In order to sustain a finding of

civil contempt, it is not necessary that the disobedience [of a court order] be deliberate or willful; rather, the mere act of disobedience, regardless of motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party' " (*Palmieri v Town of Babylon*, 167 AD3d 637, 640 [2d Dept 2018]; *see generally El-Dehdan*, 26 NY3d at 35). "A motion to punish a party for civil contempt is addressed to the sound discretion of the . . . court" (*Matter of Moreno v Elliott*, 155 AD3d 1561, 1562 [4th Dept 2017], *lv dismissed in part & denied in part* 30 NY3d 1098 [2018] [internal quotation marks omitted]; *see Matter of Kieran XX. [Kayla ZZ.]*, 154 AD3d 1094, 1096 [3d Dept 2017]).

Here, there is no dispute that the court issued a lawful and clear mandate in the prior order directing respondents to respond to petitioner's outstanding FOIL requests, and that respondents were aware of that order and what it required them to do. In response to petitioner's requests, respondents provided petitioner with some of the requested records, but denied access to others, including records sought in connection with petitioner's first request. On appeal, the parties dispute whether respondents' responses relating to petitioner's first request actually complied with the court's prior order and whether petitioner was prejudiced by respondents' purported noncompliance. We conclude that petitioner did not establish that respondents violated the prior order with respect to their responses to petitioner's first request. Specifically, we conclude that respondents' corrected letter to petitioner provided a proper basis to deny that request pursuant to Public Officers Law § 89 (3) (a), i.e., that the request did not reasonably describe the records he was asking respondents to produce because, as the request was formulated, respondents could not respond to it with reasonable effort (*see Matter of Reclaim the Records v New York State Dept. of Health*, 185 AD3d 1268, 1273 [3d Dept 2020], *lv denied* 36 NY3d 910 [2021]). Moreover, even assuming, arguendo, that respondents did not comply with the prior order with respect to their responses to petitioner's first request, we conclude that the court did not abuse its discretion in denying the motion because petitioner failed to establish that he was prejudiced by respondents' purported failure to fully respond to that request (*see generally McCain v Dinkins*, 84 NY2d 216, 226 [1994]; *Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 239-240 [1987]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

435

CA 22-01162

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND GREENWOOD, JJ.

IN THE MATTER OF EAGLE RIDGE HOUSING PARTNERS,
PETITIONER-APPELLANT,

V ORDER

TOWN OF LERAY, RESPONDENT-RESPONDENT.

INDIAN RIVER CENTRAL SCHOOL DISTRICT,
INTERVENOR-RESPONDENT.

WOLFGANG & WEINMANN, BUFFALO (PETER A. WEINMANN OF COUNSEL), FOR PETITIONER-APPELLANT.

BARCLAY DAMON LLP, SYRACUSE (DEBRA C. SULLIVAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

FERRARA FIORENZA PC, EAST SYRACUSE (JEFFREY M. LEWIS OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered March 18, 2022, in a proceeding pursuant to RPTL article 7. The order dismissed the petitions for reductions of tax assessments.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 9 and 13, 2023,

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

Entered: June 30, 2023 Ann Dillon Flynn

Clerk of the Court

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

438

CA 22-01471

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND GREENWOOD, JJ.

IN THE MATTER OF MARK O'BRIEN, LCSW-R,
DIRECTOR OF COMMUNITY SERVICES FOR THE
COUNTY OF ERIE, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRENDA H., RESPONDENT-APPELLANT.

BRENDA H., RESPONDENT-APPELLANT PRO SE.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (MORGANN K. OBROCHTA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered July 8, 2022. The order denied the application of respondent to, inter alia, stay a prior amended order.

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

Memorandum: In this Mental Hygiene Law § 9.60 proceeding, respondent, pro se, appeals from an order that denied her application seeking, inter alia, to stay a prior amended order that, among other things, directed that she receive assisted outpatient treatment (AOT) for a period of six months (AOT order).

We dismiss the appeal as moot. It is well settled that "an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]; *see Matter of Buffalo Teachers Fedn., Inc. [Board of Educ. of the Buffalo Pub. Schs.]*, 179 AD3d 1553, 1554 [4th Dept 2020]). Here, the AOT order expired by its own terms on November 5, 2022. Thus, adjudication of the merits will not "result in immediate and practical consequences to the parties" (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012]; *see City of New York v Maul*, 14 NY3d 499, 507 [2010]; *Matter of Yuri M. [Karpati]*, 107 AD3d 999, 1000 [2d Dept 2013]). Contrary to respondent's contention, we conclude that the exception to the mootness doctrine does not apply in this case (*see Matter of Belkin v Aleksander Z.*, 189 AD3d 1032, 1032 [2d Dept 2020]; *Matter of Michael P. [Perlman]*, 131 AD3d 1062, 1063 [2d Dept 2015]; *see generally Matter of Gannett Co.*,

Inc. v Doran, 74 AD3d 1788, 1789 [4th Dept 2010]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

440

CA 22-01010

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND GREENWOOD, JJ.

LILIAN C., INDIVIDUALLY AND AS GUARDIAN OF
STEFANIE C., CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 127148.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (STEVEN W. WILLIAMS OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Ramon E. Rivera, J.), entered June 3, 2022. The order, inter alia, granted the motion of defendant for summary judgment and denied the cross-motion of claimant for summary judgment.

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 amended claim, and as modified the order is affirmed without costs.

Memorandum: Claimant commenced this action on behalf of herself and her daughter seeking damages for injuries they sustained as passengers in a motor vehicle accident that took place in the City of Syracuse. The accident occurred when the vehicle claimant and her daughter were riding in was heading westbound on Burnet Avenue and collided with a vehicle heading eastbound on Burnet Avenue that had attempted to make a left turn onto South Collingwood Avenue (Collingwood). Claimant alleged that the subject intersection was dangerous because of improper lane alignment and inadequate sight lines for eastbound drivers turning left onto Collingwood due to the number of vehicles heading westbound and turning left onto a ramp to I-690 West. Defendant, State of New York (State), moved, inter alia, for summary judgment dismissing claimant's amended claim, and claimant cross-moved for summary judgment on liability. The Court of Claims, inter alia, granted the motion insofar as it concerned the amended claim and denied the cross-motion.

We agree with claimant that the court erred in granting that part of the State's motion for summary judgment dismissing the amended claim, and we therefore modify the order accordingly. Under the

ordinary rules of negligence, the State "has a nondelegable duty to keep its roads reasonably safe . . . , and the State breaches that duty 'when [it] is made aware of a dangerous highway condition and does not take action to remedy it' " (*Brown v State of New York*, 31 NY3d 514, 519 [2018]; *see Aliasgarian v State of New York* [appeal No. 2], 199 AD3d 1439, 1440 [4th Dept 2021]). The duty includes the "continuing duty to review [a planned intersection] in light of its actual operation" (*Weiss v Fote*, 7 NY2d 579, 587 [1960], *rearg denied* 8 NY2d 934 [1960]). Although the State established that its design of the intersection in 1974 was reasonably safe, claimant raised an issue of fact whether the intersection was reasonably safe at the time of the accident in light of the significant increase in traffic at that intersection over the years for drivers turning left onto the I-690 West ramp (*see generally Petronic v City of New York*, 211 AD3d 862, 865 [2d Dept 2022]; *Lifson v City of Syracuse*, 41 AD3d 1292, 1294 [4th Dept 2007]). Claimant submitted the affidavit of her expert, who averred that the significant increase in traffic volume warranted the installation of a left-turn-only lane for eastbound drivers turning left onto Collingwood. Indeed, the expert averred that there was insufficient sight distance for eastbound left-turning vehicles because of the continuous line of oncoming traffic.

We further conclude that the State failed to establish as a matter of law that it did not have actual or constructive notice of the allegedly dangerous condition. Under the circumstances of this case, the State's submission of the accident history at the intersection did not establish as a matter of law that it did not have notice (*see generally Whitaker v Kennedy/Town of Poland*, 162 AD3d 1542, 1543 [4th Dept 2018]). The State also submitted an email exchange between representatives of the State and the City of Syracuse three years prior to the accident, wherein a City representative asked whether the left turn onto Collingwood was prohibited, and then asked, "Should it be?," which raised a question of fact whether the State had notice of the allegedly dangerous condition (*see generally Gillooly v County of Onondaga*, 168 AD2d 921, 922 [4th Dept 1990]). The failure of the State to meet its initial burden with respect to the issue of notice requires denial of the motion to that extent regardless of the sufficiency of claimant's opposing papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In light of our determination, we do not address claimant's remaining contentions.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

442

KA 20-00232

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OMAR ORTIZ, DEFENDANT-APPELLANT.

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

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (DAWN CATERA LUPI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered May 17, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree, criminal possession of a weapon in the second degree (four counts), criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree (three counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), defendant contends that he was denied due process of law and was prejudiced by the admission in evidence of body camera footage from a police officer who responded to the scene of the murder and subsequently followed the victim to the hospital. Inasmuch as defendant failed to object to the admission of the footage, that contention is not preserved for our review (*see* CPL 470.05 [2]; *People v Barkley*, 201 AD3d 1362, 1362 [4th Dept 2022], *lv denied* 38 NY3d 1007 [2022]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We note that the record reveals that the allegedly prejudicial portions of the footage were not played for the jury.

Defendant further contends that the verdict with respect to the murder count is against the weight of the evidence on the ground that defendant was justified in using deadly physical force against the victim (*see* Penal Law § 35.15 [2] [a], [b]). We reject that contention. Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), it cannot be said that the jury

"failed to give the evidence the weight it should be accorded" (*People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant also contends that County Court's charge on the defense of justification, which included both a theory of self-defense (*see* Penal Law § 35.15 [2] [a]) and a theory that the victim was involved in the commission of a robbery or attempted robbery (*see* § 35.15 [2] [b]), was improper and likely to confuse the jury. Inasmuch as defendant did not object to the court's charge, he failed to preserve that contention for our review (*see People v Vazquez*, 206 AD3d 1621, 1623 [4th Dept 2022], *lv denied* 39 NY3d 965 [2022]; *People v Quick*, 187 AD3d 1612, 1613 [4th Dept 2020], *lv denied* 36 NY3d 1053 [2021]). In any event, it is without merit. Contrary to defendant's contention, the charge did not create a risk that the jury would conclude that the People were required to disprove beyond a reasonable doubt one of the theories of justification only, and the charge as a whole "adequately conveyed to the jury the correct principles of law to be applied to the case" (*People v Bolling*, 24 AD3d 1195, 1197 [4th Dept 2005], *affd* 7 NY3d 874 [2006] [internal quotation marks omitted]; *see People v Cobb*, 72 AD3d 1565, 1566 [4th Dept 2010], *lv denied* 15 NY3d 803 [2010]; *cf. People v Coleman*, 122 AD2d 568, 569 [4th Dept 1986]).

Defendant's sentence is not unduly harsh or severe.

Finally, we have reviewed the remaining contentions raised by defendant on appeal and conclude that none warrants reversal or modification of the judgment.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

444

KA 22-00632

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAMERE MCMILLAN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (GARY T. KELDER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered December 7, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). During a routine inspection of defendant's residence, a parole officer observed a knife on defendant's person and a holster in his bedroom. The parole officer then conducted a search of the residence during which he observed drug paraphernalia and what appeared to be the handle of a handgun. He informed the police, and police officers searched the residence pursuant to a search warrant. We affirm.

As an initial matter, defendant correctly contends and the People correctly concede that defendant did not validly waive his right to appeal. County Court "conflated the appeal waiver with the rights automatically waived by the guilty plea . . . and thus the record fails to establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Murray*, 197 AD3d 1017, 1017 [4th Dept 2021], *lv denied* 37 NY3d 1147 [2021] [internal quotation marks omitted]; *see People v Jones*, 211 AD3d 1489, 1490 [4th Dept 2022]; *People v Rodriguez*, 199 AD3d 1458, 1458 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022]). The court also "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" (*Murray*, 197 AD3d at 1017 [internal quotation marks omitted]; *see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *Jones*, 211 AD3d at 1490). The written waiver signed by defendant at sentencing did not "cure the ambiguit[ies] in the . . . court's colloquy . . . ; rather, the written waiver[] . . . repeated many of the errors in County Court's colloqu[y] and, in any event, the court failed to confirm that [defendant] . . . understood the contents of the written waiver[]" (*Thomas*, 34 NY3d at 566 [internal quotation marks omitted]; *see People v Bisono*, 36 NY3d 1013, 1017-1018 [2020]; *People v Anderson*, 210 AD3d 1464, 1464-1465 [4th Dept 2022]).

Defendant contends that the court erred in refusing to suppress evidence obtained as a result of the search of his residence by his parole officer. We reject that contention. "[A] parolee's constitutional right to be secure against unreasonable searches and seizures is not violated when his [residence] is searched, without a search warrant, by his parole officer if the latter's conduct is rationally and reasonably related to the performance of his duty as a parole officer" (*People v Huntley*, 43 NY2d 175, 179 [1977]; *see People v Sapp*, 147 AD3d 1532, 1533 [4th Dept 2017], *lv denied* 29 NY3d 1086 [2017]; *People v Escalera*, 121 AD3d 1519, 1520 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]). We conclude that the parole officer's testimony established that the home that was searched was defendant's residence and, to the extent that defendant challenges the parole officer's testimony, we "afford deference to the court's determination that the testimony [of the parole officer] was credible" (*People v Sapp*, 147 AD3d 1532, 1533 [4th Dept 2017], *lv denied* 29 NY3d 1086 [2017] [internal quotation marks omitted]). We further conclude that the record supports the court's determination that the search of the residence in question was "rationally and reasonably related to the performance of the parole officer's duty and was therefore lawful" (*People v Johnson*, 94 AD3d 1529, 1532 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012] [internal quotation marks omitted]). Furthermore, the parole officer testified that, upon entering the residence, he observed a knife clipped to defendant's clothes, in violation of defendant's conditions of parole, and that, upon entering defendant's bedroom, he observed an empty holster. At that point, the parole officer's search of the bedroom and another room was rationally and reasonably related to the parole officer's duty to detect and to prevent additional parole violations (*see People v Derby*, 172 AD3d 1908, 1909 [4th Dept 2019], *lv denied* 33 NY3d 1068 [2019]; *People v Reed*, 150 AD3d 1655, 1655-1656 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]; *see generally People v Goss*, 143 AD3d 1279, 1280 [4th Dept 2016], *lv denied* 28 NY3d 1145 [2017]; *Escalera*, 121 AD3d at 1520).

Defendant failed to preserve for our review his further contention that he was not properly adjudicated a second violent felony offender because neither the People nor the court complied with CPL 400.15 (*see People v Hall*, 82 AD3d 1619, 1620 [4th Dept 2011], *lv denied* 16 NY3d 895 [2011]; *People v Myers*, 52 AD3d 1229, 1230 [4th

Dept 2008]). In any event, that contention is without merit. The record establishes that there was "substantial compliance with CPL 400.15 . . . inasmuch as both defendant and defense counsel received adequate notice and an opportunity to be heard with respect to the prior conviction" (*Hall*, 82 AD3d at 1620 [internal quotation marks omitted]; *see People v Bouyea*, 64 NY2d 1140, 1142 [1985]).

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

445

KA 18-02182

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY B. RUCKER, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE 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 (Victoria M. Argento, J.), rendered August 16, 2018. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [4]). We agree with defendant, and the People correctly concede, that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We are therefore not precluded from reviewing defendant's challenge to the severity of his sentence. Nevertheless, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

449

CA 22-00128

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

IN THE MATTER OF A RECOMMITMENT ORDER
PURSUANT TO CPL 330.20 IN RELATION TO PAUL B.

SHREYAS BAXI, M.D., CLINICAL DIRECTOR OF
THE MID-HUDSON PSYCHIATRIC CENTER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PAUL B., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MICHAEL D. NEVILLE, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, GARDEN CITY (DENNIS B. FELD OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR PETITIONER-RESPONDENT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (AMANDA M. TUCCIARONE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Oneida County Court (Michael L. Dwyer, J.), dated September 17, 2021, in a proceeding pursuant to CPL 330.20. The order denied respondent's motion seeking the appointment of an independent psychiatric examiner.

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

Same memorandum as in *Matter of Paul B.* ([appeal No. 2] — AD3d — [June 30, 2023] [4th Dept 2023]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

450

CA 22-00115

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

IN THE MATTER OF A RECOMMITMENT ORDER
PURSUANT TO CPL 330.20 IN RELATION TO PAUL B.

SHREYAS BAXI, M.D., CLINICAL DIRECTOR OF
THE MID-HUDSON PSYCHIATRIC CENTER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PAUL B., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MICHAEL D. NEVILLE, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, GARDEN CITY (DENNIS B. FELD OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR PETITIONER-RESPONDENT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (AMANDA M. TUCCIARONE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Oneida County Court (Michael L. Dwyer, J.), dated October 25, 2021, in a proceeding pursuant to CPL 330.20. The order, among other things, authorized petitioner to continue custody and treatment of respondent in a secure psychiatric facility.

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

Memorandum: In this retention proceeding pursuant to CPL 330.20, respondent appeals in appeal No. 1, by permission of this Court, from an order denying his motion to appoint an independent psychiatric examiner. In appeal No. 2, respondent appeals, by permission of this Court, from a subsequent retention order finding, after a hearing, that he currently suffers from a dangerous mental disorder (*see* CPL 330.20 [1] [c]) and authorizing his continued retention for care and treatment in a secure psychiatric facility.

Initially, we conclude that respondent's appeal from the order in appeal No. 1 must be dismissed inasmuch as CPL 330.20, which governs this proceeding, does not permit a defendant to appeal from an intermediate order (*see* CPL 330.20 [21] [a] [ii]; *Matter of Marvin P.*,

52 AD3d 722, 722 [2d Dept 2008]; *see also People v Delano F.*, 176 AD3d 736, 738 [2d Dept 2019], *lv denied* 34 NY3d 1158 [2020]; *People v Tornabene*, 174 AD2d 1062, 1062 [4th Dept 1991]). We note that the appeal from the final order in appeal No. 2 brings up for review the propriety of the order in appeal No. 1 (*see* CPLR 5501 [a] [1]; *see generally Matter of State of New York v Daniel J.*, 180 AD3d 1347, 1348 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]).

We reject respondent's contention that County Court erred in denying his motion. "An indigent respondent in a civil commitment proceeding does not have an absolute right to an independent psychiatric evaluation . . . Instead, a right to present the testimony of an independent psychiatrist arises only where such testimony is necessary to a reliable assessment of an indigent respondent's mental condition" (*Matter of State of New York v Johnson*, 94 AD3d 1536, 1537 [4th Dept 2012] [internal quotation marks omitted]; *see* CPL 330.20 [15]; *see also Goetz v Crosson*, 967 F2d 29, 36-37 [2d Cir 1992]). Here, petitioner's expert addressed all of the factors relevant to a reliable assessment of respondent's mental condition (*see e.g. Matter of Jamie R. [New York State Commr. of Mental Health]*, 174 AD3d 623, 624-625 [2d Dept 2019]; *Matter of Rabinowitz v James M.*, 50 AD3d 451, 452 [1st Dept 2008]; *see generally Matter of David B.*, 97 NY2d 267, 279 [2002]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

453

CAF 22-01918

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

IN THE MATTER OF MICHAEL E. HOUCK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VALERIE R. HOUCK, RESPONDENT-RESPONDENT.

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

VALERIE R. HOUCK, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered October 17, 2022, in proceedings pursuant to Family Court Act article 4. The order denied petitioner's objections to an order of the Support Magistrate.

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

Memorandum: Petitioner father commenced these Family Court Act article 4 proceedings seeking to modify a prior order of child support by terminating his support obligation with respect to the parties' three children, and seeking an order directing respondent mother to pay child support to him. Following a hearing, the Support Magistrate, inter alia, modified but did not terminate the father's child support obligation under the prior order and dismissed the father's petition seeking support. The father now appeals from an order in which Family Court, inter alia, denied his objections to the order of the Support Magistrate. We affirm.

The father contends that the Support Magistrate erred in imputing income to him for child support purposes based upon money he received from the federal Paycheck Protection Program (PPP) in 2021. We reject that contention. A support magistrate "possess[es] considerable discretion to impute income in fashioning a child support award . . . [, and such an] imputation of income will not be disturbed [where, as here,] there is record support for [it]" (*Matter of Muok v Muok*, 138 AD3d 1458, 1459 [4th Dept 2016] [internal quotation marks omitted]; *see Matter of Rapp v Horbett*, 174 AD3d 1315, 1317-1318 [4th Dept 2019]). A support magistrate "may impute income based on a party's employment history, future earning capacity, educational background, or money received from friends and relatives" (*Matter of Drake v Drake*, 185 AD3d 1382, 1383 [4th Dept 2020], *lv denied* 36 NY3d 909 [2021]).

Here, the record establishes that the father's business suffered a temporary downturn due to the COVID-19 pandemic and that the PPP monies brought his income for 2021 back up to an amount that was generally consistent with what it had been prior to the pandemic. Inasmuch as "child support is determined by the parents' ability to provide for their child[ren] rather than their current economic situation" (*id.* [internal quotation marks omitted]; *see Matter of Bashir v Brunner*, 169 AD3d 1382, 1383 [4th Dept 2019]), we conclude that the Support Magistrate properly considered the PPP monies in imputing income to the father.

Contrary to the father's further contention, the Support Magistrate did not abuse his discretion in not imputing income to the mother and instead using her actual earnings in calculating child support inasmuch as "courts may decline to impute income when a parent has a voluntary reduction in income and a legitimate and reasonable basis for such a reduction" (*Matter of Montgomery v List*, 173 AD3d 1657, 1658 [4th Dept 2019]; *see Matter of Parmenter v Nash*, 166 AD3d 1475, 1476 [4th Dept 2018], *lv dismissed* 33 NY3d 996 [2019]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

459

CA 22-01640

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

RICHARD BLANKE, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF KAREN J. BLANKE, DECEASED, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 129285.)

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Debra A. Martin, J.), entered March 18, 2022. The order granted the motion of defendant for summary judgment and dismissed the claim.

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

Memorandum: Claimant, the husband of Karen J. Blanke (decedent), commenced this action, individually and as administrator of decedent's estate, seeking damages for her wrongful death resulting from a rear-end motor vehicle accident at the intersection of Route 63 and Chandler Road. The Court of Claims granted the motion of defendant, State of New York (State), for summary judgment dismissing the claim, and claimant appeals. We affirm.

Although a municipality owes an absolute duty to keep its highways in a reasonably safe condition (*see Friedman v State of New York*, 67 NY2d 271, 283 [1986]; *Weiss v Fote*, 7 NY2d 579, 584 [1960], *rearg denied* 8 NY2d 934 [1960]), it is afforded qualified immunity from liability arising out of highway planning decisions (*see Friedman*, 67 NY2d at 283; *Weiss*, 7 NY2d at 584-586, 588). Thus, "liability for injury arising out of the operation of a duly executed highway safety plan may only be predicated on proof that the plan either was evolved without adequate study or lacked reasonable basis" (*Weiss*, 7 NY2d at 589; *see Friedman*, 67 NY2d at 284; *Kosoff-Boda v County of Wayne*, 45 AD3d 1337, 1338 [4th Dept 2007]). Here, the State met its initial burden of establishing that the traffic plan it adopted was reasonable and based on adequate study, and plaintiff failed to raise an issue of fact with respect thereto (*see Riddell v*

City of New York, 209 AD3d 891, 892 [2d Dept 2022]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The State presented evidence establishing that it repeatedly studied the accident rate and visibility issues at the subject intersection and made changes as necessary. In response, claimant submitted an expert affidavit that was speculative and unsupported by the record, and thus failed to raise a triable issue of fact (*see Ginsberg v BJ's Wholesale Club, Inc.*, 187 AD3d 1547, 1548 [4th Dept 2020]; *Cannarozzo v County of Livingston*, 13 AD3d 1180, 1181 [4th Dept 2004]). Claimant's additional submissions likewise failed to raise a triable issue of fact as to the State's adequate study of or reasonable basis for the highway plan (*see Kosoff-Boda*, 45 AD3d at 1338*; Harford v City of New York*, 194 AD2d 519, 520 [2d Dept 1993]).

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

461

TP 23-00185

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

IN THE MATTER OF TYLER P., A MINOR CHILD,
BY HIS NATURAL MOTHER, MARI G., PETITIONER,

V MEMORANDUM AND ORDER

SARAH G. MERRICK, COMMISSIONER OF ONONDAGA
COUNTY DEPARTMENT OF SOCIAL SERVICES-ECONOMIC
SECURITY, ONONDAGA COUNTY DEPARTMENT OF
SOCIAL SERVICES-ECONOMIC SECURITY, AND NEW YORK
STATE DEPARTMENT OF HEALTH, OFFICE OF TEMPORARY
AND DISABILITY ASSISTANCE, OFFICE OF ADMINISTRATIVE
HEARINGS, RESPONDENTS.

BERNARD V. KLEINMAN, SOMERS, FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT NEW YORK STATE DEPARTMENT OF HEALTH, OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, OFFICE OF ADMINISTRATIVE HEARINGS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Gregory R. Gilbert, J.], entered January 23, 2023) to review a determination of respondents. The determination denied the application for payment of third-party health insurance benefits.

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

Memorandum: In this proceeding pursuant to CPLR article 78, petitioner seeks to annul a determination of the New York State Department of Health, issued after a fair hearing, that upheld a determination of respondent Onondaga County Department of Social Services–Economic Security denying petitioner's application for reimbursement of premiums for employer-sponsored health insurance on the ground that payment would not be cost-effective. Contrary to petitioner's contention, the record contains substantial evidence (*see* CPLR 7803 [4]; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-182 [1978]; *Matter of Albino v Shah*, 111 AD3d 1352, 1354 [4th Dept 2013]; *Matter of Barbato v New York State Dept. of Health*, 65 AD3d 821, 822-823 [4th Dept 2009], *lv denied* 13 NY3d 712 [2009]) supporting the determination that payment of the health insurance premiums would not be cost-effective (*see* 18 NYCRR 360-7.5 [g] [1]; *Matter of Maione v New York State Off. of Temporary &*

Disability Assistance, 144 AD3d 916, 916 [2d Dept 2016], *lv denied* 29 NY3d 918 [2017], *rearg denied* 30 NY3d 1039 [2017]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

463

KA 18-00847

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GAELEN S. ANDERSON, DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, SCOTTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 13, 2018. The appeal was held by this Court by order entered November 18, 2022, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (210 AD3d 1464 [4th Dept 2022]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We previously held this case, reserved decision, and remitted the matter to Supreme Court to issue a ruling "on the threshold issue whether the police had the requisite reasonable suspicion to justify the initial pursuit" of defendant (*People v Anderson*, 210 AD3d 1464, 1466 [4th Dept 2022]). Upon remittal, the court ruled that there was reasonable suspicion for the initial pursuit. We now affirm.

"[I]t is well settled that the police may pursue a fleeing defendant if they have a reasonable suspicion that defendant has committed or is about to commit a crime . . . While flight alone is insufficient to justify pursuit, defendant's flight in response to an approach by the police, *combined with other specific circumstances indicating that the suspect may be engaged in criminal activity*, may give rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Rainey*, 110 AD3d 1464, 1465 [4th Dept 2013] [internal quotation marks omitted]; *see People v Sierra*, 83 NY2d 928, 929 [1994]; *People v Walker*, 149 AD3d 1537, 1538 [4th Dept 2017], *lv denied* 30 NY3d 954 [2017]). "In determining whether a pursuit was justified by reasonable suspicion, the emphasis should not be narrowly focused on . . . any . . . single factor, but [rather] on an

evaluation of the totality of circumstances, which takes into account the realities of everyday life unfolding before a trained officer" (*People v Bachiller*, 93 AD3d 1196, 1197 [4th Dept 2012], *lv dismissed* 19 NY3d 861 [2012] [internal quotation marks omitted]; *see Walker*, 149 AD3d at 1537).

Here, the People presented evidence at the suppression hearing that, after being flagged down by a citizen who alleged that someone had just fired shots at a nearby location, a police officer heard gunshots being fired in that location. He immediately went there and observed every single person in the area seeking cover except defendant, who was upright and fleeing the scene while holding his waistband with both hands. The officer had been trained that the use of such a gesture is indicative of a person holding a "very heavy object" or a gun in the pants.

"[T]ak[ing] into account the realities of everyday life unfolding before [the] trained officer" and all of the "*other specific circumstances*" (*Bachiller*, 93 AD3d at 1197 [internal quotation marks omitted]; *see Sierra*, 83 NY2d at 929; *Walker*, 149 AD3d at 1538), we conclude that the officer's initial pursuit was justified by reasonable suspicion, and we thus reject defendant's contention that the court erred in refusing to suppress identification evidence and physical evidence (*see People v Habeeb*, 177 AD3d 1271, 1273 [4th Dept 2019], *lv denied* 34 NY3d 1159 [2020]; *Matter of Ya-Sin S.*, 122 AD3d 751, 752-753 [2d Dept 2014]; *see generally People v Moore*, 6 NY3d 496, 500-501 [2006]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

466

KA 19-00542

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY ANDERSON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered February 25, 2019. The judgment convicted defendant upon a jury verdict of course of sexual conduct against a child in the first degree and course of sexual conduct against a child in the second 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 course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]) and course of sexual conduct against a child in second degree (§ 130.80 [1] [a]), defendant contends that he was denied his right to be present during the *Sandoval* conference. As the People correctly concede, the record does not establish whether defendant was present at the *Sandoval* conference. Because the outcome of the conference was not "wholly favorable and the surrounding circumstances do not negate the possibility that defendant might have made a meaningful contribution to the colloquy," we cannot conclude from this record that defendant's presence would have been superfluous (*People v Favor*, 82 NY2d 254, 267 [1993], *rearg denied* 83 NY2d 801 [1994]). We therefore hold the case, reserve decision, and remit the matter to County Court for a reconstruction hearing on whether defendant was present (*see People v Goodman*, 275 AD2d 969, 969 [4th Dept 2000]; *People v Jenner*, 202 AD2d 986, 986 [4th Dept 1994]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

467

KA 21-01124

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL WILSON, SR., DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered December 15, 2020. The judgment convicted defendant upon a plea of guilty of assault in the first degree, attempted assault in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [3]), attempted assault in the second degree (§§ 110.00, 120.05 [9]), and endangering the welfare of a child (§ 260.10 [1]).

We reject defendant's contention that his waiver of the right to appeal is invalid. County Court's oral colloquy amply established that the right to appeal was "separate and distinct" from those rights automatically forfeited by pleading guilty (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Cromie*, 187 AD3d 1659, 1659 [4th Dept 2020]) and did not "utterly mischaracterize[ ] the nature of the right . . . defendant was being asked to cede" (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020] [internal quotation marks omitted]). Indeed, we note with approval the court's reliance on the Model Colloquy, which "neatly synthesizes . . . the governing principles" regarding the waiver of the right to appeal (*id.* at 567; *see* NY Model Colloquies, Waiver of Right to Appeal). In addition, the court informed defendant, before he entered his plea, that any challenge to the severity of his sentence would be encompassed by the waiver of his right to appeal, while clarifying that the legality of the sentence could still be challenged on appeal. Thus, "all the relevant circumstances reveal a knowing and voluntary waiver" (*Thomas*, 34 NY3d at 563).

Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

475

CA 22-01624

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

JACQUELINE MARKHAM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES P. MARKHAM, DEFENDANT-RESPONDENT.

LACY KATZEN LLP, ROCHESTER (DAVID D. MACKNIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TULLY RINCKEY, PLLC, ROCHESTER (THOMAS SETSER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), dated April 11, 2022. The order dismissed the application of plaintiff to hold defendant in contempt.

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

Memorandum: In this post-divorce action, plaintiff appeals from an order dismissing her application by order to show cause seeking to hold defendant in contempt for failure to comply with an order and judgment dated August 28, 2018, requiring defendant to pay certain arrears. We affirm.

As a preliminary matter, although not raised by the parties and although "[n]o appeal lies from a mere decision" (*Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]; *see generally* CPLR 5501 [c]; 5512 [a]), we conclude that the paper appealed from meets the essential requirements of an order, and we therefore treat it as such (*see Matter of Louka v Shehatou*, 67 AD3d 1476, 1476 [4th Dept 2009]).

"In order to prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the party charged with contempt violated a clear and unequivocal mandate of the court, thereby prejudicing the movant's rights . . . The movant has the burden of proving contempt by clear and convincing evidence" (*Wolfe v Wolfe*, 71 AD3d 878, 878 [2d Dept 2010]; *see El-Dehdan v El-Dehdan*, 114 AD3d 4, 10 [2d Dept 2013], *affd* 26 NY3d 19 [2015]). Here, plaintiff failed to meet her burden inasmuch as it is undisputed that defendant made the monthly payments as specified in the August 28, 2018 order and judgment. Moreover, contrary to plaintiff's contention, the provision in the order and judgment stating that plaintiff was owed $23,371.82 in arrears as of May 4, 2018 " 'did not provide any time

for payment [of that total amount of arrears] and therefore, did not constitute a clear and unequivocal mandate' " requiring defendant to pay that amount within a certain period of time (*Belkhir v Amrane-Belkhir*, 128 AD3d 1382, 1382 [4th Dept 2015]).

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

489

CA 22-01772

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

THOMAS G. MACALLISTER, DERIVATIVELY AS A MEMBER AND MANAGER OF MIRROR SHOW PROPERTIES, LLC, PLAINTIFF-RESPONDENT,

V ORDER

MSM, INC., AND DONNA SHULTZ, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (JOSHUA M. AGINS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ADAMS LECLAIR LLP, ROCHESTER (STEVEN E. COLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered May 16, 2022. The order, inter alia, granted in part the motion of plaintiff for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 30, 2023,

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

490

CA 22-01905

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

THOMAS G. MACALLISTER, DERIVATIVELY AS A MEMBER AND MANAGER OF MIRROR SHOW PROPERTIES, LLC, PLAINTIFF-RESPONDENT,

V ORDER

MSM, INC., AND DONNA SHULTZ, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (JOSHUA M. AGINS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ADAMS LECLAIR LLP, ROCHESTER (STEVEN E. COLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered June 15, 2022. The judgment awarded plaintiff money damages of $111,198.37, plus interest, costs and disbursements.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 30, 2023,

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

491

CA 22-01906

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

THOMAS G. MACALLISTER, DERIVATIVELY AS A MEMBER AND MANAGER OF MIRROR SHOW PROPERTIES, LLC, PLAINTIFF-RESPONDENT,

V ORDER

MSM, INC., AND DONNA SHULTZ, DEFENDANTS-APPELLANTS. (APPEAL NO. 3.)

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (JOSHUA M. AGINS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ADAMS LECLAIR LLP, ROCHESTER (STEVEN E. COLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered June 15, 2022. The judgment awarded plaintiff attorney's fees in the amount of $35,810.50.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 30, 2023,

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

493

KA 21-00483

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD D. TENNANT, JR., DEFENDANT-APPELLANT.

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

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered February 5, 2021. 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: On appeal from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that his waiver of the right to appeal is invalid and that the enhanced sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal was not knowingly, voluntarily and intelligently entered (*see People v Terry*, 203 AD3d 1578, 1578 [4th Dept 2022], *lv denied* 38 NY3d 1010 [2022]) or otherwise does not encompass his challenge to the severity of the sentence (*see People v Baker*, 204 AD3d 1471, 1471 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]), 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]).

Although defendant further contends that County Court erred in imposing an enhanced sentence without conducting a hearing pursuant to *People v Outley* (80 NY2d 702 [1993]), defendant failed to preserve that contention for our review (*see People v Peckham*, 195 AD3d 1437, 1437 [4th Dept 2021], *lv denied* 37 NY3d 994 [2021]). In any event, the record establishes that defendant, who failed to appear for sentencing and was arrested on new felony charges after he had pleaded guilty, admitted in open court that he had violated the conditions of the court's sentence promise, thus obviating the need for a hearing.

We have reviewed defendant's remaining contentions and conclude

that none warrants modification or reversal of the judgment.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

498

CAF 22-00562

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

IN THE MATTER OF AUBREE R., JAELYNN R., AND LEIGH B.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NATASHA B., RESPONDENT-APPELLANT, AND MICHAEL R., RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS R. BABILON OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (ERIN WELCH FAIR OF COUNSEL), FOR PETITIONER-RESPONDENT.

ARLENE H. BRADSHAW, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered March 23, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights with respect to the subject children.

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

Memorandum: On appeal from an order terminating her parental rights with respect to the three children who are the subject of this proceeding on the ground of permanent neglect, respondent mother contends that petitioner failed to establish that it exercised diligent efforts to encourage and strengthen the parental relationship both prior to and during the period of her incarceration as required by Social Services Law § 384-b (7) (a). We reject that contention.

"An authorized agency that brings a proceeding to terminate parental rights based upon permanent neglect bears the burden of establishing that it has made 'diligent efforts to encourage and strengthen the parental relationship' " (*Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 429 [2012], quoting Social Services Law § 384-b [7] [a]; *see generally Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]). " '[D]iligent efforts' . . . mean *reasonable* attempts . . . to assist, develop and encourage a meaningful relationship between the parent and the child" (§ 384-b [7] [f] [emphasis added]), and they " 'include reasonable attempts at providing counseling, scheduling regular

visitation with the child[ ], providing services to the parent[] to overcome problems that prevent the discharge of the child[ ] into [the parent's] care, and informing the parent[] of [the child's] progress' " (*Matter of Whytnei B. [Jeffrey B.]*, 77 AD3d 1340, 1341 [4th Dept 2010]; *see Matter of Caidence M. [Francis W.M.]*, 162 AD3d 1539, 1539 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018]). The "[p]etitioner is not required, however, to guarantee that the parent succeed in overcoming [the parent's] predicaments . . . but, rather, the parent must assume a measure of initiative and responsibility" (*Whytnei B.*, 77 AD3d at 1341 [internal quotation marks omitted]).

"While an agency's obligation to exercise diligent efforts is not obviated by a parent's incarceration . . . , it does create[] some impediments, both to the agency and to the parent, leading courts to conclude that diligent efforts in such circumstances may be established by the agency apprising the incarcerated parent of the child's well-being, developing an appropriate service plan, investigating possible placement of the child with relatives suggested by the parent, responding to the parent's inquiries and facilitating telephone contact between the parent and child" (*Caidence M.*, 162 AD3d at 1539 [internal quotation marks omitted]; *see* Social Services Law § 384-b [7] [f]; *Matter of Callie H. [Taleena W.]*, 170 AD3d 1612, 1613 [4th Dept 2019], *lv denied* 35 NY3d 905 [2020]).

Here, petitioner established by clear and convincing evidence (*see* Social Services Law § 384-b [3] [g] [i]) that it fulfilled its duty to exercise diligent efforts to encourage and strengthen the mother's relationship with the children during the relevant time period, but that the mother failed to plan for the future of the children or to progress meaningfully to overcome the predicaments that initially endangered the children and led to their removal from her care (*see Callie H.*, 170 AD3d at 1613-1614*; Matter of Jaxon S. [Jason S.]*, 170 AD3d 1687, 1688-1689 [4th Dept 2019]; *see generally Star Leslie W.*, 63 NY2d at 142).

We reject the mother's further contention that she was denied effective assistance of counsel when her attorney failed to object to allegedly inadmissible business records and allegedly prejudicial court exhibits. "It is axiomatic that, because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings" (*Matter of Kelsey R.K. [John J.K.]*, 113 AD3d 1139, 1140 [4th Dept 2014], *lv denied* 22 NY3d 866 [2014] [internal quotation marks omitted]; *see Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [4th Dept 2010]). Here, the mother's attorney successfully objected at the hearing to the admission of numerous records and refused to stipulate to other records. Even assuming, arguendo, that the mother's attorney should have objected to the other evidence offered by petitioner (*see generally Matter of Dustin H.*, 40 AD3d 995, 996 [2d Dept 2007]), we conclude that "the record, viewed in totality, reveals that the [mother] received meaningful representation" (*Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1360 [4th Dept 2021]; *see Matter of Nykira*

H. [Chellsie B.-M.], 181 AD3d 1163, 1165 [4th Dept 2020]).

Contrary to the mother's further contention, Family Court did not abuse its discretion in refusing to issue a suspended judgment. At a dispositional hearing, the court "is concerned only with the best interests of the children . . . and its determination is entitled to great deference" (*Matter of Cheyenne C. [James M.]*, 185 AD3d 1517, 1520 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]; *see* Family Ct Act § 631; *Star Leslie W.*, 63 NY2d at 147). Here, at the time of the dispositional hearing, the children had been in foster care for over three years and had bonded with their respective foster parents, who intended to adopt them. In the circumstances of this case, a suspended judgment was not warranted because "any progress made by [the mother] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the child[ren]'s unsettled familial status" (*Matter of London J. [Niaya W.]*, 138 AD3d 1457, 1458 [4th Dept 2016], *lv denied* 27 NY3d 912 [2016] [internal quotation marks omitted]). We therefore conclude that the court properly terminated the mother's parental rights with respect to the children who are the subject of this proceeding and freed the children for adoption.

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

504

CA 22-00725

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

RAYMOND PANEK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHELLE BRANTNER, MARCELLUS CENTRAL SCHOOL DISTRICT AND MARCELLUS CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, DEFENDANTS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LEWIS G. SPICER, SYRACUSE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered April 5, 2022. The order, insofar as appealed from, denied in part defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action against defendants Marcellus Central School District, Marcellus Central School District Board of Education (school board), and Michelle Brantner, the superintendent, asserting causes of action for defamation and intentional infliction of emotional distress. The complaint alleged, inter alia, that Brantner defamed plaintiff when speaking to members of a high school cross-country team after plaintiff had been dismissed as their coach. Following discovery, defendants moved for summary judgment dismissing the complaint, contending, in relevant part, that Brantner's statements to the students were covered by an absolute privilege. Supreme Court denied the motion to the extent that it sought dismissal of the defamation cause of action. We agree with defendants that the court should have dismissed the defamation cause of action.

"The absolute privilege defense affords complete immunity from liability for defamation to an official [who] is a principal executive of State or local government . . . with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties" (*Spring v County of Monroe*, 169 AD3d 1384, 1385 [4th Dept 2019] [internal quotation marks omitted]; *see Clark v McGee*, 49 NY2d 613, 617 [1980]). Here, plaintiff does not

dispute that Brantner, as superintendent, is a government official to whom the absolute privilege would apply (*see Sindoni v Board of Educ. of Skaneateles Central School Dist.*, — AD3d —, 2023 NY Slip Op 03102 [4th Dept 2023]; *Santavicca v City of Yonkers*, 132 AD2d 656, 657 [2d Dept 1987]). The question presented is whether Brantner was acting within the scope of her duties as superintendent when she met with members of the cross-country team in a classroom before school to discuss plaintiff's termination.

We conclude that, contrary to the court's determination, Brantner's statements were made during the course of the performance of her duties as a school superintendent and were about matters within the ambit of those responsibilities. Brantner testified at her deposition that the school board asked her to speak with the students, who had appeared at school board meetings demanding to know why plaintiff had been fired, and plaintiff offered no evidence to the contrary. In any event, even assuming, arguendo, that Brantner decided on her own to meet with the students, we conclude that she was acting within the scope of her duties when making the statements. Although Education Law § 1711, which outlines the general powers and duties of school superintendents, does not specifically authorize superintendents to meet with students, the statute is not an exhaustive list delineating every action that a school superintendent is permitted to engage in, and the absence from the statute of a reference to a particular category of action does not mean that it is unauthorized. In our view, a school superintendent does not act ultra vires when speaking to students in a school setting about a matter related to their education or extracurricular activities. Consequently, Brantner's statements were absolutely privileged and the defamation cause of action must be dismissed.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

507.1

CA 21-01801

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

MARY C. WALSH, EXECUTOR OF THE ESTATE OF
MICHAEL W. WALSH, DECEASED, AND INDIVIDUALLY
AS THE SURVIVING SPOUSE OF MICHAEL W. WALSH,
PLAINTIFF-RESPONDENT,

V ORDER

AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR
BY MERGER TO BUFFALO PUMPS, INC., ET AL.,
DEFENDANTS.

XEROX CORPORATION, APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (JENNIFER M. SCHAUERMAN OF COUNSEL), FOR APPELLANT.

LIPSITZ & PONTERIO, LLC, BUFFALO (DENNIS P. HARLOW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Erin P. Gall, J.), entered December 7, 2021. The order granted the motion of plaintiff for an order nunc pro tunc approving third-party settlements.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 23, 2023,

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

507

CA 22-01093

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

IN THE MATTER OF RONDUE GENTRY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARMTENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered June 20, 2022, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: In this proceeding pursuant to CPLR article 78, petitioner seeks to annul the determination, following a tier III disciplinary hearing, that he violated certain inmate rules. Petitioner appeals from a judgment that dismissed the petition.

We note at the outset that, because the petition raises the issue whether the determination following an evidentiary hearing is supported by substantial evidence, Supreme Court should have transferred the proceeding to this Court (*see* CPLR 7804 [g]). We now consider the matter de novo, as if it had been properly transferred to us (*see Matter of Medina v Graham*, 71 AD3d 1598, 1598 [4th Dept 2010]; *Matter of Hosmer v New York State Off. of Children & Family Servs.*, 289 AD2d 1042, 1042 [4th Dept 2001]).

Petitioner contends that the determination was not supported by substantial evidence and that he was denied a fair hearing because the Hearing Officer failed to call a retired sergeant and failed to obtain certain video footage of the underlying events. Contrary to petitioner's contention, the determination that petitioner violated inmate rules 113.10 (7 NYCRR 270.2 [B] [14] [i]), 113.23 (7 NYCRR 270.2 [B] [14] [xiii]), and 114.10 (7 NYCRR 270.2 [B] [15] [i]) is

supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 140 [1985]). Although petitioner contends that the witnesses' testimony was inconsistent, any inconsistencies in the testimony "created credibility issues for the Hearing Officer to resolve" (*Matter of Sherman v Annucci*, 142 AD3d 1196, 1197 [3d Dept 2016]).

Moreover, we conclude that the Hearing Officer did not violate petitioner's right to call witnesses. The Hearing Officer "made a meaningful effort to locate and produce" the retired sergeant whom petitioner requested (*Matter of Davies v Johnson*, 203 AD2d 970, 970 [4th Dept 1994]; *see Sherman*, 142 AD3d at 1197).

Finally, we reject petitioner's contention that the Hearing Officer improperly denied petitioner access to one of the video recordings of the underlying events. We note that the Hearing Officer "requested the recording and was advised by facility staff that the video did not exist" (*Matter of Wimberly v Annucci*, 185 AD3d 1364, 1365 [3d Dept 2020], *lv denied* 36 NY3d 903 [2020]).

We therefore vacate the judgment, confirm the determination, and dismiss the petition.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

509

KA 22-01172

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE PONCE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT WARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), entered July 12, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). We reject defendant's contention that Supreme Court's assessment of 15 points under risk factor 11 for history of drug or alcohol abuse, which was based on the recommendation in the risk assessment instrument prepared by the Board of Examiners of Sex Offenders, is not supported by clear and convincing evidence (*see* § 168-n [3]). Although defendant asserted that his prior drug and alcohol use was recreational and did not constitute abuse, his admissions to the Probation Department regarding his daily marihuana use during the time period of the offense established a pattern of drug use in his history evincing substance abuse (*see People v Stewart*, 199 AD3d 1479, 1480 [4th Dept 2021], *lv denied* 38 NY3d 908 [2022]; *People v Richardson*, 197 AD3d 878, 879 [4th Dept 2021], *lv denied* 37 NY3d 918 [2022]). Moreover, defendant admitted that he provided marihuana and alcohol to the underage victim during the course of his sexual offense (*see People v Caleb*, 170 AD3d 1618, 1619 [4th Dept 2019], *lv denied* 33 NY3d 910 [2019]).

Contrary to defendant's further contention, the court did not abuse its discretion in denying his request for a downward departure to risk level one or two. Even assuming, arguendo, that defendant "satisfied his burden with respect to the first two steps of the three-step analysis required in evaluating a request for a downward departure," we

conclude that the court did not abuse its discretion in denying defendant's request (*People v Cornwell*, 213 AD3d 1239, 1240 [4th Dept 2023], *lv denied* — NY3d — [2023]; *see People v Pritchard*, 213 AD3d 1215, 1216 [4th Dept 2023], *lv denied* 39 NY3d 914 [2023]; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). Upon weighing the mitigating circumstances—including the fact that defendant pleaded guilty to statutory rape—against the aggravating circumstances, we conclude that the totality of the circumstances does not warrant a downward departure inasmuch as defendant's presumptive risk level "does not represent an over-assessment of his dangerousness and risk of sexual recidivism" (*People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]; *see People v Simmons*, 195 AD3d 1566, 1569 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]; *see generally People v Sincerbeaux*, 27 NY3d 683, 690-691 [2016]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

513

KA 21-01283

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON A. INGLESTON, DEFENDANT-APPELLANT.

RYAN J. MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered August 3, 2021. The judgment convicted defendant upon a jury verdict of attempted robbery in the third degree and 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 attempted robbery in the third degree (Penal Law §§ 110.00, 160.05) and burglary in the second degree (§ 140.25 [2]). We reject defendant's contention that the evidence is legally insufficient to support his conviction of burglary in the second degree. Even assuming, arguendo, that defendant's contention is fully preserved for our review, "[v]iewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion" that defendant was the perpetrator of the burglary (*People v Bleakley*, 69 NY2d 490, 495 [1987]; *see People v Colon*, 211 AD3d 1613, 1614 [4th Dept 2022], *lv denied* 39 NY3d 1141 [2023]). Further, "[t]he element of 'intent to commit a crime [in the dwelling]' may be inferred from defendant's conduct and the surrounding circumstances . . . including the circumstances of the entry" (*People v Thompson*, 206 AD3d 1708, 1709 [4th Dept 2022], *lv denied* 38 NY3d 1153 [2022]; *see* § 140.25 [2]). Here, the evidence established, among other things, that defendant obtained entry to the victims' house by breaking a window. "The fact that defendant used force in obtaining entry to the [house] by breaking the glass window[ ] . . . 'amply supports the inference that he had criminal intent' " (*People v Bergman*, 70 AD3d 1494, 1494 [4th Dept 2010], *lv denied* 14 NY3d 885 [2010]; *see People v Gelling*, 163 AD3d 1489, 1492 [4th Dept 2018], *amended on rearg* 164 AD3d 1673 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018]). Contrary to

defendant's contention, the jury's rejection of the affirmative defense of duress is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495; *People v Box*, 181 AD3d 1238, 1240 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020], *cert denied* — US —, 141 S Ct 1099 [2021]; *People v Hammond*, 84 AD3d 1726, 1726 [4th Dept 2011], *lv denied* 17 NY3d 816 [2011]).

We reject defendant's further contention that County Court erred in denying his request to charge criminal trespass in the second degree as a lesser included offense of the count of burglary in the second degree (*see generally People v Cajigas*, 19 NY3d 697, 701-702 [2012]). Here, based on all the evidence at trial, the only reasonable view of the evidence is that defendant knowingly entered or remained unlawfully in a dwelling with the intent to commit a crime therein (*see* Penal Law § 140.25 [2]; *People v Reibel*, 181 AD3d 1268, 1269 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020], *reconsideration denied* 35 NY3d 1096 [2020]; *People v Martinez*, 9 AD3d 679, 681 [3d Dept 2004], *lv denied* 3 NY3d 709 [2004]). We therefore further conclude that "under no reasonable view of the evidence could the jury have found that defendant committed the lesser offense but not the greater" (*People v Blim*, 63 NY2d 718, 720 [1984]; *see Reibel*, 181 AD3d at 1269).

Defendant's further contention that he was denied effective assistance of counsel must be raised by way of a motion pursuant to CPL article 440 inasmuch as this is not the "rare case [in which] . . . it [is] possible, based on the trial record alone, to deem counsel ineffective for failure to [adequately] pursue a suppression motion" (*People v Carver*, 27 NY3d 418, 420 [2016]; *see People v Roots*, 210 AD3d 1532, 1534 [4th Dept 2022]; *see generally People v Love*, 57 NY2d 998, 1000 [1982]). Contrary to defendant's contention, his sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

515

KA 22-01398

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCE M. FERRIS, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Wayne County Court (John B. Nesbitt, J.), dated August 6, 2021. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). We agree with defendant that County Court violated his due process rights by sua sponte assessing or increasing points for three of the risk factors in the risk assessment instrument (RAI) without notice to him. "The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine his or her risk level pursuant to SORA and a meaningful opportunity to respond to the risk level assessment" (*People v Chrisley,* 172 AD3d 1914, 1915 [4th Dept 2019] [internal quotation marks omitted]; *see* § 168–n [3]; *People v Hackett*, 89 AD3d 1479, 1480 [4th Dept 2011]). Here, neither the Board of Examiners of Sex Offenders (Board) nor the People requested the assessment of points under risk factors 6 and 12 or an increase of points assessed under risk factor 2, and defendant learned of the assessment of additional points for the first time when the court issued its decision (*see Hackett*, 89 AD3d at 1480; *cf. People v Wheeler*, 59 AD3d 1007, 1008 [4th Dept 2009], *lv denied* 12 NY3d 711 [2009]). However, the court's error was harmless inasmuch as defendant was already a presumptive level three risk based on the RAI prepared by the Board and recommended for adoption by the People (*cf. People v Ritchie*, 203 AD3d 1562, 1564 [4th Dept 2022]; *see generally People v June*, 195 AD3d 1443, 1444-1445 [4th Dept 2021], *lv denied* 37 NY3d 912 [2021]).

Contrary to defendant's contention, we conclude that the court complied with Correction Law § 168-n (3), requiring the court to set forth the findings of fact and conclusions of law on which it based its determination (*cf. People v Dean*, 169 AD3d 1414, 1415 [4th Dept 2019]).

We further reject defendant's contention that he was denied effective assistance of counsel. Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Stack*, 195 AD3d 1559, 1560 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]).

We have considered defendant's remaining contentions and conclude they do not warrant modification or reversal of the order.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

525.2

OP 23-00359

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

IN THE MATTER OF JAMES (NEE NANCY) P.,
PETITIONER,

V MEMORANDUM AND ORDER

HON. M. WILLIAM BOLLER, JUSTICE OF THE
SUPREME COURT, ERIE COUNTY, AND JOHN FLYNN,
DISTRICT ATTORNEY, ERIE COUNTY,
RESPONDENTS.

ALEXANDRA HARRINGTON, BUFFALO, FOR PETITIONER.

HARMONY A. HEALY, WATERTOWN, FOR RESPONDENT JOHN FLYNN, DISTRICT ATTORNEY, ERIE COUNTY.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to prohibit enforcement of an order of respondent Hon. M. William Boller, Justice of the Supreme Court, Erie County, requiring petitioner to submit to a psychiatric evaluation by the expert for the People.

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

Memorandum: Petitioner filed an application for resentencing pursuant to CPL 440.47. Petitioner supported the application with, among other things, an expert report based on a confidential psychological evaluation. The People moved to, inter alia, compel petitioner to undergo a reciprocal psychiatric evaluation by the People's expert. Supreme Court issued an order granting the motion with respect to the psychiatric evaluation, and petitioner thereafter commenced this original CPLR article 78 proceeding seeking to prohibit enforcement of that order.

We "cannot examine the merits of petitioner's claim without first determining whether the issue presented by the petition is the type for which the extraordinary remedy of prohibition may lie" (*Matter of Makhani v Kiesel*, 211 AD3d 132, 137 [1st Dept 2022]; *see Matter of Auer v Smith*, 77 AD2d 172, 180 [4th Dept 1980], *appeal dismissed* 52 NY2d 1070 [1981]). "[A]n article 78 proceeding in the nature of prohibition will not lie to correct procedural or substantive errors of law . . . Rather, the extraordinary remedy of prohibition may be obtained only where a clear legal right of a petitioner is threatened by a body or officer

acting in a judicial or quasi-judicial capacity without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding of which it has jurisdiction" (*Matter of Soares v Herrick*, 20 NY3d 139, 145 [2012] [internal quotation marks omitted]). Prohibition "is not available to correct or prevent trial errors of substantive or procedural law, no matter how grievous" (*Matter of Doe v Connell*, 179 AD2d 196, 198 [4th Dept 1992]), and "the difference between a trial error and an action in excess of the court's power is that the latter impacts the entire proceeding" (*Matter of Doorley v DeMarco*, 106 AD3d 27, 34 [4th Dept 2013]; *see Matter of Rush v Mordue*, 68 NY2d 348, 353 [1986]). Moreover, even where prohibition is technically available, it " 'is not mandatory, but may issue in the sound discretion of the court' " (*Soares*, 20 NY3d at 145, quoting *La Rocca v Lane*, 37 NY2d 575, 579 [1975]).

We conclude that the order granting the People's motion with respect to the psychiatric evaluation does not have proceeding-wide effect (*see Matter of Maria S. v Tully*, 214 AD3d 988, 991 [2d Dept 2023]; *see generally Matter of State of New York v King*, 36 NY2d 59, 64 [1975]). The People sought a psychiatric evaluation in response to the expert report submitted by petitioner, and the use of the psychiatric evaluation will be merely one component of the larger resentencing hearing ordered by the court on petitioner's application pursuant to CPL 440.47. Thus, although we express no view whether that part of the order granting a psychiatric evaluation was legal error, under the circumstances presented here, any such error would, at most, "constitute an error in the action . . . itself related to the proper purpose of the action or proceeding" (*Maria S.*, 214 AD3d at 991 [internal quotation marks omitted]; *see Matter of Tucker v Buscaglia*, 262 AD2d 979, 979 [4th Dept 1999]; *Matter of James N. v D'Amico*, 139 AD2d 302, 303-304 [4th Dept 1988], *lv denied* 73 NY2d 703 [1988]). We therefore dismiss the petition on the ground that prohibition does not lie.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

526

KA 22-00188

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SUSAN C., DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Thomas J. Miller, J.), dated December 31, 2021. The order denied the application of defendant for resentencing pursuant to CPL 440.47.

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

Memorandum: On appeal from an order denying her application for resentencing pursuant to the Domestic Violence Survivors Justice Act (*see* CPL 440.47), defendant contends that she was denied meaningful representation at the hearing on the application. We reject that contention. Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of representation, we conclude that defense counsel provided defendant with meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

527

KA 20-01636

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SERINA A. WOLFE, DEFENDANT-APPELLANT.

MICHAEL J. PULVER, NORTH SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered March 6, 2020. The judgment convicted defendant upon a jury verdict of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of grand larceny in the fourth degree (Penal Law § 155.30 [4]). Contrary to the contention of defendant, County Court did not abuse its discretion in holding a hearing, the trial, and sentencing in her absence. "Before proceeding in [a] defendant's absence, the court should [make an] inquiry and recite[] on the record the facts and reasons it relied upon [to determine whether the] defendant's absence was deliberate" (*People v Brooks*, 75 NY2d 898, 899 [1990], *mot to amend remittitur granted* 76 NY2d 746 [1990]). Here, the court provided defendant with the requisite warnings pursuant to *People v Parker* (57 NY2d 136, 141 [1982]), informed defendant of the hearing and trial dates, and granted several adjournments when defendant repeatedly failed to appear and failed to provide documentation to support her alleged reasons for failing to appear. At each failure of defendant to appear, the court inquired into the reason for defendant's absence and, after five failures to appear, the court determined that it would proceed in her absence due to the fact that she was unable to provide any evidence of a legitimate reason for missing several of those court appearances (*see People v Bynum*, 125 AD3d 1278, 1278 [4th Dept 2015], *lv denied* 26 NY3d 927 [2015]; *People v Zafuto*, 72 AD3d 1623, 1623-1624 [4th Dept 2010], *lv denied* 15 NY3d 758 [2010]; *cf. People v Houghtaling*, 87 AD3d 1302, 1302 [4th Dept 2011]; *People v McCullough*, 209 AD2d 965, 965 [4th Dept 1994]). We thus conclude that "the court made a proper inquiry and placed its reasoning on the record for determining that defendant's absence was deliberate" (*Zafuto*, 72 AD3d at 1624). Indeed, after being released

on her own recognizance, defendant never once returned to court despite being informed of each court proceeding. Inasmuch as the hearing, trial and sentencing were held on four consecutive days, the court was not required to revisit the issue on each consecutive day.

We reject defendant's further contention that she was denied effective assistance of counsel when defense counsel failed to object when the court proceeded in defendant's absence. "There can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

528

KA 22-00439

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DUSTIN M. SMITH, DEFENDANT-APPELLANT.

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

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered March 3, 2022. The judgment convicted defendant upon a plea of guilty of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [8]), stemming from incidents where he purposely squeezed his three-month-old daughter, causing her to sustain numerous fractures. Defendant contends that he did not validly waive his right to appeal because "there is no basis [in the record] upon which to conclude that [County Court] ensured 'that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Jones*, 107 AD3d 1589, 1590 [4th Dept 2013], *lv denied* 21 NY3d 1075 [2013], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Barzee*, 204 AD3d 1422, 1422 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid or that defendant's discovery contention would survive even a valid waiver, we nevertheless affirm the judgment.

Defendant contends that the court erred in denying that part of his omnibus motion seeking to strike the People's certificate of compliance on the ground that they violated their discovery obligations under CPL 245.20 (1) (k). By subsequently pleading guilty, however, defendant forfeited that contention because "the forfeiture occasioned by a guilty plea extends to claims premised upon, inter alia, . . . motions relating to discovery," such as the motion to strike at issue here (*People v Salters*, 187 AD3d 1677, 1677 [4th Dept 2020], *lv denied* 36 NY3d 975 [2020] [internal quotation marks omitted]; *see People v Dempsey*, 197 AD3d 1020, 1021-1022 [4th

Dept 2021], *lv denied* 37 NY3d 1160 [2022]; *see generally People v Hansen*, 95 NY2d 227, 230 [2000]). Indeed, we note that defendant's contentions are based solely on violations of the discovery statute and are not constitutional or jurisdictional in nature (*see Hansen*, 95 NY2d at 230; *cf. People v Wilson*, 159 AD3d 1600, 1601 [4th Dept 2018]). We further note that, on appeal, defendant identifies no discoverable evidence that the People failed to disclose.

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

529

KA 21-01061

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS T. DUNCAN, DEFENDANT-APPELLANT.

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

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered April 8, 2021. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). We affirm.

Defendant contends that a traffic stop initiated after a police officer allegedly observed that the vehicle in which defendant was riding had an illegal window tint was unlawful and that County Court therefore erred in refusing to suppress evidence seized as a result of that traffic stop. As an initial matter, defendant's contention that, at the probable cause hearing, the People failed to establish the police officer's training and qualifications with respect to his ability to visually estimate the tint of the subject window (*see People v Reedy*, 211 AD3d 1629, 1630 [4th Dept 2022]) is not properly before us because that argument is raised for the first time in defendant's reply brief (*see People v James*, 162 AD3d 1746, 1747 [4th Dept 2018], *lv denied* 32 NY3d 1112 [2018]).

Affording great deference to the court's resolution of credibility issues at the suppression hearing, as we must (*see generally People v Prochilo*, 41 NY2d 759, 761 [1977]), we conclude that the record supports the court's determination that the police officer lawfully stopped the vehicle in which defendant was riding because the officer had probable cause to believe the vehicle had

excessively tinted windows, in violation of Vehicle and Traffic Law § 375 (12-a) (b) (*see People v Daniels*, 117 AD3d 1573, 1574 [4th Dept 2014]; *People v Brock*, 107 AD3d 1025, 1026-1027 [3d Dept 2013], *lv denied* 21 NY3d 1072 [2013]; *People v Collins*, 105 AD3d 1378, 1379 [4th Dept 2013], *lv denied* 21 NY3d 103 [2013]).

Defendant contends that his plea was not knowingly, voluntarily, or intelligently entered because defendant was coerced into accepting the plea by statements made by the court. By not moving to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve that contention for our review (*see People v Williams*, 198 AD3d 1308, 1309 [4th Dept 2021], *lv denied* 37 NY3d 1149 [2021]; *People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

We agree with defendant, as the People correctly concede, that inasmuch as the plea proceeding and sentence reflect defendant's status as a second felony drug offender with a prior violent offense (*see* Penal Law § 70.71 [1] [b], [c]), the record confirms that the court merely misstated during sentencing that defendant was a second felony offender rather than a second felony drug offender with a prior violent offense. We therefore note that the amended uniform sentence and commitment form must be corrected to reflect that defendant was sentenced as a second felony drug offender with a prior violent felony conviction (*see People v Lewis*, 208 AD3d 989, 992 [4th Dept 2022], *lv denied* 39 NY3d 941 [2022]).

We have considered defendant's remaining contentions and conclude they do not warrant reversal or modification of the judgment.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

530

KA 18-02053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HERBERT SMITH, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN R. WALTHER 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 (Victoria M. Argento, J.), rendered July 19, 2018. The judgment convicted defendant upon a jury verdict of burglary in the third degree.

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 after a jury trial of burglary in the third degree (Penal Law § 140.20). We agree with defendant that County Court erred in denying his challenges for cause to two prospective jurors, and we therefore reverse the judgment and grant a new trial.

It is well established that, when a prospective juror makes a statement or statements that "cast serious doubt on their ability to render an impartial verdict" (*People v Arnold*, 96 NY2d 358, 363 [2001]), that prospective juror must be excused for cause unless they provide an "unequivocal assurance that they can set aside any bias and render an impartial verdict based on the evidence" (*People v Johnson*, 94 NY2d 600, 614 [2000]; *see People v Nicholas*, 98 NY2d 749, 750 [2002]; *People v Chambers*, 97 NY2d 417, 419 [2002]).

Here, "[t]here is no question that [the] statements [made by the two prospective jurors] cast serious doubt on [their] ability to render an impartial verdict" (*People v Lewis*, 71 AD3d 1582, 1583 [4th Dept 2010]; *see People v Nicholas*, 286 AD2d 861, 862 [4th Dept 2001], *affd* 98 NY2d 749 [2002]; *People v Mitchum*, 130 AD3d 1466, 1467 [4th Dept 2015]; *People v White*, 275 AD2d 913, 914 [4th Dept 2000]).

The first prospective juror stated in response to a question concerning police officers that she "was raised to respect them" and that, because "they're the people that are protecting you, you should

trust them." When further probed about weighing the credibility of a police officer's testimony against a defendant's testimony, she stated that she would "most likely [believe] the police officer." The second prospective juror stated that, because of his work as an emergency medical technician, he saw police "in a very positive light." When asked the same question about whose version of events he would believe, the prospective juror stated "[t]o be completely honest, probably the first responder police officer."

Further, both prospective jurors repeated that they would likely believe a police officer's account of an event over a defendant's version after the court attempted to rehabilitate them (*see Lewis*, 71 AD3d at 1583). Thus, their respective affirmative answers when the court asked them if they could be fair and impartial were "insufficient to constitute . . . unequivocal declaration[s]" that they could set aside their stated bias in favor of police officers (*People v Bludson*, 97 NY2d 644, 646 [2001]). After the court denied his challenges for cause, defendant used peremptory challenges to remove the two prospective jurors from the venire and, therefore, "[b]ecause defendant exhausted all of his peremptory challenges before the completion of jury selection, reversal is required" (*Lewis*, 71 AD3d at 1584; *see* CPL 270.20 [2]; *People v Strassner*, 126 AD3d 1395, 1396 [4th Dept 2015]).

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

532

KA 19-01025

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRELL TERRY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 26, 2019. The judgment convicted defendant upon his plea of guilty of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of assault in the second degree (Penal Law § 120.05 [2]). As the People correctly concede, defendant's waiver of the right to appeal is invalid because Supreme Court's colloquy and the written waiver used overbroad language that mischaracterized the waiver as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Contrary to defendant's contention, however, the court did not err in enhancing defendant's sentence. It is well settled that a court may impose an enhanced sentence on a defendant if the court informs the defendant that the promised sentence is conditioned on being truthful in any subsequent presentence interview and the defendant then is not truthful in that interview (*see People v Hicks*, 98 NY2d 185, 187-188 [2002]; *People v Stanley*, 128 AD3d 1472, 1474 [4th Dept 2015]). Indeed, "the violation of an explicit and objective plea condition that was accepted by the defendant can result in the imposition of an enhanced sentence" (*People v Pianaforte*, 126 AD3d 815, 816 [2d Dept 2015]; *see generally Hicks*, 98 NY2d at 188). Here, the court informed defendant during the plea colloquy that it would not adhere to the sentencing promise if defendant did not "cooperate with probation" during his presentence investigation interview. The court added that defendant could not "walk into probation and say, I didn't commit this offense, my attorney forced me into it."

In his presentence investigation report, the probation officer stated that defendant "indicated that he had nothing to do with this crime" and claimed that "he took the plea . . . because his attorney told him he was looking at 20 years if he didn't." The probation officer testified consistently with that report at a subsequent hearing pursuant to *People v Outley* (80 NY2d 702 [1993]). The court determined that defendant violated the conditions of the sentencing promise and sentenced defendant to an enhanced term of incarceration. Inasmuch as defendant violated an explicit and objective plea condition that he accepted, we conclude that the court did not err in enhancing defendant's sentence (*see Hicks*, 98 NY2d at 189).

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

545

CA 22-00718

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

MATTHEW CHMIELEWSKI, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 136833.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SLATER SLATER SCHULMAN LLP, MELVILLE (STEPHENIE L. BROSS OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered March 31, 2022. The order denied the motion of defendant to dismiss the claim.

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

Memorandum: Claimant commenced this claim pursuant to the Child Victims Act (CVA) (*see* CPLR 214-g) seeking, inter alia, to recover damages based on allegations that, in 1962, claimant was a minor and in foster care when defendant's negligence resulted in claimant being sexually abused by a priest employed by the foster care home in which defendant had placed claimant. Claimant further alleged that, prior to the date of the incident, defendant knew or should have known that the priest had a propensity to sexually abuse children. Defendant moved to dismiss the claim on, inter alia, the ground that the claim failed to comply with the requirements of Court of Claims Act § 11 (b) because the claim failed to state the "time when" the claim arose and failed to state the "nature" of the claim. The Court of Claims denied the motion and defendant now appeals. We affirm.

"[B]ecause suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed" (*Lepkowski v State of New York*, 1 NY3d 201, 206-207 [2003] [internal quotation marks omitted]; *see Kolnacki v State of New York*, 8 NY3d 277, 280 [2007], *rearg denied* 8 NY3d 994 [2007]). The Court of Claims Act "places five specific substantive conditions upon the State's waiver of sovereign immunity by requiring the claim to specify (1) 'the nature of [the claim]'; (2) 'the time when' it arose; (3) the 'place where' it arose; (4) 'the items of damage or injuries claimed

to have been sustained'; and (5) 'the total sum claimed' " (*Lepkowski*, 1 NY3d at 207, quoting Court of Claims Act § 11 [b]; *see Davis v State of New York*, 64 AD3d 1197, 1197 [4th Dept 2009], *lv denied* 13 NY3d 717 [2010]). "[A]bsolute exactness" is not required, but the information alleged must be " 'made with sufficient definiteness to enable [defendant] to be able to investigate the claim promptly and to ascertain its liability under the circumstances' " (*Deep v State of New York*, 56 AD3d 1260, 1260 [4th Dept 2008]). "The failure to satisfy any of the conditions [set forth in Court of Claims Act § 11 (b)] is a jurisdictional defect" (*Kolnacki*, 8 NY3d at 281; *see Lepkowski*, 1 NY3d at 209).

Contrary to defendant's contention, the allegations in the claim sufficiently stated "the nature of [the claim]" (Court of Claims Act § 11 [b]). The claim includes allegations that defendant was responsible for providing for the protection, safety and well-being of children in its care that it placed in foster care homes, including a responsibility to use reasonable care in the investigation, licensing, supervision and monitoring of foster care homes where they placed children, that the alleged perpetrator of the sexual abuse of claimant was a "priest, counselor, representative, servant, or employee" of the foster care home in which defendant had placed claimant, that the sexual abuse of claimant occurred during the perpetrator's supervision of an outing at a park for the foster care children, and that defendant had actual and/or constructive notice of the sexual abuse. Claimant also alleged that claimant's injuries "arose as a result of the defendant's negligence, negligent hiring, retention, supervision, and/or direction," which "allow[ed] an environment to develop that placed vulnerable at-risk infants in situations where they were exposed to sexual abuse" while they were under the supervision and care of defendant. We conclude that those allegations are sufficient to provide defendant with "an indication of the manner in which . . . claimant was injured and how [defendant] was negligent" (*Rodriguez v State of New York*, 8 AD3d 647, 647 [2d Dept 2004]), and thus "defendant cannot reasonably assert that it is unaware of 'the nature of [the claim]' " (*Martinez v State of New York*, 215 AD3d 815, 818 [2d Dept 2023]; *see generally Donahue v State of New York*, 174 AD3d 1549, 1549 [4th Dept 2019]).

Contrary to defendant's further contention, under the circumstances of this case, the allegations in the claim are sufficient to satisfy the "time when" requirement of Court of Claims Act § 11 (b). "The determination whether a claimant's statement of the 'time when' the claim arose is sufficiently definite to enable the State to investigate and ascertain its liability under the circumstances is a sui generis determination depending upon the nature of the claim and specificity of allegations set forth in the claim" (*Fenton v State of New York*, 213 AD3d 737, 739 [2d Dept 2023]). Here, claimant alleges that the claim "accrued on or about and in between" the year 1962. Given that the claim was brought under the CVA, which revived for statute of limitations purposes certain civil claims relating to sexual abuse that may have occurred some decades ago, and that the alleged sexual abuse alleged in this case occurred more than 60 years ago, when claimant was a child, we conclude that the one-year

time frame alleged in the claim is sufficient (*see Wagner v State of New York*, 214 AD3d 930, 931-932 [2d Dept 2023]; *Fenton*, 213 AD3d at 740-741).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

547

KA 20-01575

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAPHAEL C. TORRES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Suzanne Maxwell Barnes, J.), rendered May 17, 2019. The judgment convicted defendant upon a jury verdict of robbery in the second degree and robbery in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count of robbery in the second degree (Penal Law § 160.10 [3]) and two counts of robbery in the third degree (§ 160.05). The charges arose from incidents in which defendant forcibly stole a vehicle and purse from one victim and, the following day, forcibly stole a purse from a second victim.

We reject defendant's contention that County Court erred in permitting the People to introduce certain *Molineux* evidence. 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 that it was relevant to the issues of defendant's intent and motive (*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]). Moreover, 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]).

We reject defendant's contention that the evidence is not legally sufficient to support the conviction of robbery in the third degree under count 3 of the indictment (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Moreover, viewing the evidence in light of the elements of counts 1 and 2 as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict with respect to those counts is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable, it cannot be said that the jury "failed to give the evidence the weight it should be accorded" (*id.*; *see People v Kalinowski*, 118 AD3d 1434, 1436 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]).

We agree with defendant that the court erred in admitting in evidence a recording of a 911 call made by a witness to one of the incidents. The 911 recording constitutes hearsay (*see People v Buie*, 86 NY2d 501, 505 [1995]), and no exception to the rule against hearsay applies herein. Nevertheless, we conclude that the error was harmless because "the 'proof of [defendant's] guilt was overwhelming . . . and . . . there was no significant probability that the jury would have acquitted [him] had the proscribed evidence not been introduced' " (*People v Spencer*, 96 AD3d 1552, 1553 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012], *reconsideration denied* 20 NY3d 989 [2012], quoting *People v Kello*, 96 NY2d 740, 744 [2001]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

548

KA 22-01882

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSUE BAEZ, DEFENDANT-APPELLANT.

JEREMY D. SCHWARTZ, LACKAWANNA, FOR DEFENDANT-APPELLANT.

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (ERIK D. BENTLEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (David W. Foley, J.), rendered October 31, 2022. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a weapon in the second degree.

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

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

We reject defendant's contention that County Court erred in refusing to suppress evidence obtained pursuant to a search warrant for defendant's residence. "[A] search warrant may be issued only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur . . . , and where there is sufficient evidence from which to form a reasonable belief that evidence of the crime may be found inside the location sought to be searched" (*People v McLaughlin*, 193 AD3d 1338, 1339 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021] [internal quotation marks omitted]; *see People v Bartholomew*, 132 AD3d 1279, 1280 [4th Dept 2015]). "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985]).

Here, the factual allegations contained in the two affidavits attached to the warrant application provided probable cause to believe that defendant was operating a drug business out of his residence based on the observations of a confidential informant (CI) and surveillance conducted by the Chautauqua County Sheriff's Office and

the Erie County Sheriff's Office (*see People v Ferron*, 248 AD2d 962, 963 [4th Dept 1998], *lv denied* 92 NY2d 879 [1998]). Contrary to defendant's contention, the reliability of the CI was established by the statement of one of the officers that the CI had given credible and accurate information in the past (*see People v Colon*, 192 AD3d 1567, 1568 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]; *People v Baptista*, 130 AD3d 1541, 1542 [4th Dept 2015], *lv denied* 27 NY3d 991 [2016]; *see generally People v Johnson*, 66 NY2d 398, 403 [1985]).

Defendant's further contention that the information on which the search warrant was based was stale is unpreserved for our review (*see* CPL 470.05 [2]; *Baptista*, 130 AD3d at 1543), and we decline to exercise our power to reach that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

557

CA 22-00465

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

KELLY M. JOCOY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AARON L. JOCOY, DEFENDANT-RESPONDENT.

DIPASQUALE & CARNEY, LLP, BUFFALO (JASON R. DIPASQUALE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JAMES P. RENDA, WILLIAMSVILLE, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Paula L. Feroleto, J.), entered March 16, 2022. The judgment, among other things, dissolved the marriage between the parties and equitably distributed the marital assets.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by striking from the seventh decretal paragraph the sum of $19,174 and substituting therefor the sum of $29,228, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff wife appeals from a judgment of divorce that, inter alia, directed defendant husband to pay child support in the amount of $1,300 per month and a net amount of $8,740 for retroactive child support, and directed him to pay plaintiff $19,174, representing her half of the marital value of the former marital residence.

We reject plaintiff's contention that Supreme Court (Kloch, Sr., A.J.) erred in determining the amount of child support. The parties stipulated to the amount of the basic child support obligation determined pursuant to Domestic Relations Law § 240 (1-b) (c) (*see generally Matter of Cassano v Cassano*, 85 NY2d 649, 653 [1995]; *Martusewicz v Martusewicz*, 217 AD2d 926, 927 [4th Dept 1995], *lv denied* 88 NY2d 801 [1996]). It is well settled that, where the statutory formula results in an unjust or inappropriate result, the court may resort to the factors set forth in section 240 (1-b) (f) (1-10) and order payment of an amount that is just and appropriate (*see Bast v Rossoff*, 91 NY2d 723, 729 [1998]; *Elizabeth B. v Scott B.*, 189 AD3d 1833, 1837-1838 [3d Dept 2020]). The court here found that the presumptive amount would be unjust or inappropriate and considered several factors under section 240 (1-b) (f) in awarding a lower amount. We reject plaintiff's contention that the court was in effect improperly applying the proportional offset method (*cf. Matter of*

Livingston County Support Collection Unit v Sansocie, 203 AD3d 1675, 1676-1677 [4th Dept 2022]), and we conclude that the court did not abuse its discretion in deviating from the presumptive amount of child support (*see Hughes v Hughes*, 200 AD3d 1404, 1408-1409 [3d Dept 2021]; *Eberhardt-Davis v Davis*, 71 AD3d 1487, 1488 [4th Dept 2010]). Contrary to plaintiff's further contention, the court in fact awarded child support arrears.

We reject plaintiff's contention that the court erred in calculating defendant's separate property credit with respect to the marital residence. Defendant purchased the residence prior to the marriage, and less than three years after the marriage, title to the residence was transferred into the parties' joint names and the mortgage was refinanced. The court did not abuse its broad discretion (*see generally Haggerty v Haggerty*, 169 AD3d 1388, 1390 [4th Dept 2019]) in calculating defendant's separate property credit by determining his equity in the residence as of the time of the marriage (*see Ruane v Ruane*, 55 AD3d 586, 588 [2d Dept 2008]; *see also Santamaria v Santamaria*, 177 AD3d 802, 804-805 [2d Dept 2019]).

We agree with plaintiff, however, that the court abused its discretion in determining the value of the marital residence by using the valuation date as of the commencement of the action rather than the valuation as of the time of trial. "As a general rule, the value of the marital residence should be fixed as of the time of trial" (*Hutchings v Hutchings*, 155 AD2d 971, 971-972 [4th Dept 1989]; *see Wittig v Wittig*, 258 AD2d 883, 884 [4th Dept 1999]; *Rosenberg v Rosenberg*, 145 AD2d 916, 918 [4th Dept 1988], *lv denied* 74 NY2d 603 [1989]). We therefore modify the judgment by striking from the seventh decretal paragraph the sum of $19,174 to be awarded to plaintiff representing her half of the marital value of the former marital residence and substitute therefor the sum of $29,228.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

563

CA 21-01754

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

TORSTEN BEHRENS, M.D., AND JOSEPHINE ZAGARELLA,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, ET AL., DEFENDANTS,
AND NOEL SUTTON, DEFENDANT-RESPONDENT.

TIVERON LAW PLLC, AMHERST (TYLER J. ECKERT OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RUPP PFALZGRAF LLC, BUFFALO (CHRISTOPHER R. BITAR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered October 26, 2021. The order, inter alia, granted the motion of defendant Noel Sutton to dismiss the complaint against him.

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

Memorandum: Plaintiffs commenced this action seeking damages for, inter alia, false arrest and abuse of process. Plaintiffs appeal from an order that, inter alia, granted the motion of Noel Sutton (defendant) to dismiss the complaint against him pursuant to CPLR 3211 (a) (5) and (7). We affirm.

Plaintiffs contend that Supreme Court erred in dismissing the seventh cause of action, for abuse of process, to the extent that it is asserted by Torsten Behrens, M.D. (plaintiff), against defendant. We note at the outset that, by failing to brief the remaining claims and causes of action that were dismissed against defendant, plaintiffs have abandoned those claims and causes of action (*see Kammerer v Mercado*, 195 AD3d 1513, 1514 [4th Dept 2021], *lv denied* 38 NY3d 905 [2022]; *Cunningham v Mary Agnes Manor Mgt., L.L.C.*, 188 AD3d 1560, 1562 [4th Dept 2020]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Contrary to plaintiffs' contention, we conclude that the court properly dismissed plaintiff's abuse of process claim against defendant as untimely. Abuse of process is an intentional tort that is subject to the one-year statute of limitations (*see* CPLR 215 [3]; *Bittner v Cummings*, 188 AD2d 504, 506 [2d Dept 1992]). Plaintiff's

claim at issue accrued on January 7, 2019, when criminal charges were filed against plaintiff, and plaintiffs commenced this action more than one year later. We reject plaintiffs' contention that the claim did not accrue until the criminal charges were dismissed against plaintiff (*see Cunningham v State of New York*, 53 NY2d 851, 853 [1981]; *Keller v Butler*, 246 NY 249, 255 [1927]; *see generally Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]).

In any event, we further conclude that the court properly dismissed plaintiff's abuse of process claim against defendant for failure to state a claim. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). We must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88).

"Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; *see Chambers v Town of Shelby*, 211 AD3d 1456, 1459 [4th Dept 2022]; *Liss v Forte*, 96 AD3d 1592, 1593 [4th Dept 2012]). Here, the complaint insofar as it concerns the claim at issue fails to state the third element. The complaint simply states that defendant's use of process furthered the goal of harassing and intimidating plaintiff. "A malicious motive alone, however, does not give rise to a cause of action for abuse of process" (*Curiano*, 63 NY2d at 117; *see Chambers*, 211 AD3d at 1459; *Place v Ciccotelli*, 121 AD3d 1378, 1380 [3d Dept 2014]). There is no collateral objective identified in the complaint with respect to defendant's use of the legal process against plaintiff (*see DeMartino v Golden*, 150 AD3d 1200, 1201-1202 [2d Dept 2017]; *Perez v Mount Sinai Med. Ctr.*, 297 AD2d 615, 615-616 [1st Dept 2002]; *cf. D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 960 [4th Dept 2014]; *see also Wilner v Village of Roslyn*, 99 AD3d 702, 704 [2d Dept 2012]).

Plaintiffs' alternative contention that the seventh cause of action states a claim by plaintiff against defendant for malicious prosecution is raised for the first time on appeal and is not properly before us (*see Mohrman v Johns*, 210 AD3d 1075, 1076 [2d Dept 2022]; *Walker v George*, 97 AD3d 741, 741 [2d Dept 2012]; *Valeriano v Rome Sentinel Co.*, 43 AD3d 1357, 1358 [4th Dept 2007]). "An issue may not be raised for the first time on appeal . . . where[, as here], it 'could have been obviated or cured by factual showings or legal countersteps' in the trial court" (*Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]). We also do not consider plaintiffs' contentions that are raised for the first time in their reply brief (*see Solvay Bank v Feher Rubbish Removal, Inc.*, 187 AD3d 1596, 1597 [4th Dept

2020]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

569

CAF 22-00826

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

IN THE MATTER OF TIMAR P.,
RESPONDENT-APPELLANT.

ONEIDA COUNTY ATTORNEY,
PETITIONER-RESPONDENT;

JAMES B., APPELLANT.

MEMORANDUM AND ORDER

SUSAN B. MARRIS, ATTORNEY FOR THE CHILD, MANLIUS, FOR RESPONDENT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR APPELLANT.

DEANA D. GATTARI, ROME, FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered March 28, 2022, in a proceeding pursuant to Family Court Act article 3. The order, inter alia, adjudicated respondent to be a juvenile delinquent.

It is hereby ORDERED that said appeal by James B. is unanimously dismissed, the order is reversed on the law without costs and the matter is remitted to Family Court, Oneida County, for further proceedings on the petition.

Memorandum: In this juvenile delinquency proceeding pursuant to Family Court Act article 3, respondent and his father each appeal from an order of disposition that adjudicated respondent to be a juvenile delinquent and placed him in the custody of the Office of Children and Family Services for a period of 12 months. Even assuming, arguendo, that the father has standing to appeal the order, the father challenges only respondent's placement, and we conclude that his appeal is moot inasmuch as the placement has expired (*see Matter of Oscar R.M.*, 213 AD3d 855, 855 [2d Dept 2023]; *Matter of Alvin H.*, 206 AD3d 1658, 1658-1659 [4th Dept 2022]; *Matter of Michael H.*, 99 AD3d 1258, 1258 [4th Dept 2012]).

Respondent's contention that he was denied his right to a speedy hearing is unpreserved for our review (*see Matter of Dashawn R.*, 114 AD3d 686, 686 [2d Dept 2014], *lv denied* 23 NY3d 901 [2014]; *Matter of Shellito D.*, 226 AD2d 1075, 1076-1077 [4th Dept 1996]), as is his contention that Family Court erred in considering hearsay evidence at the fact-finding hearing (*see generally Matter of Jerome G.*, 192 AD3d 1476, 1477 [4th Dept 2021], *lv denied* 37 NY3d 906 [2021]). We decline

to exercise our power to address those contentions as a matter of discretion in the interest of justice (*see id.*).

Respondent contends that the court violated his constitutional and statutory right to be present at the fact-finding hearing. We agree, and we therefore reverse the order and remit the matter to Family Court for further proceedings on the petition. "[R]espondents in juvenile delinquency proceedings have a constitutional and statutory right to be present at all material stages of court proceedings, including fact-finding hearings (*see* US Const 6th Amend; NY Const, art I, § 6; Family Ct Act § 341.2 [1])" (*Matter of Arielle B.*, 17 AD3d 1056, 1056 [4th Dept 2005]). Respondents "may, however, waive the right to be present at such proceedings" (*id.*). " 'In order to effect a voluntary, knowing and intelligent waiver, the [respondent] must, at a minimum, be informed in some manner of the nature of the right to be present at [the fact-finding hearing] and the consequences of failing to appear' for that hearing" (*id.* at 1056-1057). Here, the court did not advise respondent that he had a right to be present at the fact-finding hearing and that the consequence of his failure to appear would be that the fact-finding hearing would proceed in his absence (*see generally People v Parker*, 57 NY2d 136, 141 [1982]). We therefore conclude on this record that there is no voluntary, knowing, and intelligent waiver of respondent's right to be present at the hearing (*see Arielle*, 17 AD3d at 1057; *Matter of Anthony B.*, 43 AD2d 688, 689 [1st Dept 1973]; *see also People v Campbell*, 209 AD2d 1042, 1042 [4th Dept 1994]).

In light of our determination, we do not address respondent's remaining contentions.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

572

KA 20-00849

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB BEACH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered May 28, 2019. The judgment convicted defendant upon his plea of guilty of course of sexual conduct against a child in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]), 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 the sentence (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Martin*, 213 AD3d 1299, 1299-1300 [4th Dept 2023]; *People v Gordon*, 191 AD3d 1367, 1368 [4th Dept 2021], *lv denied* 36 NY3d 1120 [2021]). Nonetheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

574

KA 22-00779

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD J. HEFFERNAN, DEFENDANT-APPELLANT.

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

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Jennifer M. Noto, J.), dated March 11, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk and a sexually violent offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*).

Defendant contends that County Court erred in assessing points under risk factor 11. We reject that contention. Pursuant to the Sex Offender Registration Act: Risk Assessment Guidelines and Commentary (2006), "offenders are assessed 15 points under risk factor 11 if they have a history of drug or alcohol abuse or if they were abusing drugs or alcohol at the time of the sex offense" (*People v Palmer*, 20 NY3d 373, 376 [2013]; *see People v Richardson*, 197 AD3d 878, 879 [4th Dept 2021], *lv denied* 37 NY3d 918 [2022]). Here, the People established that defendant admitted to using alcohol, marihuana, crack cocaine, LSD, and hallucinogenic mushrooms, that while incarcerated he sought treatment for substance abuse, and that defendant's discharge summary from sex offender treatment while incarcerated included a recommendation that he receive additional substance abuse treatment upon his release from custody. Thus, the court properly assessed points under risk factor 11 because the People established, by clear and convincing evidence, a "pattern of drug or alcohol use in . . . defendant's history" evincing a history of substance abuse (*People v Kowal*, 175 AD3d 1057, 1057 [4th Dept 2019] [internal quotation marks omitted]; *see People v Turner*, 188 AD3d 1746, 1746-1747 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]). Although the Board of Examiners of Sex Offenders (Board) did not recommend assessing defendant points

under risk factor 11, their determination that defendant would "be scored conservatively" under that risk factor is not dispositive inasmuch as the "court is not bound by the Board's recommendations but, rather, must make its own determinations based on the evidence" (*People v Cook*, 29 NY3d 121, 125 [2017]; *see People v Perez*, 35 NY3d 85, 92 [2020], *rearg denied* 35 NY3d 986 [2020]).

Contrary to defendant's further contention, we conclude that the court did not err in granting the People's request for an upward departure from defendant's presumptive classification as a level two risk to a level three risk. It is well settled that a SORA "court may make an upward departure from a presumptive risk level when, after consideration of the indicated factors[, the court determines that] there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines" (*People v Potts*, 179 AD3d 1536, 1536 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020] [internal quotation marks omitted]; *see People v Gillotti*, 23 NY3d 841, 861 [2014]). We conclude that the People established the existence of such an aggravating factor by clear and convincing evidence and that the upward departure was warranted under the totality of the circumstances (*see generally People v Perez*, 158 AD3d 1070, 1071 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018]*; People v Calderon*, 126 AD3d 1383, 1383-1384 [4th Dept 2015], *lv denied* 25 NY3d 909 [2015]).

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01682

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

ADAM REGDOS, PLAINTIFF-APPELLANT,

V ORDER

JOSEPH CLOUTIER, ET AL., DEFENDANTS.

NIAGARA COUNTY, NONPARTY-RESPONDENT.
(APPEAL NO. 1.)

SPARACINO & SPARACINO, PLLC, NORTHPORT (JESSIE M. DJATA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (BRIAN P. CROSBY OF COUNSEL), FOR NONPARTY-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Deborah A. Chimes, J.), entered August 17, 2022. The order denied the motion of plaintiff for leave to substitute a party and to amend the complaint.

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court

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

583

CA 22-01683

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

ADAM REGDOS, PLAINTIFF-APPELLANT,

V ORDER

JOSEPH CLOUTIER, ET AL., DEFENDANTS,
AND NEW DIRECTIONS YOUTH AND FAMILY
SERVICES, INC., FORMERLY KNOWN AS
WYNDHAM LAWN HOME FOR CHILDREN,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

SPARACINO & SPARACINO, PLLC, NORTHPORT (JESSIE M. DJATA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JULIA M. HILLIKER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Deborah A. Chimes, J.), entered August 17, 2022. The order granted plaintiff's motion for leave to reargue and, upon reargument, adhered to a prior order dismissing plaintiff's claims against defendant New Directions Youth and Family Services, Inc., formerly known as Wyndham Lawn Home for Children.

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

Entered: June 30, 2023

Ann Dillon Flynn
Clerk of the Court