[redacted]

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. [redacted]

[redacted]

Petitioner-Respondent,

—against—

[redacted]

Respondent-Appellant.

BRIEF FOR PETITIONER-RESPONDENT [redacted]

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PRELIMINARY STATEMENT

[redacted] ("Appellant") appeals from a five-year order of protection that the Family Court ([redacted] granted to Appellant's wife, Petitioner-Respondent [redacted] Ms. M.") and a two-year order of protection granted to their two children that was based on testimony that Appellant: repeatedly threatened to kill Ms. M. and the children after she asked for a divorce; on several occasions, forced her to have sexual intercourse with him against her will while she was half asleep; and, in a rage, threw two metal objects that nearly hit Ms. M. and one of the children.

Appellant's challenge to the Family Court's decision is a meritless collage of arguments that is often difficult to parse. It is unclear what Appellant is actually appealing as, in violation of this Court's rules, he failed to provide any statement of the "questions involved."

Appellant's principal argument seems to be that the Family Court's credibility determinations should be overturned. Yet, as this Court has repeatedly held, the Family Court is in the best position to evaluate witness credibility. Here, the court explained its credibility determinations in its decision, finding Ms. M.'s testimony to be "convincing, consistent and credible" in contrast to Appellant's "inconsistent, self-serving, combative, and argumentative" testimony. (Decision and Order at 3, [redacted]

[redacted] ["Decision"]). Appellant's argument is baseless and does not come close to clearing the high bar for overturning the Family Court's well-founded credibility determinations. Indeed, the record—including corroborating evidence—amply supports all of the Family Court's findings.

Switching tack, Appellant makes political and ideological arguments about the influence of "woke" culture in the legal system and a supposed anti-male bias in Article 8 proceedings. Those have no place in this appeal, where there is no evidence of any bias whatsoever on the part of the Family Court judge.

Appellant makes several other meritless arguments before even getting to the substance of the multiple family offenses that the Family Court found he had committed, including complaints about the length of the proceedings (to which he contributed) and several grievances that should be directed at the Legislature (if anyone), not this Court. Appellant even attempts to resurrect the obsolete "marital exemption" to sexual violence by arguing that, because he was Ms. M.'s husband, he could not have intended to commit family offenses like sexual abuse in the third degree and forcible touching against Ms. M. But the courts have long rejected that supposed defense, which the Court of Appeals rightly called "irrational and absurd." *People* v. *Liberta*, 64 N.Y.2d 152, 164 (1984). And the Legislature has repealed it.

To the extent that Appellant is challenging the sufficiency of the evidence to support the Family Court's findings that he committed multiple family

offenses—any *one* of which would be sufficient to justify the order of protection—his arguments fail. Appellant committed sexual abuse in the third degree and forcible touching when he repeatedly forced Ms. M. to have sex with him without her consent—sometimes by physically restraining her or beginning the assault while she was still asleep. He also committed harassment in the first and second degrees by—on a weekly basis by the time Ms. M. fled the marital home—making repeated threats to kill Ms. M., himself, and their two young children. These actions also constitute menacing in the second and third degrees, as do Appellant's actions on [redacted] On that date, Appellant, angry that Ms. M. refused to participate in a religious ceremony, flung a steel cup and tray at Ms. M. and their then-three-year-old, saying, "Watch what's going to happen." And, Appellant's forceful grabbing of Ms. M.'s wrist during an argument supports the finding of assault in the third degree.

Finally, Appellant incorrectly argues that an audio clip played during the cross-examination of Appellant was inadmissible hearsay. In fact, the Family Court judge correctly admitted the clip for the non-hearsay purpose of impeaching Appellant's testimony with a prior inconsistent statement.

Contrary to Appellant's arguments, the record is replete with credible evidence of his having committed multiple family offenses, as well as violations of a Temporary Order of Protection that he admitted to but now tries to downplay as

merely "technical" violations. This Court should decline Appellant's invitation to second-guess the Family Court's findings; it should affirm the Family Court's decision in full.

COUNTERSTATEMENT OF QUESTIONS INVOLVED[1]

1. Does Appellant's brief raise any issues that warrant reversal of the Family Court's findings?

No.

[1] In violation of Appellate Division Practice Rule § 1250.8(b)(3), Appellant's brief does not include "a concise statement . . . of the questions involved, set forth separately and followed immediately by the answer, if any, of the court from which the appeal is taken."

COUNTERSTATEMENT OF FACTS

I. THE PARTIES

Ms. M. and Appellant met in [redacted] and were married later that year. [redacted].) They have two children, ages nine and six. (Decision at 1.)

II. PROCEDURAL HISTORY[2]

Following months of escalating sexual abuse and threats of violence against her and the children by Appellant, Ms. M. left the marital home with her children and sought refuge at a domestic violence shelter on [redacted] after an incident in which Appellant threw two metal objects at her and their [redacted]-year-old. ([redacted] Two days later, she filed a Family Offense Petition and obtained a Temporary Order of Protection ("TOP") against Appellant.

The TOP required that Appellant stay away from the children except for Court-ordered visitation, and that he stay away from Ms. M., her home, the children's school, and Ms. M.'s place of employment. (*See* [redacted] Temporary Order of Protection.) It also prohibited Appellant from communicating (by mail, phone, email, voicemail, or other means) with Ms. M. and the children,

[2] Appellant cites three transcripts that are not in the record: [redacted] (Appellant's brief erroneously says this hearing was on [redacted] Br. at 4–5, 6.

except in regard to Court-ordered visitation. (*Id.*) It further prohibited Appellant from committing family offenses against Ms. M. or the children, including assault, harassment, and menacing. (*Id.*)

On [redacted] after retaining Sanctuary for Families, Center for Battered Women's Legal Services as counsel, Ms. M. filed an Amended Family Offense Petition against Appellant, alleging, among other things, that Appellant had repeatedly threatened to kill Ms. M. and the children after she asked for a divorce, repeatedly forced her to have sexual intercourse against her will, and then—on the day she filed her initial petition—threw two metal objects at her and one of their children. (*See* [redacted] Amended Family Offense Petition.)

On [redacted] the Family Court issued an amended TOP that included additional restrictions, including that Appellant refrain from communication or contact with Ms. M. via "any other third party contact INCLUDING any and all Social Media Outlets." (*See* [redacted] Temporary Order of Protection.)

On [redacted] after months of unwanted communication and inappropriate behavior toward her and the children, Ms. M. filed a Violation Petition alleging multiple violations of the TOP. (*See* [redacted] Petition for Violations of an Order of Protection.)

The matter came for trial in Bronx Family Court before the Honorable [redacted] in [redacted] The six-day trial took place on [redacted] [redacted]. Due to the COVID-19 pandemic, the trial was entirely remote and conducted virtually. The TOP was extended to remain in place during the pendency of the proceedings and trial.[3]

On [redacted] the Court issued a Decision and Order After Fact-Finding, granting a five-year full stay away Final Order of Protection in favor of Ms. M. and a two-year "Usual Terms" Final Order of Protection for the children. [redacted]

III. THE EVIDENCE AT TRIAL

A. Forced Sex and Abortion in [redacted]

Appellant's abusive behavior began at least as early as [redacted] In the fall of that year, after the birth of their second child, Ms. M. told Appellant that she did not want to have sex again until she was on birth control, but he pressured her to do so anyway. ([redacted] She testified: "He would say it's okay.

[3] [redacted]

You're not going to be—you're not going to get pregnant. I did ask him to be careful. However, he was not. Therefore, later on, I would just disagree on having sex with him just because he wasn't careful. . . . I would tell him that I don't want to have sex until I get birth control." [redacted] In response, "[Appellant] would just promise that he's going to be careful, that it's okay." (*Id.* at 83:22–25.)

Ms. M. became pregnant as a result of the unprotected sex, and Appellant gave her an ultimatum: either "get [an] abortion or—or he's going to leave me and the kids alone while I'm pregnant, while the baby's still three months old, in a state where I don't know anybody because we just moved there." (*Id.* at 84:1–11.) Through tears, Ms. M. testified that, after this ultimatum, she had an abortion despite wanting to continue the pregnancy. (*Id.* at 84:12–17.)

B. Ms. M. Asks for a Divorce, and Appellant Responds with Threats

As time went on, Ms. M. decided that she wanted a divorce. ([redacted] Tr. at 40:1–2.) She told Appellant this [redacted] and he responded by making repeated threats against her and their children's lives. ([redacted] at 39:24–25, 40:1–16.)

Ms. M. testified that "[h]e did threaten me. He said – he said that he's going to kill me, kids, and then the boyfriend, which I didn't have." ([redacted]. at

40:14–16.) She testified that when Appellant threatened her, "he was angry, and his voice was raised." (1[redacted] Tr. at 41:15–16.)

Ms. M. testified that, during one altercation in [redacted] Appellant "looked disturbed, and I could not predict what he—what was in his mind. And he was scary." (*Id.* at 42:14–15.) Appellant made "repetitive threats throughout this period of time [from [redacted] through [redacted] and it happened "mostly about once a week, sometimes twice a week during this period." (*Id.* at 44:20–21, 45:5–6.)

Ms. M. testified that "when [Appellant] kept saying it [that he would kill her and the children] repeatedly, [she] got extremely concerned and scared and [she] felt in danger" because she "was afraid that he will do what he said he will." (*Id.* at 45:17–24.)

C. Appellant Forcefully Grabs Ms. M.'s Wrist

There were constant arguments after Ms. M. said she wanted a divorce, including one instance in which Appellant grabbed Ms. M.'s wrist and did not let go for several minutes, leaving it red and stinging, (*id.* at 47:2–4, 64:18–25, 65:1–25.) so that she had to apply ice to it. *Id.* at 66:4–6. Both children were playing in the living room directly adjacent to the hallway in which the argument took place. ([redacted] at 54:20–25, 55:11–23.) Ms. M. asked Appellant not to argue in front

of the children, but he refused to stop, stating that "the kids need to know what's happening in the family." (*Id.* at 55:6–9.)

D. Sexual Abuse

In [redacted] when Ms. M. told Appellant that she wanted a divorce, she also told him that she no longer wished to have sex with him. But Appellant would not take "no" for an answer. He repeatedly forced her to have sex with him without asking and over her objections. ([redacted] Tr. at 40:1–2, 46:20–25, 47:1–25, 48:1–25, 49:1–25, 50:1–25, 51:1–7, 51:20–25, 54:12–14; [redacted] Tr. at 47:17, 56:16–18, 58:11–16.) ("[Appellant] would have sex with me against my will.")

Toward the end of [redacted] Ms. M. began sleeping in the children's bedroom in an attempt to stop Appellant's unwanted advances. (*Id.* at 54:11–14, 57:18–20.) It did not work. "Since I slept in the bedroom with the children, he would come in the middle of the night, pick me up from the bed, carry to me his bed, put me down, take my underwear off, put his penis into my vagina and start having sex with me while I was still asleep." (*Id.* at 47:21–25.)

In a groggy state, Ms. M. would try to push Appellant off but was unable to because he would "hold his hands against [her] shoulders to push [her] down," and though she "was trying to fight him off," she was not strong enough. (*Id.* at 48:3–9, 50:17–18.)

Ms. M. testified: "I was afraid. I was terrified. I was completely unprotected in my own house. . . . Because I'm being held down against my will and basically, I think I was being raped and also kids were sleeping next door" less than six feet away. (*Id.* at 47:11–15, 51:25, 52:1–5.)

Ms. M. said that when she told Appellant that sex against her will was wrong and considered rape, "[h]e did say that we are married. I—I am his wife and he's my husband, and we have to have sex, whether—whether if I wanted to or not," and "[h]e would disagree with me and say that since we are a married couple, it's not considered to be rape." (*Id.* at 54:23–25, 55:8–9.)

E. Meeting with the Parties' Spiritual Advisor in June 2019

In an effort to alleviate her worsening situation, Ms. M. and Appellant met with the parties' spiritual advisor—someone Appellant respected—in the [redacted] area in late [redacted] (*Id.* at 61:18–25, 62:1–2.) During the meeting, Ms. M. said that Appellant was "having sex with [her] without [her] consent." (*Id.* at 62:8–11.) Ms. M. testified that, in response, Appellant said that "he's my husband and he's going to continue having sex with me, whether I want it or not. . . . [H]e basically threatened to kill me and the kids and then himself again, in front of the spiritual advisor as well." (*Id.* at 61:21–25, 62:15–20.)

[4] The parties were followers of the [redacted] faith. [redacted] at 6:8–10; [redacted] at 13:11–17.

Appellant also threatened to kill Ms. M., himself, and the children if Ms. M.'s mother visited. (*Id.* at 68:4–10.) Ms. M. testified that on leaving the meeting with Appellant's spiritual advisor, she "realized that [her] last hope didn't work," and she knew that she "had to leave as soon as possible, because he's not going to stop." (*Id.* at 62:21–25, 62:1.)

F. Appellant Throws Objects at Ms. M., and She Flees to a Domestic Violence Shelter

The incident that finally caused Ms. M. to take the children and flee from the marital home took place on [redacted] On that day, the parties' older son was having a kindergarten graduation. (*Id.* at 71:3–10.)

Ms. M. testified that, while she was getting their younger child ready at home, Appellant was performing a religious ceremony for his deceased father. [redacted] Tr. at 71:8–25.) When Ms. M. told Appellant that she was not going to participate because they were running late to the graduation, Appellant became angry. (*Id.* at 72:13–22.)

Appellant was standing close to Ms. M. as she was getting their three-year-old son ready to leave: "[h]e was standing next to me, about two feet away, I guess, three feet tops. It's a small space." (*Id.* at 72:18–22, 73:8–16.) As they turned to go downstairs, "[Appellant] got angry, and I heard something fly by me and it—it made a noise. It was a steel cup" that Appellant had flung at them. (*Id.* at 18–22.)

Then, from a distance of about six to 10 feet, Appellant threw a metal tray at Ms. M. and their three-year-old as they fled down the stairs. (*Id.* at 73:23–25, 74:1–8.) As he threw the cup and tray, Appellant repeated: "Watch what's going to happen, watch what's going to happen." (*Id.* at 74:15–16.)

Ms. M. and the younger son went to the school for their older son's graduation and "blended with the crowd." (*Id.* at 74:21–22.) Appellant also attended. ([redacted] Tr. at 89:7–8.) Ms. M. returned home later with the two children only after she was sure that Appellant had left for work. [redacted] Tr. at 75:8–9.) When they arrived home, it was "a disaster. The TV was not in the bedroom anymore, it was in the hallway turned upside down. The table was, that was in the hallway, it was turned upside down." (*Id.* at 75:12–17.)

Ms. M. quickly packed, and she and the children fled to a domestic violence shelter that evening. (*Id.* at 77:18–24, Decision at 2.) She immediately filed a Family Offense Petition on [redacted] and obtained the Temporary Order of Protection that continued during the pendency of the proceedings and trial.[5]

G. Appellant's Violations of the Temporary Order of Protection

Ms. M. testified that Appellant repeatedly violated the Temporary Order of Protection by sending her text messages that did not relate to court-ordered visitation with the children. ([redacted] Tr. at 94:21–25, 95:1–16, 96:2–14, [redacted]

[5] *See supra* note 3.

Tr. at 48:6–23, 49:2–8, 76:9–25, 77:1–25.) Ms. M. introduced five exhibits, four of which included numerous unsolicited text messages from Appellant. [redacted] Tr. at 2; [redacted] Tr. at 2.) Appellant sent several text messages on Valentine's Day [redacted] depicting religious love gods and pictures of the family that he had edited with hearts, all of which made Ms. M. feel extremely anxious and harassed. (*Id.* at 52:11-25, 53:1–24.) In one text message that Ms. M. found particularly unsettling, Appellant asked her to join him and the children in the park during a court-ordered visit with Appellant. ([redacted] Tr. at 79:4–19.) Ms. M. said that made her feel "very scared," because there "is an order of protection and the order clearly says not to come near, not to talk, except for communication regarding the visitation. And he—he does it anyway." (*Id.* at 80:25, 81:1–4.)

Also, in late [redacted], Appellant sent Ms. M.'s personal and confidential OB-GYN records to several people—including her father—via the WhatsApp messaging application. ([redacted] Tr. at 89:19–24, 90:20–25; [redacted] Tr. at 19:6-9.) Ms. M. felt very embarrassed and harassed. [redacted] Tr. at 92:7–8.)

On [redacted] Ms. M. noticed that the children were visibly upset after a visit with Appellant. ([redacted] Tr. at 45:12–14.) When she asked why they seemed so "tense," they told her that Appellant "was biting them" on their shoulders. (*Id.*; [redacted] Tr. at 46:2–3.) Ms. M. testified that, while the children were usually "very talkative," on this occasion, they were "quiet" and the younger

child was "extremely sad." (*Id.* at 46:7–11.) The younger child "kept repeating, 'papa was biting me, papa was biting me, and I don't like it.'" (*Id.* at 46:11–12.)

Ms. M. also had a disturbing personal encounter with Appellant on [redacted] when she met him in a parking lot to drop the children off for a visit. Ms. M. was getting the children out of the car when Appellant arrived. [redacted] Tr. at 59:5–7.) He approached Ms. M. to try to open the passenger doors, despite Ms. M.'s requests for him "to step away from the car." (*Id.* at 59:14–15.) Instead of stepping away, Appellant "got angry . . . his voice was raised" and drew closer to Ms. M., standing "basically shoulder to shoulder." (*Id.* at 59:17–24.)

Ms. M. testified that that she "fel[t] unsafe . . . , scared" and "didn't know if [she] should call the police." (*Id.* at 61:5–9.) When the children did come out of the car, "[Appellant] looked at our older son" and spoke to him "in a raised voice." (*Id.* at 62:2–5.)

As a result of all of these unwanted communications and conduct, Ms. M. filed a Violation Petition on [redacted] (*See* Petition for Violations of an Order of Protection, [redacted]

H. Appellant's Testimony

In his testimony, Appellant denied making threats against Ms. M. and the children, denied forcing Ms. M. to have sex, and denied discussing those issues with the spiritual advisor ([redacted] Tr. at 75:12–25, 76:1–20; [redacted] Tr. at

35:17-21.) But he admitted to some of the violations that Ms. M. described, including sending Ms. M. unwanted text messages despite the Temporary Order of Protection and disseminating her confidential medical records without her permission. ([redacted]

I. Appellant's Demeanor

The Court admonished Appellant on several occasions for outbursts during the trial, refusing to follow the Court's directions, and making distracting facial expressions and gestures. *See, e.g.*, ([redacted] Tr. at 79:25, 80:1–2) ("THE COURT: Sir, you had your—you had outbursts yesterday, the Court is not going to accept any more outbursts from you."); ([redacted] Tr. at 32:8–14) ("THE COURT: [Appellant], this is the judge. I'm going to ask you to please refrain from any demonstrative actions with your face, such as the shaking of the head, the rolling of your eyes, while the witness is testifying. Especially given the technology, you know, we can—it's—everything is very apparent to everybody what you do with your face."); (*id.* at 49:13–18) ("THE COURT: Okay. Sir, I'm just going to give you a—this is the first official warning. You've had outbursts on two separate days, both times on which the Court had to mute you. I've already had to say, explain to you today not to make demonstrative facial expressions while on camera, while [Ms. M.] was testifying.").

Appellant's own lawyer also admonished his client several times for his continued outbursts. *See* ([redacted] Tr. at 78:11–15) ("[redacted] [Appellant], I agreed to represent you for the purpose of this—of this proceeding, okay. If you're going to keep interrupting when you're told you can't talk, I'm going to ask the Court to relieve me again. Please stop."); (*id.* at 79:17–18) ("[redacted] [Appellant] stop with the nonsense, with the facial reactions."); ([redacted] Tr. at 9:2-7) ("[redacted] [Appellant], stop. Stop. I'm not asking you a question right now. I'm asking the witness a question. Please put your microphone on mute. Okay? Please put your microphone on mute, [Appellant]. I'm sorry [Ms. M.]. Put your microphone on mute, sir. I'm sorry, [Ms. M.].").

IV. THE FAMILY COURT'S [redacted] DECISION AND ORDER

On [redacted] the Family Court issued a four-page, single-spaced Decision and Order After Fact-Finding. ([redacted]

The Court found that Ms. M. had established by a fair preponderance of the evidence that Appellant had committed acts that would constitute family offenses, including forcible touching, sexual abuse in the third degree, harassment in the first and second degrees, menacing in the second and third degrees, and assault in the third degree. (Decision at 3.) The Court further found that Appellant had

committed some of those acts in the presence of the children, and that he had violated the Temporary Order of Protection. (*Id.* at 4.)

The Court therefore granted a five-year full stay-away Final Order of Protection in favor of Ms. M. and a two-year "Usual Terms" Final Order of Protection for the children. (*Id.*)

In its Decision and Order, the Court made multiple references to the parties' credibility, noting that it "had the opportunity to assess the demeanor of the witnesses and to assess the credibility, sincerity, and truthfulness of the testimony presented." (*Id.* at 1–2.)

The Court "credit[ed] the testimony of Petitioner, [Ms. M.], and [found] that Petitioner [] met her burden and proved by a preponderance of the evidence, that Respondent committed family offenses against her and that some of these offenses occurred in front of the subject children." (*Id.* at 2.)

The Court recounted several details of Ms. M.'s credible testimony. (*Id.* at 3.) Her testimony was "convincing, consistent, and credible" that Appellant committed several family offenses. Ms. M.'s testimony was credible in that she "appeared to testify openly, honestly, and consistently, often becoming emotional, on both direct and cross examination." (*Id.*)

The Court contrasted Ms. M.'s credibility with Appellant's lack of credibility: "In contrast, much of Respondent's testimony was not credible, in that

it often appeared inconsistent, self-serving, combative, and argumentative. In fact, some of Respondent's testimony could also be viewed as admissions." (*Id.*) The Court explained that it did not credit Appellant's testimony as, "throughout the proceedings, he appeared argumentative, combative, and possessed a complete lack of regard for this Court. In fact, throughout these proceedings, Respondent continually had outbursts which forced the Court to cease testimony and silence Respondent." (*Id.* at 2.) The Court found that Appellant violated the Temporary Order of Protection by texting Ms. M. despite knowledge that the TOP was in place, which he admitted to during the trial. (*Id.*)

ARGUMENT

I. THE FAMILY COURT'S CREDIBILITY JUDGMENTS HAVE A SOUND AND SUBSTANTIAL BASIS IN THE RECORD

Appellant's central argument appears to be that the Family Court should have credited Appellant's testimony and not Ms. M.'s. He argues that Ms. M.'s testimony was "so bizarre and farfetched that no rational trier-of-fact should have found it credible" (Br. at 18); that "the Family Court abused its discretion in crediting the Petitioner's fact-finding testimony" (*id.* at 30); and that "[t]he Family Court's credibility assessments cannot be supported" (*id.* at 33).

This argument fails. Appellant's disagreement with the Family Court's credibility determinations ignores the well-settled rule that the Family Court "has the best vantage point for evaluating the credibility of the witnesses," and therefore

"its determination should not be set aside unless it lacks a sound and substantial evidentiary basis."[6] *Everett C.* v. *Oneida P.*, 61 A.D.3d 489, 489 (1st Dep't 2009); *see also Any G.* v. *Ayman H.*, 208 A.D.3d 1097 (1st Dep't 2022).

Here, the court "had the opportunity to assess the demeanor of the witnesses and to assess the credibility, sincerity, and truthfulness of the testimony presented." (Decision at 1–2.) It found that "[a]t the outset, Petitioner's testimony was credible in that Petitioner appeared to testify openly, honestly, and consistently, often becoming emotional, on both direct and cross examination." (*Id.* at 3.) In contrast, "much of Respondent's testimony was not credible, in that it often appeared inconsistent, self-serving, combative, and argumentative." (*Id.*)

This Court should "accord[] great deference to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor." *People* v. *Kancharla*, 23 N.Y.3d 294, 303 (2014) (citation omitted). Contrary to Appellant's conclusory assertions, there was a sound and substantial basis for the Family Court's decision to credit Ms. M.'s testimony and not Appellant's, and the Court's findings were entirely consistent with a fair interpretation of the evidence.

[6] In some cases, this Court has stated its standard of review as being that it will not substitute its judgment for that of the Family Court unless "it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence." *Nagel* v. *Nagel*, 85 A.D.3d 559 (1st Dep't 2011) (citation omitted). Ms. M. submits that the Family Court's judgment should be affirmed under either standard.

Ms. M.'s testimony was not, as Appellant asserts, "bizarre and farfetched," (Br. at 18) but rather, as the Family Court correctly concluded, the "credible" testimony of a wife subjected to repeated abuse. Decision at 3.

II. APPELLANT'S COMPLAINTS ABOUT "THE MANNER IN WHICH ARTICLE 8 PETITIONS ARE HANDLED" AND "WOKE" CULTURE DO NOT PROVIDE A BASIS TO DISTURB THE FAMILY COURT'S RULING

Rather than focusing on any purported errors by the Family Court in this matter, much of Appellant's brief consists of Appellant's complaints about how Article 8 petitions are handled generally, and about what he refers to as "woke" culture and "the politically correct charged climate in which we all find ourselves." (Br. at 20, 33, 37.)

Appellant complains that:

- he "does not does not understand the need for Family Court to issue unnecessary Article 8 relief to a Petitioner who is also a party to a companion custody proceeding" (*id.* at 1);
- "in every family court in this State in which a male stands accused," while a petitioner "need prove her family offense allegations by a mere preponderance of the evidence, a respondent must prove his innocence by 100% of the evidence" (*id.* at 18–19);
- "a Criminal Court Judge has absolutely no difficulty releasing a rapist, murderer or other miscreant back into the community when the evidence is lacking; however, there is this abject fear on the part of Family Court Judges of denying an order of protection to almost every one who asks, regardless of the evidence" (*id.* at 19);
- "the noble Legislative goal intended by Article 8 has devolved into a wholesale system of civil orders of protection to virtually all who ask, first come first served" (*id.* at 21).

Appellant even complains of decisions by this Court and the Second Department in other cases, which he contends show that "almost any proof of any allegation of abusive conduct will now suffice to support a finding of a family offense." (*Id.* at 21–22.)

Nothing about this case, however, fits Appellant's complaints. There is no evidence that the Family Court applied any presumption in favor of Ms. M. or against Appellant, much less that it required Appellant to "prove his innocence by 100% of the evidence." The Family Court judge explained his reasons for crediting Ms. M.'s testimony over Appellant's, and it had nothing to do with "wokeness" or "political correctness." If Appellant believes that Article 8 proceedings are unfair, his remedy is to seek to abolish or amend Article 8 legislatively. His complaints do not show that the Family Court erred in any way in applying existing law.

III. THE LENGTH OF THE PROCEEDINGS, MUCH OF WHICH APPELLANT HIMSELF CONTRIBUTED TO, DID NOT RENDER THE PROCEEDINGS UNFAIR

Appellant further argues that the Family Court proceeding was "fundamentally unfair" and a violation of his due process rights because of how long it lasted. (Br. at 22.) His argument fails. He cites no case holding that delay alone—attributable here to numerous factors, including those of Appellant's own making—is a denial of due process that warrants reversal in this type of case. The main case on which Appellant relies—*Matter of Dustin H.*, 40 A.D.3d 995 (2d Dep't 2007)—

concerns a termination of parental rights, which is an entirely different area of family law.

Adjournments of hearings are governed by Family Court Act § 836. Generally, "[a]djournments are a fact of life in any [family court] proceeding, and may be based on a myriad of grounds, ranging from the need to subpoena witnesses or documents to the inevitable counsel conflicts and court congestion." Fam. Ct. Act § 836 (citing Merril Sobie, Practice Commentaries). Section 836 "prescribes a liberal 'for good cause shown' standard. Moreover, there is no statutory limitation on the number of durations of adjournments." § 12:13 Sobie Practice Commentaries, The Fact-Finding Hearing.

Notably, none of the delays were attributable to Ms. M. One reason for delay was that the proceeding was litigated during the peak of the COVID-19 pandemic, which exacerbated delays caused by an already overburdened Family Court.[7] Because of the pandemic, the trial and many of the hearings were conducted

[7] *See* Melissa Russo, *NYC Family Court in Crisis, New Report Says*, NBC NEW YORK (Feb. 4, 2022) ("The report [prepared by the NYC Bar Association and the Fund for Modern Courts] . . . concludes that during the pandemic, the vast majority of families 'had virtually no access' to the court. Citing historic underfunding, compared with other courts in the state, the report concludes 'Family Court was ill-equipped to respond quickly, consistently, fairly and comprehensively' to families' needs. . . . Now, almost two years later, many families are still facing staggering waits for relief, with their next court dates scheduled more than a year out.").

virtually, introducing delays and complications caused by technological errors and glitches.

But Appellant's own actions also contributed to the delay, including by having a series of lawyers begin to represent him, only to resign and be replaced by another. In all, three different counsel represented him over the course of the proceeding.

Appellant dismissed his first counsel, [redacted] claiming he was not "looking after [Appellant's] best interest." (*See* [redacted] Notice of Motion to Change Attorney.) Appellant's second court-appointed counsel, [redacted] asked to be relieved on [redacted] Ms. [redacted]s Notice of Motion to be Relieved as Counsel states: "In a case where the client acts in a manner that is contrary to the advice of his or her attorney, the attorney/client relationship has come to an end and cannot be rehabilitated." (*See* [redacted] Notice of Motion to be Relieved as Counsel.) [redacted] was then appointed to represent Appellant. The Court emphasized: "[Appellant], you've had two attorneys. Mr. [redacted] is going to be number three. You need to be able to work with him and communicate with him. All right?" ([redacted] Tr. at 7:6–9.)

Despite this caution from the Court, Appellant asked for yet another attorney on the eve of trial with Mr. [redacted]'s filing of an Order to Show Cause on [redacted] (*See* [redacted] Order to Show Cause.) Ultimately, Mr.

[redacted] was reengaged for the Order of Protection trial but relieved at its conclusion. ([redacted] Tr. at 44:2–5; 2/4/22 Tr. at 4–5, 23.)

In these circumstances, the length of the proceedings was not a violation of Appellant's due process rights.

IV. THE EVIDENCE AMPLY SUPPORTS THE FAMILY COURT'S FINDINGS THAT APPELLANT COMMITTED FAMILY OFFENSES

Appellant next argues that the Family Court erred in failing to dismiss the petition at the conclusion of Ms. M.'s direct case for failure to prove a family offense by sufficient evidence. (Br. at 17.) This argument, too, fails. Ms. M.'s direct testimony amply supported her claims, as the Family Court correctly ruled [redacted] Tr. at 73:25–74:7), and supported the Family Court's ultimate findings that Appellant committed seven family offenses: (i) forcible touching; (ii) sexual abuse in the third degree; (iii) harassment in the first and (iv) second degrees; (v) menacing in the second and (vi) third degrees; and (vii) assault in the third degree.

A finding of *any one* of these offenses would support the Family Court's entry of an order of protection. *See Lisa W.* v. *John M.*, 132 A.D.3d 459, 460 (1st Dep't 2015) (holding that evidence supported a finding of harassment in the second degree, which was sufficient to support an order of protection); *see also Putnam* v. *Jenney*, 168 A.D.3d 1155, 1156 (3d Dep't 2019) ("In a family offense

proceeding, the petitioner has the burden of establishing by a fair preponderance of the evidence that the respondent committed *one* of a number of specified offenses.") (citing Fam. Ct. Act §§ 812 [1]; 832) (emphasis added). Appellant raises no issue sufficient to require reversal as to any of the family offenses, much less all of them.

A. Sexual Abuse in the Third Degree Is Not a Lesser Included Offense of Forcible Touching

Appellant argues that the finding that he committed sexual abuse in the third degree should be dismissed because, according to Appellant, third-degree sexual abuse is a lesser included offense of forcible touching. (Br. 30.) But the Court of Appeals has expressly rejected that argument.

In *People* v. *Gauman*, 22 N.Y.3d 678, 683 (2014), the court held that "third-degree sexual abuse is *not* 'the lesser crime' as compared to forcible touching." *Id.* at 683 (emphasis added). "Rather, third-degree sexual abuse is part of a family of crimes that also includes second- and first-degree sexual abuse, where punishment is elevated if additional factors are present." *Id.* Appellant's argument is thus contrary to law, and fails accordingly.

Appellant's reliance on an earlier decision from the Fourth Department, *People* v. *Felton*, 145 A.D.2d 969 (4th Dep't 1988), is misplaced. In *Felton*, the court noted that third-degree sexual abuse is a lesser included offense of first-degree sexual abuse and of attempted first-degree sexual abuse. *Id.* at 971. It had nothing

to do with whether third-degree sexual abuse is a lesser included offense of forcible touching.

B. The Evidence Supported Findings of Appellant's Intent

Appellant's argument that the evidence does not adequately support findings of his "intent" also fails.

1. Sexual Gratification

First, Appellant argues that the evidence failed to show that he acted with intent to sexually gratify himself, as required to prove "sexual contact." (Br. at 35.) That argument fails for numerous reasons.

As an initial matter, Appellant relies on an outdated definition of "sexual contact" that the Legislature repealed in 2010. The outdated definition, which Appellant sets forth as the purportedly "controlling statute" (Br. at 27), contained a "marital exemption"; that is, it defined sexual contact as any touching of the sexual or other intimate parts "of a person not married to the actor."

As New York courts have held, the "marital exemption" in this and other sex crime statutes was "irrational and absurd," *People* v. *Liberta*, 64 N.Y.2d 152, 164 (1984), and "abhorrent," *People* v. *Alexis*, 14 Misc. 3d 978, 981 (Sup. Ct. Kings Cnty. 2007), and a concept that "should never again be countenanced in an enlightened society." *Alexis*, 14 Misc. 3d at 981; *see also People* v. *Naylor*, 196 A.D.2d 320, 322 (3d Dep't 1994) (holding that the marital exemption is

inapplicable to a crime that is based upon lack of consent, including sexual abuse in the third degree).

Accordingly, the Legislature removed the marital exemption from the definition of "sexual contact" in 2010 because "[i]n cases of domestic violence or marital rape, a perpetrator should be held accountable, and the law should not provide an exception for married persons." (*See* July 12, 2010 Letter from Assemb. Amy Paulin to Gov. Counsel Peter Kiernan re Bill A.9938-A/S.7702-A, available at, https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/21542.[8])

In a footnote, Appellant's counsel "concedes" that Appellant's contact with his wife "satisfies the definition of 'sexual contact'" under Penal Law § 130.00(3). (Br. at 30 n.22.) Nonetheless, nearly all of his "intent" arguments rely on the "abhorrent" theory underlying the obsolete marital exemption that a wife is deemed to consent to sexual violence. *See, e.g.*, (Br. at 30) ("Appellant contends that the Family Court erred . . . in finding that Appellant had committed any acts of sexual misconduct by engaging in sexual relations with his wife."); (*id.* at 31) ("The Appellant herein and the Petitioner were husband and wife, married to each other.");

[8] Thus, under the current definition, "sexual contact" means "means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed." Penal Law § 130.00(3).

(*id.* at 32) ("[A]ppellant cannot have been expected to know that his wife . . . was not a willing participant at the time of the act."); (*id.* at 37) ("Summarizing Appellant's argument, playful, loving foreplay between a married couple does not mutate into criminal conduct merely because one of the participants later decides to leave the relationship.").

In fact, Appellant appears to lament that "marriage is a defense where the sexual contact is based upon the alleged victim being less than 17 years of age. Yet marriage is not a defense where the alleged victim is actually married to the alleged perpetrator." (Br. at 37 n.23.)

These arguments have no place in the law. The Family Court could properly infer Appellant's intent to sexually gratify himself—as required for forcible touching—"from the acts themselves, absent any other explanation." *In re Dorlis B.*, 132 A.D.3d 578, 579 (1st Dep't 2015); *see also Tawanda A.A.* v. *Joseph D.A.*, 188 A.D.3d 401, 402 (1st Dep't 2020) (holding that intent is "properly inferred from respondent's actions and the surrounding circumstances.").

Ms. M. testified to multiple instances when Appellant physically carried her from one bedroom to another to have sex with her over her objections, and held his hands against her shoulders to push her down. ([redacted] Tr. at 48:3–9, 51:5–7.) That is more than enough to show Appellant's purpose to "gratify[] his sexual desire," Penal Law § 130.52(1), whether the parties are married or not.

The cases that Appellant relies on where an intent to sexually gratify was not found (Br. at 36) are inapposite. They involved minors and facts such as "the chaotic situation of children fighting on a school bus" or "a ten-year-old bully acting out on the school bus," *see In re Keenan O.*, 273 A.D.2d 167 (1st Dep't 2000); *In re Clifton B.*, 271 A.D.2d 285 (1st Dep't 2000); *In re Shamar D.*, 84 A.D.3d 605 (1st Dep't 2011), not a grown man like Appellant forcing his wife to have sex with him.

2. Menacing

In regard to the offense of menacing in the second and third degrees, Appellant "repeats and realleges" his arguments that Ms. M.'s testimony failed to prove his intent to put her "in fear of death or injury of any kind." (Br. at 39.)

That argument fails, too. Appellant threatened to kill Ms. M. and their children on multiple occasions and over an extended period of several months after she told him she wanted a divorce. ([redacted] Tr. at 44:20–21, 45:2–24.) That is more than enough evidence to show she had a reasonable fear of physical injury. *See In re Luis A.*, 223 A.D.2d 505, 506 (1st Dep't 1996) ("[T]he evidence of respondent's repeated acts of stalking, hitting, grabbing and threatening the complainant with physical harm could lead a rational person to infer that respondent intended to place complainant in reasonable fear of physical injury, and thereby was guilty of second degree menacing."); *People* v. *Payton*, 161 Misc. 2d 170, 175

(Crim. Ct. 1994) (holding that "two or more threats, express or implied, to cause serious physical injury to another person" is sufficient to show menacing in the second degree). Nor is there anything in the statute that "indicate[s] a legislative intent to immunize [defendants] who target persons familiar to them." *In re Luis A.*, 223 A.D. 2d at 506.

The incident on [redacted] during which Appellant, in a rage, threw two metal objects at Ms. M., holding their younger child, also constituted "menacing." *See Erin C.* v. *Walid M.*, 165 A.D.3d 547, 548 (1st Dep't 2018) (affirming finding of menacing in the third degree where defendant, in an "extremely agitated" state, followed his wife around their apartment "screaming insults" that forced her to lock herself in her bedroom to get away from him); *Kristina L.* v. *Elizabeth M.*, 156 A.D.3d 1162, 1165 (3d Dep't 2017) (affirming finding of menacing in the third degree where respondent had a verbal confrontation with petitioner and, in her anger, threw a coffee mug in petitioner's direction).

3. Harassment

Appellant also argues that there was "no evidence to support a finding that Appellant acted in a manner which was intended to harass and annoy the Petitioner." (Br. at 41–42.) But, in so doing, he addresses only one of his acts that constituted his harassment of Ms. M.: his repeated text messages to her which he

himself admitted were in violation of the Court's Temporary Order of Protection. ([redacted] at 48:16–25.)

Appellant disregards Ms. M.'s testimony that he repeatedly made threats against Ms. M.'s and the children's lives after Ms. M. told him that she wanted a divorce in [redacted] at 39:24–25, 40:1–16.) Appellant made "repetitive threats" from [redacted] that he would "kill [Ms. M. and the] kids," and during one conversation, Appellant "looked disturbed, and [Ms. M.] could not predict what he—what was in his mind. And he was scary." ([redacted] Tr. at 42:14–15, 44:20–21, 45:5–6.)

Ms. M. testified that when Appellant made these threats on a weekly basis, she "got extremely concerned and scared and [she] felt in danger" because she "was afraid that he will do what he said he will[.]" ([redacted] Tr. at 45:17–24.) Weekly threats against Ms. M. and the children clearly satisfy a "course of conduct" that "alarm[ed]" Ms. M. and placed her in "reasonable fear of physical injury." (Penal Law §§ 240.25, 240.26 [3].)

The element of intent to harass, annoy, or alarm "may, and in most instances must, be established by inferences drawn from the surrounding circumstances," and from the totality of conduct of the accused. *People* v. *Collins*, 178 A.D.2d 789, 789 (3d Dep't 1991); *see also People* v. *Roman*, 13 A.D.3d 1115,

1115–16 (4th Dep't 2004). Ms. M.'s testimony, detailing years of escalating domestic violence and abuse, was more than enough to meet that standard.

As in *Christina Z.* v. *Bishme AA.*, 132 A.D.3d 1102, 1103 (3d Dep't 2015), the "history of domestic violence" that made Ms. M. "fearful of what the father might do to her and the child[ren]" supports a finding of harassment. *See also Angelique QQ.* v. *Thomas RR.*, 151 A.D.3d 1322, 1323–24 (3d Dep't 2017) (crediting the Family Court's determination that "given the father's history of domestic violence" and the surrounding circumstances of the couple's 10-year relationship—during which petitioner mother was "fearful of the father because he had been physically abusive"—respondent father's communications constituted harassment in the second degree).

C. The Evidence Showed That Ms. M. Did Not Consent to Appellant's Family Offenses

Appellant argues that there is "no evidence to support a conclusion of law that [he] knew or should have known that his wife was not in agreement with Appellant's wish to engage in marital relations." (Br. at 36.) This argument, too, is meritless.

"Lack of consent results from: (a) forcible compulsion; or (b) incapacity to consent; or (c) where the offense charged is sexual abuse or forcible touching, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's

conduct." (Penal Law §§ 130.05 [2] [a]–[c].) A person is deemed incapable of consent when she is "physically helpless," *id.* § 30.05(3)(d), which includes being asleep. *See People* v. *Chodakowski*, 162 A.D.3d 476, 476 (1st Dep't 2018) (holding that victim could not consent where she was asleep when intercourse started); *People* v. *Fuller*, 50 A.D.3d 1171, 1174 (3d Dep't 2008) ("[A] person who is sleeping is 'physically helpless' for the purposes of consenting to sexual intercourse.") (citation omitted).

Here, Ms. M. testified that, on multiple occasions between [redacted] and [redacted] Appellant had sex with her without her consent. On [redacted], Ms. M. awoke to Appellant having sex with her while she was asleep (already constituting lack of consent). ([redacted] Tr. at 49:25.) She told him "to stop," to "get off of" her, and to "stop doing what he's doing" because Ms. M. was "not willing to participate in that." (*Id.* at 51:5–7.) Instead of stopping, Appellant responded, "it's okay, it's okay" and continued having sex with Ms. M. (*Id.* at 51:20–23.)

On this night and several others, Appellant put his hands on Ms. M.'s shoulders, so she could not get up. (*Id.* at 50:14–16.) Overpowered by his "bulky" frame, she tried to fight him off but was not strong enough. (*Id.* at 50:16–22.)

All of this was more than enough to show that Ms. M. did not consent. *See, e.g.*, *Monwara G.* v. *Abdul G.*, 153 A.D.3d 1174, 1175 (1st Dep't 2017)

(affirming the trial court's finding of sexual abuse in the third degree where respondent husband forced petitioner wife to engage in sex against her will); *People* v. *Cook*, 186 A.D.2d 879, 880 (3d Dep't 1992) (holding that forcible compulsion was established by the victim's testimony that defendant pulled her down, restrained her arms, removed her clothing and laid on top of her, preventing her escape while he had intercourse with her).

Not only was there lack of consent because Ms. M. was "asleep when the intercourse started," but once she woke up and tried to push Appellant off, he physically "restrained" her and continued having sex with her against her will. *Chodakowski*, 162 A.D.3d at 476; *Cook*, 186 A.D.2d at 880.

D. The Evidence Supports the Family Court's Finding of Assault in the Third Degree

Appellant argues there was "no evidence of any injury whatsoever to [Ms. M.]" to support the Family Court's finding that he committed assault in the third degree. (Br. at 39.) This argument fails, too.

"Physical injury" means impairment of physical condition or substantial pain. (Penal Law § 10.00 [9].) This element "may be satisfied by relatively minor injuries causing 'more than slight or trivial pain.'" *Matter of Martha B.* v. *Julian P.*, 133 A.D.3d 418, 419 (1st Dep't 2015).

Appellant disregards Ms. M.'s testimony about an incident in which Appellant grabbed her wrist and "held it tight" for "a couple of minutes," and that,

when he let go, it was red, and she had to apply an ice pack to it. [redacted] Tr. at 64:18–25, 65:1–25, 66:1–6.) Ms. M. testified that her wrist was "stinging and burning" after Appellant finally let go. (*Id.*)

Appellant argues that Ms. M. did not require medical attention and thus did not experience physical injury. (Br. at 40–41.) However, *People* v. *Guidice*, 83 N.Y.2d 630, 636 (1994) held that "[l]ack of medical treatment is but a factor to consider in resolving such issues, for pain is subjective." Indeed, the cases that Appellant cites, *see People* v. *Medor*, 39 A.D.3d 362 (1st Dep't 2007); *In re Manny P.*, 33 A.D.3d 330 (1st Dep't 2006), did not *require* the victim to have sought medical attention to prove assault—they merely considered it as a factor.

Taken together, Ms. M.'s testimony was sufficient to show that Appellant committed assault in the third degree by forcefully grabbing her wrist "with the intent to cause physical injury" to Ms. M., and in fact "caus[ing] such injury" to her. (Penal Law § 120.00 [1].)

V. THE FAMILY COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING MS. M.'S COUNSEL TO IMPEACH APPELLANT WITH AUDIO CLIPS TO SHOW A PRIOR INCONSISTENT STATEMENT

Appellant's argument that the Trial Court improperly allowed Ms. M.'s counsel to play certain audio clips to impeach Appellant with a prior inconsistent statement (Br. at 24–26) is also meritless.

Appellant challenges the clips[9] as "hearsay." (Br. at 23, 25.) But they were not hearsay. Hearsay is an out-of-court statement offered for the truth of the matter asserted. *Nucci ex rel. Nucci* v. *Proper*, 95 N.Y.2d 597, 602 (2001). Statements not offered for the truth of the matter asserted are not hearsay. *See DeSario* v. *SL Green Mgm't LLC*, 105 A.D.3d 421, 422 (1st Dep't 2013); *Giardino* v. *Beranbaum*, 279 A.D.2d 282, 282 (1st Dep't 2001). Here, Petitioner's counsel offered the clips for the well-established non-hearsay purpose of showing a prior inconsistent statement. *See People* v. *Duncan*, 46 N.Y.2d 74, 80 (1978) ("As a general rule, the credibility of any witness can be attacked by showing an inconsistency between his testimony at trial and what he has said on previous occasions.").

Appellant's argument that the Family Court abused its discretion in allowing the tapes to be played as impeachment evidence because no foundation was laid and Appellant denied recognizing his voice on the clips (Br. at 24) is also incorrect.[10]

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[9] Appellant refers to the audio clips as "video tapes" because Ms. M. recorded Appellant using a smart phone camera feature. However, no video was displayed. The "tapes" played in court are most accurately described as audio clips.

[10] The Family Court's decision on whether to admit impeachment evidence is reviewed under an abuse of discretion standard. *See People* v. *Ludwig*, 24 N.Y.3d 221, 223 (2014); *People* v. *Duncan*, 46 N.Y.2d 74, 80 (1978).

Under New York law, laying a foundation is not required where the evidence presented is a prior inconsistent statement of a party opponent offered for impeachment purposes. *See Viera* v. *New York City Transit Auth.*, 221 A.D.2d 625, 625 (2d Dep't 1995) ("Where the witness sought to be discredited is a party to the action, the laying of a foundation is unnecessary, as the party's statements are treated as admissions and, as such, are received as primary evidence against him or her."); Robert A. Barter & Vincent C. Alexander, *Evidence in New York State and Federal Courts* § 6:52 (Nov. 2022 Update) ("[F]oundation requirements are inoperative, however, when the prior inconsistent statement is that of an adverse party."); 1 McCormick On Evidence § 37 (8th ed. Jan. 2020 Update) ("If a party takes the stand as a witness and the adversary desires to use the party's prior inconsistent statement . . . the prevailing view is that the requirement for a foundation is inapplicable. . . .").

Appellant's argument that the recording did not qualify as a prior inconsistent statement because it was purportedly consistent with Appellant's testimony (Br. at 26) also fails. Appellant argues that "[t]he male voice on the tape does not admit to multiple counts of rape and sexual assault." (*Id.*) But that was not the testimony being impeached. Rather, as the Family Court stated, the tape was played to impeach Appellant's statement on cross-examination that, between [redacted]

[redacted] he had never told Ms. M. that a wife has a duty to have sex with her husband. ([redacted] Tr. at 99:24–25, 100:1–8; Decision at 2.)

The transcription of the audio clips in the trial transcript is difficult to follow and appears to be incomplete. But, even if Appellant's statement on the tape was not directly at odds with his testimony, New York courts do not require prior inconsistent statements to "directly contradict the witness' testimony." *People* v. *Wise*, 46 N.Y.2d 321, 326 (1978) ("Indeed, a more rigorous rule requiring direct contradiction would be at odds with the purpose underlying use of prior inconsistents, since such statements are admitted principally to assist the jury in its fact-finding role."); *see also Larkin* v. *Nassau Electric R. Co.*, 205 N.Y. 267, 269 (1912) ("Nor need there be a direct and positive contradiction. It is enough that the testimony and the statements are inconsistent and tend to prove differing facts.").

In any event, any error in admission of the audio clips was harmless. The clips concerned a collateral issue not necessary to support the Family Court's findings that Appellant committed family offenses. Moreover, while the Family Court referred to the clips in his recitation of the evidence Ms. M. offered, he noted that they were offered "for impeachment purposes," and there is no suggestion that he relied on them in any way in either assessing Appellant's credibility or in finding that Ms. M.'s allegations of family offenses was supported by a preponderance of the evidence. (Decision at 3.)

In these circumstances, any error was harmless. *See, e.g.*, *In re Ramel Anthony S.*, 124 A.D.3d 445, 445 (1st Dep't 2015) (concluding that error in admitting certain agency progress notes was harmless "in light of the clear and convincing evidence of permanent neglect in the remaining progress notes and the testimony adduced at the fact-finding hearing"); *Gracie C.* v. *Nelson C.*, 118 A.D.3d 417, 417 (1st Dep't 2014) (holding error was harmless where there was "overwhelming additional evidence supporting the court's determination"); *In re Virginia C.*, 88 A.D.3d 514 (1st Dep't 2011) ("In any event, even if Family Court improperly admitted the postpetition evidence, such evidence was harmless.").

VI. THE FAMILY COURT PROPERLY FOUND THAT APPELLANT VIOLATED THE TEMPORARY ORDER OF PROTECTION, WARRANTING AN ORDER OF PROTECTION

Section 842 of the Family Court Act allows for an Order of Protection to be issued on "a finding by the court on the record that the conduct alleged in the petition is in violation of a valid order of protection." The court found that "Respondent violated the Temporary Order of Protection by sending Petitioner text messages during the pendency of this matter which commenced in [redacted] (Decision at 2.) A total of five pieces of documentary evidence were entered into the record demonstrating Appellant's violations. *See* [redacted]. at 2; [redacted] Tr. at 2. Appellant also admitted that he knew about the TOP by [redacted] but continued to

send Ms. M. text messages anyway. ([redacted] Tr. at 45:15–22; *see also* Decision at 2.)

In *Lisa T.* v. *King E.T.*, 30 N.Y.3d 548, 551, 556–57 (2017), the court affirmed the Family Court's order of protection after finding "willful violations of two [TOPs]" where respondent had knowledge of the TOP and, regardless, communicated with petitioner's mother about issues "unrelated to the child's visitation or any emergency." *See also Rosa N.* v. *Luis F.*, 87 N.Y.S.3d 155, 156–57 (1d Dep't 2018) (affirming Order of Protection where respondent was aware of a TOP prohibiting communication but continued to contact petitioner and admitted to doing so during a hearing).

Appellant does not appear to challenge this finding, but rather, attempts to downplay his violations by describing them as "poor judgment" and "technical only."[11] However, the facts are simple: Appellant was aware that a TOP existed prohibiting contact with Ms. M., and he repeatedly contacted her about issues wholly unrelated to visitation. The record, evidence, "and Respondent's own admissions," support the Family Court's finding that Appellant "violated the underlying Temporary Order of Protection," and Appellant provides no reason to disturb that finding. (Decision at 4.)

[11] Appellant does not address violations of the Temporary Order of Protection—or that Ms. M substantiated the Violation Petition—other than a passing reference to the violations as "technical only." Br. at 42.

VII. THE FAMILY COURT PROPERLY FOUND AGGRAVATING CIRCUMSTANCES AND CORRECTLY GRANTED A FIVE-YEAR ORDER OF PROTECTION THAT INCLUDED THE SUBJECT CHILDREN

Section 842 of the New York Family Court Act permits a family court to issue up to a five-year order of protection upon a finding of any one of the aggravating circumstances outlined in Section 827. (Fam. Ct. Act § 842.)

A. The Record Supports a Finding of Aggravating Circumstances

To the extent that Appellant is challenging the Family Court's finding of 'aggravating circumstances," that challenge also fails. Appellant's only argument is to state that the finding of aggravating circumstances as to Ms. M. is "not supported by legally sufficient evidence"—which is not the standard—"or a preponderance of the evidence." (Br. at 44.)

That is incorrect. The Family Court Act defines aggravating circumstances as covering multiple situations, which include, in pertinent part here, "physical injury . . . to the petitioner caused by the respondent" or "the exposure of any family or household member to physical injury by the respondent. . . ." (Fam. Ct. Act § 827 [a] [vii].) The evidence supports the Family Court's finding of aggravating circumstances in three ways.

First, the Family Court made a finding of assault in the third degree, which includes physical injury. (Decision at 3.) As in *Coumba F.* v. *Mamdou D.*,

102 A.D.3d 634, 634 (1st Dep't 2013), where the court affirmed a finding of aggravating circumstances where the "evidence . . . show[ed] that petitioner sustained a physical injury, i.e., pain and bruises after respondent struck her," the court should affirm the findings here because Appellant caused Ms. M. physical injury when he forcefully grabbed and held her wrist.

Second, courts in this Department have affirmed findings of aggravating circumstances where a child was present during a violent incident (even just "present in the home") or where the violence was directed toward the child. *See Coumba F.*, 102 A.D.3d at 635; *Monique J.* v. *Keith S.*, 194 A.D.3d 611, 612 (1st Dep't 2021); *Omobolanle O.* v. *Kevin J.*, 154 A.D.3d 442, 443 (1st Dep't 2017). The court in *Coumba F.* held that the "finding of aggravating circumstances [wa]s supported by a preponderance of the evidence showing that the child was present during a number of violent incidents directed at petitioner." 102 A.D.3d at 634 (citing Fam. Ct. Act § 827 [a] [vii]).

Here, Ms. M. testified that the couple's then-three-year-old son was present for the incident on [redacted] in which Appellant aggressively threw a metal cup and cooking tray at them while repeating, "Watch what's going to happen." ([redacted] Tr. at 73:18–24, 74:15–16.) Ms. M. was forced to shield the young child with her body as she carried him out of the apartment. (*Id.* at 74:4–8.) Ms. M. testified that in mid[redacted], both children were present in the home, playing

directly adjacent to the hallway in which a loud argument took place after Ms. M. accused Appellant of raping her, and he grabbed her wrist tightly for several minutes. [redacted] Tr. at 47:2–4, 64:18–25, 65:1–25; [redacted] Tr. at 54:20–25, 55:11–23.) As discussed, Ms. M. testified extensively about Appellant's sexual abuse. She also testified to the children's close proximity: the distance from the children's bed to Appellant's bed to which he carried Ms. M. was only about six feet. ([redacted] Tr. at 47:9–15.)

Thus, the Family Court properly found aggravating circumstances because Appellant's violent and aggressive conduct took place both "in the presence of the child[ren]" and while the children were "present in the home" even if his actions were sometimes "directed [only] at Petitioner." *Monique J.*, 194 A.D.3d at 612; *Omobolanle O.*, 154 A.D.3d at 443.

Third, as discussed *supra*, the record provides a separate basis for a finding of aggravating circumstances due to "a history of repeated violations of prior orders of protection by the respondent." (Fam. Ct. Act § 827 [a] [vii]). This includes temporary orders of protection. *See, Jaynie S.* v. *Gaetano D.*, 134 A.D.3d 473, 474 (1st Dep't 2015).

B. The Children Were Properly Included in the Order of Protection

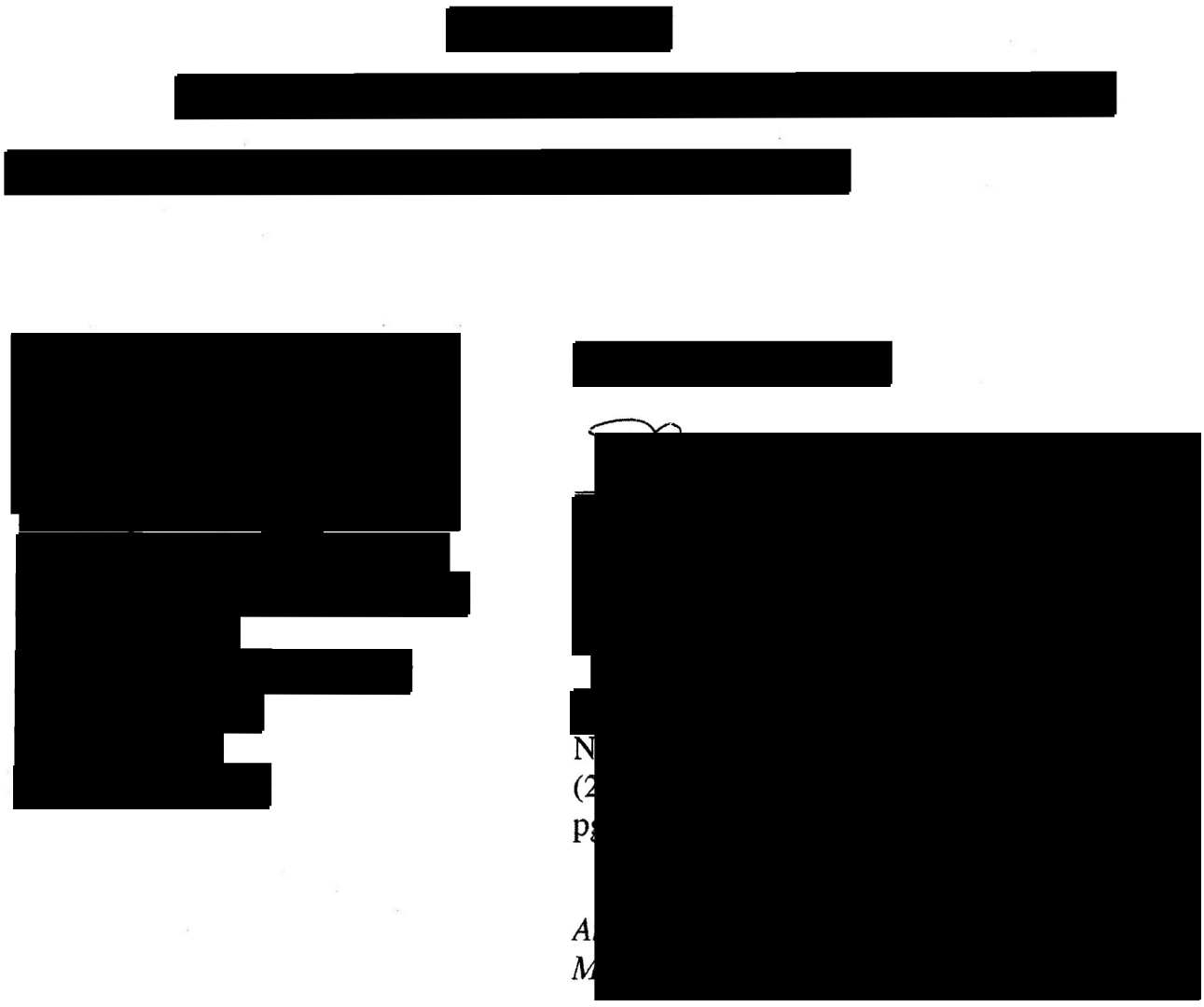
Appellant's assertion that the children should not have been included in the order of protection (Br. at 44) is also baseless. To start, Appellant did not

challenge the inclusion of the children in the Order of Protection below, and the issue therefore is not preserved for appellate review. *See Tatyana M.* v. *Mark R.*, 205 A.D.3d 420, 422 (1st Dep't 2022).

In any event, the Family Court properly found that the children should be included in the final order of protection. The court in *Tatyana M.* held that the child's inclusion in the order of protection was warranted due to "the fact that respondent committed the [family] offenses in the child's presence." *Id.*; *see also Danta P.C.* v. *Tyrell C.*, 125 A.D.3d 568, 568 (1st Dep't 2015) ("The Referee properly issued the order of protection in favor of the children as well as petitioner, because some of respondent's threatening statements to petitioner were made in the children's presence."). The court in *Coumba F.* held that "[a]lthough respondent's violence was directed toward petitioner, it occurred a number of times in the presence of the child; thus the inclusion of the child in the order is warranted." *Coumba F.*, 102 A.D.3d at 635.

Appellant claims there was "absolutely no evidence" of "any conduct which placed the children at risk," but that is not true. (Br. at 44.) Here, as detailed in section VII(A) *supra* on aggravating circumstances, Appellant committed multiple family offenses "in the presence of the subject children." (Decision at 4.) The record supports their inclusion in the order.

Additionally, the trial court was measured in entering an order that fit the facts of the case by issuing only a two-year limited Order of Protection for the children, simply requiring that Appellant refrain from committing any family offenses against the children. (Decision at 1.) Further, Ms. M.'s Order of Protection "expressly preserves respondent's visitation rights" because it includes a carveout to facilitate visitation. Decision at 1; *Tatyana M.*, 205 A.D.3d at 422. This Court should affirm these appropriately crafted orders.



PRINTING SPECIFICATIONS STATEMENT

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