SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 6, 2011

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. JEROME C. GORSKI

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

278.1

CA 10-00871

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

EMMA HARTSOCK, INDIVIDUALLY AND AS TEMPORARY GUARDIAN OF THE PERSON AND PROPERTY OF ROY A. HARTSOCK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT T. SCACCIA, ET AL., DEFENDANTS, NASH-CAR SALES & SERVICE AND E. DAVID NASHWINTER, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

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

DIXON & HAMILTON, LLP, GETZVILLE (MICHAEL B. DIXON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 29, 2009. The order granted the motion of defendants Nash-Car Sales & Service and E. David Nashwinter for summary judgment dismissing the complaint against them.

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

Memorandum: In appeal No. 1, plaintiff appeals from an order granting the motion of defendants Nash-Car Sales & Service and E. David Nashwinter (collectively, Nashwinter defendants) for summary judgment dismissing the complaint against them. In appeal No. 2, defendant Robert T. Scaccia appeals from an order granting the motion of the Nashwinter defendants for summary judgment dismissing Scaccia's cross claim against them.

Plaintiff is the mother and temporary guardian of Roy A. Hartsock, who was seriously injured in a motor vehicle accident that occurred while he was a passenger in a vehicle driven by Scaccia. Scaccia lost control of the vehicle, which flipped and struck a utility pole. A police accident report, authored in part by Niagara County Deputy Sheriff Timothy Callaghan, concluded that Scaccia had been speeding, had a blood alcohol content of .14% and had two front tires that were under the "legal limit[]" for tread measurement. Callaghan discovered that the Nashwinter defendants inspected the vehicle three days prior to the accident and determined that it passed inspection.

With respect to the order in appeal No. 1, we conclude that Supreme Court properly granted the motion of the Nashwinter defendants for summary judgment dismissing the complaint against them. Even assuming, arguendo, that the Nashwinter defendants failed to inspect Scaccia's vehicle correctly, we conclude that there is no evidence establishing that they assumed a duty to plaintiff by "launch[ing] a force or instrument of harm" (*Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [internal quotation marks omitted]). Indeed, there is no evidence that the alleged failure to inspect the tires correctly created "an unreasonable risk of harm to others" (*Church v Callanan Indus.*, 99 NY2d 104, 111; *see generally Stiver*, 9 NY3d at 257).

In appeal No. 2, we conclude that the court properly granted the motion of the Nashwinter defendants for summary judgment dismissing Scaccia's cross claim for indemnification "and/or" contribution against them. Even assuming, arguendo, that "[a] legal duty independent of [their] contractual obligations [to Scaccia] may be imposed by law [on the Nashwinter defendants] as an incident to [that contractual] relationship" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551; *see generally Raquet v Braun*, 90 NY2d 177, 182-183), we conclude that the Nashwinter defendants met their initial burden on the motion, and Scaccia failed to raise a triable issue of fact whether the condition of the tires was a proximate cause of the accident. In opposition to the motion, Scaccia submitted the deposition testimony of Callaghan, who testified that he could not recall the tire measurements but that the tires were "visibly . . . unsafe." Callaghan could not conclude for certain that the tires were a cause of the accident or whether the accident would have occurred had the tires been within the legal limit for tread measurement. Given the speculative nature of Callaghan's deposition testimony and the absence of any other evidence that the tires were under the legal limit for tread measurement or otherwise a cause of the accident, we conclude that Scaccia failed to raise a triable issue of fact sufficient to defeat the motion (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544; *Swauger v White*, 1 AD3d 918, 919-920).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

278.2

CA 10-00872

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

EMMA HARTSOCK, INDIVIDUALLY AND AS TEMPORARY GUARDIAN OF THE PERSON AND PROPERTY OF ROY A. HARTSOCK, PLAINTIFF,

V MEMORANDUM AND ORDER

ROBERT T. SCACCIA, DEFENDANT-APPELLANT, NASH-CAR SALES & SERVICE, E. DAVID NASHWINTER, DEFENDANTS-RESPONDENTS, JULIE'S SEABREEZE RESTAURANT, ET AL., DEFENDANTS. (APPEAL NO. 2.)

LAW OFFICES OF TAYLOR & SANTACROSE, BUFFALO (DESTIN C. SANTACROSE OF COUNSEL), FOR DEFENDANT-APPELLANT.

DIXON & HAMILTON, LLP, GETZVILLE (MICHAEL B. DIXON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 8, 2010. The order granted the motion of defendants Nash-Car Sales & Service and E. David Nashwinter for summary judgment dismissing defendant Robert T. Scaccia's cross claim against them.

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

Same Memorandum as in *Hartsock v Scaccia* ([appeal No. 1] ___ AD3d ___ [May 6, 2011]).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

281

KA 09-00436

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY ATTEA, DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered October 8, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of stolen property in the third degree (Penal Law § 165.50). Contrary to defendant's contention, the plea was not jurisdictionally defective (*cf. People v Zanghi*, 79 NY2d 815). Defendant was arrested for criminal possession of stolen property in the fourth degree and was issued an appearance ticket directing him to appear in Buffalo City Court (*see* CPL 150.20 [2]). A felony complaint was filed in City Court, the appropriate local court, with respect to that charge (*see* CPL 150.50 [1]), and a warrant was issued for defendant's arrest when he failed to appear (*see* CPL 150.60). Defendant was thereafter arrested on an unrelated charge and was held on the warrant issued on the charge of criminal possession of stolen property in the fourth degree. The local court held defendant for the action of a grand jury on that charge (*see* CPL 180.30 [1]). As part of a plea bargain in County Court that included defendant's waiver of the right to appeal and the People's agreement not to seek persistent felony offender status, defendant agreed to waive presentation to the grand jury and to plead guilty to a superior court information (SCI) charging him with criminal possession of stolen property in the third degree (*see* CPL 195.10 [1] [a]). Inasmuch as defendant was not held for the action of a grand jury on that offense, the court lacked jurisdiction to accept the plea to a higher charge (*see People v Pierce*, 14 NY3d 564, 568-571; *Zanghi*, 79 NY2d at 817). The People therefore filed a new felony complaint charging defendant with criminal possession of stolen property in the

third degree and requested that County Court exercise its discretion to sit as a local criminal court to arraign defendant on the new felony complaint (*see* CPL 10.20 [3] [a]), and County Court granted that request.

We reject defendant's contention that the court lacked jurisdiction to accept his plea to the SCI because he had not been "arrested" prior to his arraignment on the felony complaint charging him with criminal possession of stolen property in the third degree. A superior court is mandated to sit as a local court to arraign a defendant on a felony complaint if the defendant is brought before it following his or her arrest (*see* CPL 180.20 [2]); however, we reject defendant's contention that the court's jurisdiction is determined by whether the defendant was actually arrested on the felony complaint. Here, we conclude that the court properly exercised its discretion pursuant to CPL 10.20 (3) (a) to sit as a local court in order to arraign defendant on the felony complaint, and defendant was therefore held for the action of the grand jury of the appropriate superior court (*see* CPL 180.30 [1]). The plea entered in the superior court, i.e., County Court, thus properly comported with the requirements of CPL 195.20.

To the extent that defendant's contention that he was denied effective assistance of counsel survives the plea (*see People v Hamilton*, 59 AD3d 973, *lv denied* 12 NY3d 854; *People v Burke*, 256 AD2d 1244, *lv denied* 93 NY2d 851), we conclude that it is without merit (*see generally People v Ford*, 86 NY2d 397, 404). We have reviewed defendant's remaining contention and conclude that it is without merit.

All concur except CENTRA and CARNI, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully disagree with the conclusion of our colleagues that County Court had jurisdiction to accept defendant's plea to the superior court information (SCI). We therefore dissent.

Contrary to the theory advanced by the People, the instances in which a superior court may sit as a local court for purposes of arraignment are defined by statute and are limited in nature. Specifically, CPL 10.20 (3) (a) provides in relevant part that "[s]uperior court judges may, in their discretion, sit as local criminal courts for the . . . purposes . . . [of] conducting arraignments, as provided in" CPL 180.20 (2). Contrary to the view espoused by the majority, superior court judges do not have unlimited discretion to decide when and under what circumstances they may sit as local criminal courts inasmuch as their discretion is limited by CPL 10.20 (3) (a).

Pursuant to CPL 180.20 (2), "[w]hen a defendant arrested by a police officer for a felony has been brought before a superior court judge sitting as a local criminal court for arraignment upon a felony criminal complaint charging such felony, such judge must, as a local criminal court, arraign the defendant upon such felony complaint." Here, it is undisputed that defendant was not arrested with respect to

the second felony complaint. Thus, CPL 180.20 (2) is not applicable, and the SCI is jurisdictionally defective.

We would therefore reverse the judgment, vacate defendant's plea, dismiss the SCI and remit the matter to County Court for proceedings pursuant to CPL 470.45.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

335

CA 10-02164

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

SALLY SIEGL AND JOHN SIEGL, PLAINTIFFS,

V MEMORANDUM AND ORDER

NEW PLAN EXCEL REALTY TRUST, INC., DEFENDANT.

NEW PLAN EXCEL REALTY TRUST, INC., THIRD-PARTY PLAINTIFF-APPELLANT,

V

AALCO SEPTIC & SEWER, INC., THIRD-PARTY DEFENDANT-RESPONDENT,
AND JAMES G. BONGIOVANNI, THIRD-PARTY DEFENDANT.

SASSANI & SCHENCK, P.C., LIVERPOOL (MITCHELL P. LENCZEWSKI OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ALAN J. DEPETERS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered September 14, 2010 in a personal injury action. The order granted the motion of third-party defendant AALCO Septic & Sewer, Inc. for summary judgment dismissing the amended third-party complaint against it.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Sally Siegl (plaintiff), who fell in a parking lot owned by defendant-third-party plaintiff, New Plan Excel Realty Trust, Inc. (New Plan). Third-party defendant AALCO Septic & Sewer, Inc. (AALCO) had been hired by New Plan to repair a water main break approximately two months before plaintiff fell, and AALCO had to dig a hole in the parking lot to reach the broken water main. After repairing the water main, AALCO refilled the hole and covered it with crushed stones to make the area level to the rest of the parking lot. According to New Plan, the stones thereafter settled and thereby caused a depression in the parking lot, and that is the area where plaintiff fell. New Plan appeals from an order granting AALCO's motion for summary judgment dismissing the amended third-party complaint against it, which asserted, inter alia, a claim for common-law indemnification and a cause of action for contribution. We

conclude that Supreme Court properly granted the motion.

It is well settled that the " 'right of common-law indemnification belongs to parties determined to be vicariously liable without proof of any negligence or active fault on their part' " (*Brickel v Buffalo Mun. Hous. Auth.*, 280 AD2d 985, 985). " '[W]here one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent' . . . Conversely, where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy" (*Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643, 646). Here, even assuming, arguendo, that AALCO was negligent in the performance of its duties under its oral contract with New Plan to repair the water main in New Plan's parking lot, we conclude that New Plan was itself negligent in failing to conduct an adequate inspection of its own parking lot and to remedy any defective conditions therein (*see generally Di Ponzio v Riordan*, 89 NY2d 578, 582).

We further conclude that New Plan is not entitled to contribution from AALCO. "To sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that the third-party defendant owed it a duty of reasonable care independent of its contractual obligations, or that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries" (*Guerra v St. Catherine of Sienna*, 79 AD3d 808, 809; *see Bruno v Price Enters.*, 299 AD2d 846). Here, AALCO did not owe a duty of reasonable care independent of its obligations based on its oral contract with New Plan. The record establishes as a matter of law that AALCO was hired to repair the broken water main, not to ensure that the hole in the parking lot surface was permanently repaired, and that AALCO exercised reasonable care in the performance of those contractual duties.

We cannot agree with the dissent that AALCO failed to meet its initial burden of establishing as a matter of law that it owed no duty of care directly to the injured plaintiff (*see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136). As a preliminary matter, we note that New Plan did not raise that contention either before the motion court or on appeal, and thus any such issue is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984). Indeed, New Plan appears to concede on appeal that AALCO owed no duty to plaintiff, stating in its brief that "the *only* relationship at issue before the [c]ourt on the motion was the relationship between AALCO and New Plan" (emphasis added).

Even assuming, arguendo, that the issue addressed by the dissent is properly before us, we conclude that it lacks merit. As the dissent notes, "a party who enters into a contract to render services may be said to have assumed a duty of care . . . to third [parties] . . . where [that] party, in failing to exercise reasonable care in the performance of [its] duties, 'launche[s] a force or instrument of harm' " (*Espinal*, 98 NY2d at 140, quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168). In our view, however, AALCO established as a

matter of law that it did not launch a force or instrumentality of harm, and New Plan failed to raise a triable issue of fact in opposition. AALCO's vice-president testified without contradiction that, after refilling the hole with stone and leveling it with the remainder of the parking lot, AALCO workers placed large barrels around the area and cordoned it off with tape before leaving the work site. At that point, AALCO's duties under the contract were complete, and it cannot be said that AALCO thereby placed anyone in danger. We thus conclude that AALCO established as a matter of law that it exercised reasonable care in the performance of its contractual duties, which did not include the obligation to ensure that the refilled hole remained forever level with the pavement in the parking lot, and plaintiff failed to raise a triable issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

All concur except PERADOTTO, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent in part because, in my view, there is a question of fact whether third-party defendant AALCO Septic & Sewer, Inc. (AALCO) created the dangerous condition in question, thereby rendering it liable for injuries sustained by Sally Siegl (plaintiff) (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142).

Plaintiffs commenced this action seeking damages for injuries that plaintiff sustained when she fell in a parking lot owned by defendant-third-party plaintiff, New Plan Excel Realty Trust, Inc. (New Plan). Approximately two months prior to the accident, New Plan hired AALCO to repair a broken water main located underneath the parking lot. To access the water main, AALCO cut through the pavement and dug a hole in the parking lot that was approximately six feet long by six feet wide and seven feet deep. After repairing the water main, AALCO refilled the excavated area and topped it with "cold patch," i.e., a mixture of crushed stone and tar, which was then tamped down and sealed. During the period of time between the placement of the cold patch and plaintiff's accident, the crushed stones apparently settled, causing a depression in the parking lot in the area where plaintiff fell. New Plan commenced a third-party action against AALCO seeking, inter alia, common-law indemnification and contribution. In its bill of particulars, New Plan alleged that AALCO "caus[ed] the defect" in the parking lot by "failing to adequately and properly refill the hole caused by their excavation work" and that AALCO "created a hazardous depression in the parking lot . . . ."

I agree with the majority that Supreme Court properly granted that part of AALCO's motion for summary judgment dismissing the common-law indemnification claim against it inasmuch as "[t]he right of common-law indemnification belongs to parties determined to be vicariously liable *without proof of any negligence or active fault on their part*" (*Brickel v Buffalo Mun. Hous. Auth.*, 280 AD2d 985, 985 [emphasis added]). As the majority correctly notes, regardless of AALCO's negligence in the performance of its repair work, New Plan was itself negligent in failing to conduct an adequate inspection of its parking lot and in failing to remedy any defective conditions therein

(*see generally Basso v Miller*, 40 NY2d 233, 241).

In my view, however, the court erred in granting that part of AALCO's motion for summary judgment dismissing the contribution cause of action against it. It is well settled that "a party [that] enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons . . . where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, 'launche[s] a force or instrument of harm' " (*Espinal*, 98 NY2d at 140, quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168) or, in other words, where that party creates or exacerbates a dangerous condition (*see id.* at 142-143). Here, AALCO's own submissions raised a triable issue of fact whether it "launched an instrument of harm by creating or exacerbating a hazardous condition," i.e., the depression in the parking lot (*Trzaska v Allied Frozen Stor., Inc.*, 77 AD3d 1291, 1293; *see Espinal*, 98 NY2d at 142-143; *see also Miller v Pike Co., Inc.*, 52 AD3d 1240). In support of its motion, AALCO submitted, inter alia, the deposition testimony of one of New Plan's maintenance workers, who testified that he does not typically monitor areas of the parking lot that have been treated with cold patch because cold patch "normally holds." Here, the cold patch allegedly settled approximately two inches within six to eight weeks after it was applied by AALCO. In my view, the development of such a significant depression within a relatively short period of time warrants at least an inference of negligence on the part of AALCO in filling the hole that it created, applying the cold patch, tamping it down, and/or sealing the area. I thus conclude that "there are triable issues of fact whether [AALCO] created or exacerbated the allegedly dangerous condition that caused plaintiff to fall" (*Miller*, 52 AD3d at 1240), precluding dismissal of the contribution cause of action against it.

I would therefore modify the order by denying that part of AALCO's motion for summary judgment dismissing the contribution cause of action against it and reinstating that cause of action.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

360

CA 10-00573

PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ.

HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF HERKIMER, DEFENDANT-RESPONDENT,
AND COUNTY OF HERKIMER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ROBERT J. MALONE, COUNTY ATTORNEY, HERKIMER (LORRAINE H. LEWANDROWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

KERNAN AND KERNAN, P.C., UTICA (MICHAEL H. STEPHENS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL LONGSTREET OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from a judgment (denominated order) of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered June 17, 2009. The judgment denied the motion of defendant County of Herkimer for summary judgment and granted the motion of defendant Village of Herkimer for summary judgment.

It is hereby ORDERED that the appeal by defendant County of Herkimer from that part of the judgment denying its motion for summary judgment is unanimously dismissed (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985) and the judgment is modified on the law by denying the motion of defendant Village of Herkimer in its entirety, reinstating the complaint against that defendant and reinstating the cross claims of defendant County of Herkimer and as modified the judgment is affirmed without costs.

Same Memorandum as in *Herkimer County Indus. Dev. Agency v Village of Herkimer* ([appeal No. 2] ___ AD3d ___ [May 6, 2011]).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

361

CA 10-01845

PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ.

HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY,
PLAINTIFF,

V MEMORANDUM AND ORDER

VILLAGE OF HERKIMER, DEFENDANT-RESPONDENT,
AND COUNTY OF HERKIMER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROBERT J. MALONE, COUNTY ATTORNEY, HERKIMER (LORRAINE H. LEWANDROWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL LONGSTREET OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered April 30, 2010. The order, inter alia, denied the motion of defendant County of Herkimer seeking leave to renew its motion for summary judgment on its cross claims, for leave to serve an amended answer adding a third cross claim, and for summary judgment on the third cross claim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion of defendant County of Herkimer seeking leave to renew its motion for summary judgment on its first and second cross claims and granting that part of the motion seeking leave to serve an amended answer to assert a third cross claim, upon condition that it shall serve the amended answer within 20 days of service of a copy of the order of this Court with notice of entry and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking a declaration that the real property taxes levied against it by defendant Village of Herkimer (Village) are void inasmuch as plaintiff is exempt from the payment of such taxes. Pursuant to Village Law § 11-1118, the Village added the unpaid water rents owed by plaintiff's tenant to the annual tax levies of the Village in 2004 and 2005 and, when plaintiff failed to pay those amounts, the Village turned the unpaid tax levies over to defendant County of Herkimer (County) pursuant to RPTL 1436. Pursuant to RPTL 1442 (4), the County, under protest, paid the Village the amounts levied against plaintiff for 2004 and refused to pay the Village the amounts levied against plaintiff for 2005 because plaintiff is a tax-exempt entity. The Village moved for, inter alia, summary judgment dismissing the

complaint against it and for summary judgment on its cross claim seeking a declaration that the County is obligated pursuant to RPTL 1442 (4) for the amount owed by plaintiff for unpaid water rents. The County moved for, inter alia, summary judgment on its cross claims, alleging that it is not liable to the Village pursuant to RPTL 1442 (4) because plaintiff is exempt from paying property taxes (*see* General Municipal Law § 874). In appeal No. 1, the County and plaintiff each appeal from a judgment granting the Village's motion and denying the County's motion.

While the motions were pending, however, the County Legislature determined pursuant to RPTL 1138 (6) (a) that there is no practical method to enforce the collection of the delinquent tax liens against plaintiff, and the liens were thereafter cancelled. Pursuant to RPTL 1138 (6) (c), "[a] tax district shall not be required to credit or otherwise guarantee to any municipal corporation the amount of any delinquent tax lien [that] has been cancelled . . . If such a credit or guarantee shall have been given before the cancellation of the lien, the tax district shall be entitled to charge back to the municipal corporation the amount so credited or guaranteed." The County moved for leave to renew its motion for, inter alia, summary judgment on its cross claims based upon the action of the County Legislature resulting in the cancellation of the tax liens against plaintiff. Plaintiff joined in that part of the motion. The County alleged that the cancellation of those tax liens would affect the outcome of the prior summary judgment motions. The County also moved for leave to amend its answer to add a third cross claim alleging that, pursuant to RPTL 1138 (6) (c), it is not liable to the Village for the amounts of the tax liens against plaintiff, as well as for summary judgment on that cross claim. In appeal No. 2, the County appeals from an order that, inter alia, denied that motion.

Addressing first the order in appeal No. 2, we conclude that Supreme Court erred in denying those parts of the County's motion seeking leave to renew its prior motion for summary judgment and seeking leave to amend its answer to allege a third cross claim. We therefore modify the order accordingly. With respect to that part of the motion seeking leave to renew, we conclude that the County alleged new facts that would change the prior determination on its motion for summary judgment (*see* CPLR 2221 [e]; *cf. Cole v North Am. Adm'rs*, 11 AD3d 974), and thus that the court abused its discretion in denying the motion. Although the water rents were based on usage and thus were not taxes when they were billed to plaintiff's tenant (*see State Univ. of N.Y. v Patterson*, 42 AD2d 328, 329), plaintiff was not billed for the water rents but, rather, was issued tax notices after those unpaid amounts were added to the Village tax levy pursuant to Village Law § 11-1118 (*cf. id.*). We conclude that the Village was therefore bound by the provisions of the RPTL when it turned over those unpaid tax levies to the County for enforcement proceedings (*see* RPTL 1442 [5]). By alleging that the cancellation of the tax liens relieved the County from crediting or guaranteeing to the Village the amounts of its levies against plaintiff (*see* RPTL 1138 [6] [c]), the County alleged new facts that would affect the court's determination on the prior summary judgment motion.

We further conclude that the court abused its discretion in denying that part of the County's motion seeking leave to amend its answer to include a third cross claim alleging that it is not liable to the Village for the unpaid amounts of its tax levies against plaintiff, and we therefore further modify the order accordingly. Here, "there was no inordinate delay in seeking such relief, and there was no showing of prejudice to [the Village]" (*Torvec, Inc. v CXO on the GO of Del., LLC*, 38 AD3d 1175, 1176-1177; *see* CPLR 3025 [b]). The court, however, properly denied that part of the motion for summary judgment on the third cross claim inasmuch as issue on that cross claim has not been joined and thus that part of the motion is premature (*see* CPLR 3212 [a]).

In light of our determination in appeal No. 2, we conclude with respect to appeal No. 1 that the court erred in granting the Village's motion for, inter alia, summary judgment dismissing the complaint against it and summary judgment on its cross claim. Further, we conclude that the court erred to the extent that it dismissed the County's cross claims and thus that they should be reinstated. We therefore modify the judgment accordingly.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

362

CA 10-01846

PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ.

HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY,
PLAINTIFF,

V ORDER

VILLAGE OF HERKIMER, DEFENDANT-RESPONDENT,
AND COUNTY OF HERKIMER, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

ROBERT J. MALONE, COUNTY ATTORNEY, HERKIMER (LORRAINE H. LEWANDROWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL LONGSTREET OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered May 11, 2010. The order denied the motion of defendant County of Herkimer for relief pursuant to 22 NYCRR 202.48 (b).

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

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

436

KA 09-01861

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAQUILLE DAVIS, ALSO KNOWN AS SHAQUILLE L. DAVIS, DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered August 4, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted robbery 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 attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [1]), defendant contends that County Court abused its discretion in denying his request for youthful offender status. We reject that contention. " 'The determination . . . whether to grant . . . youthful offender status rests within the sound discretion of the court and depends upon all the attending facts and circumstances of the case' " (*People v Dawson*, 71 AD3d 1490, 1490, *lv denied* 15 NY3d 749). Here, defendant attempted to rob a 64-year-old man who was out for his early morning walk and repeatedly punched him in the face, causing him to sustain a severely broken jaw that had to be wired shut for eight weeks. In light of the brutal and senseless nature of the crime, it cannot be said that the court abused its discretion in denying defendant's request for youthful offender status (*see People v Randleman*, 60 AD3d 1358, *lv denied* 12 NY3d 919; *People v Bell*, 56 AD3d 1227, *lv denied* 12 NY3d 781). We perceive no reason to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see People v Potter*, 13 AD3d 1191, *lv denied* 4 NY3d 889; *People v Phillips*, 289 AD2d 1021). Finally, the sentence is not unduly harsh or severe.

Entered: May 6, 2011

Patricia L. Morgan
Clerk of the Court

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

441

KA 10-00012

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARVIN J. SNYDER, DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, BUFFALO, FOR DEFENDANT-APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered December 21, 2009. The judgment convicted defendant, upon a jury verdict, of gang assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of gang assault in the first degree (Penal Law § 120.07), defendant contends that County Court abused its discretion in consolidating for trial defendant's indictment with those of two codefendants. We reject that contention. All three codefendants were part of a group that assaulted the same victim, and the evidence against them was virtually identical. Contrary to defendant's contention, there were no irreconcilable conflicts between the various defense theories (*see generally People v Mahboubian*, 74 NY2d 174, 184-185; *People v Roland*, 283 AD2d 965, *lv denied* 96 NY2d 924). Although none of the codefendants testified at trial, the primary defense of defendant and one of the codefendants was that another individual who was not a defendant in the case had alone caused the victim's injuries by repeatedly stomping on his head. The remaining codefendant claimed that she was not anywhere near the victim when he was beaten. Defendant also raised a justification defense, but that defense was not inconsistent with any of the other defenses asserted at trial. Moreover, the three codefendants did not accuse each other of the crime, and none of their attorneys acted as a second prosecutor against another codefendant. Under the circumstances, we conclude that the court did not abuse its discretion in consolidating the indictments for trial (*see People v Buccina*, 62 AD3d 1252, 1253, *lv denied* 12 NY3d 913; *People v Wilburn*, 50 AD3d 1617, 1618, *lv denied* 11 NY3d 742).

We reject the further contention of defendant that the evidence is legally insufficient to establish that he caused the victim's

injuries (*see generally People v Bleakley*, 69 NY2d 490, 495). Two prosecution witnesses testified that they observed defendant beating or kicking the victim as he lay defenseless on the ground. Another witness testified that defendant was among a group of people that surrounded the victim during the beating, although she admitted that she was uncertain which individuals took part in the beating. Defense counsel vigorously attacked the credibility of those witnesses, but it cannot be said that the testimony in question is incredible as a matter of law (*see People v Williams*, 81 AD3d 1281; *People v Nilsen*, 79 AD3d 1759). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there was a " 'valid line of reasoning and permissible inferences [that] could lead a rational person' to convict" defendant of gang assault in the first degree (*People v Santi*, 3 NY3d 234, 246, quoting *People v Williams*, 84 NY2d 925, 926). In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Given the serious nature of the injuries inflicted upon the victim, who sustained permanent brain damage, and considering defendant's criminal history, we conclude that the sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they lack merit.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

452

CA 10-01936

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, GREEN, AND GORSKI, JJ.

JOYCE A. GOETCHIUS, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JAMES J. GOETCHIUS, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PERRY J. SPAVENTO, M.D. AND MOUNT ST. MARY'S HOSPITAL OF NIAGARA FALLS, DEFENDANTS-RESPONDENTS.

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RICOTTA & VISCO, ATTORNEYS & COUNSELORS AT LAW, BUFFALO (JOHN M. VISCO OF COUNSEL), FOR DEFENDANT-RESPONDENT MOUNT ST. MARY'S HOSPITAL OF NIAGARA FALLS.

BROWN & TARANTINO, LLC, BUFFALO (TAMSIN J. HAGER OF COUNSEL), FOR DEFENDANT-RESPONDENT PERRY J. SPAVENTO, M.D.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered June 22, 2010 in a medical malpractice and wrongful death action. The order granted defendants' motion to compel.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph and granting the motion by directing plaintiff to submit to Supreme Court a certified complete copy of decedent's collateral source records from Community Blue and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: In this wrongful death action based upon defendants' alleged medical malpractice, plaintiff appeals from an order granting defendants' motion seeking, inter alia, to compel plaintiff to provide an authorization to obtain the records of the physician who performed bypass surgery on her husband (decedent) approximately seven years before his death, as well as the records of the hospital where the surgery took place, and to provide an authorization for the release of collateral source records from decedent's health insurance carrier, Community Blue. We conclude at the outset that, although plaintiff is not seeking damages for medical expenses incurred on behalf of decedent, the records from decedent's health insurance carrier are nevertheless "material and necessary" to the defense of this action (CPLR 3101 [a]), inasmuch as they may contain information "reasonably calculated to lead to relevant

evidence" (*Grieco v Kaleida Health* [appeal No. 2], 79 AD3d 1764, 1765). Indeed, the records are likely to include the names of decedent's medical providers and prior medical conditions that may be relevant to the defense of this action. We further conclude, however, that Supreme Court erred in directing plaintiff to provide an authorization permitting the release of those records to defendants. Rather, they should be reviewed by Supreme Court in camera so that irrelevant information is not disclosed to defendants (*see Tirado v Koritz*, 77 AD3d 1368, 1369; *see generally Tabone v Lee*, 59 AD3d 1021, 1022; *Mayer v Cusyck*, 284 AD2d 937). We therefore modify the order accordingly.

We reject plaintiff's contention that the court erred in directing her to provide defendants with information relating to decedent's bypass surgery. It is well settled that "[a] party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue" (*Weber v Ryder TRS, Inc.*, 49 AD3d 865, 866). Considering that the autopsy report listed arteriosclerotic coronary disease as one of the causes of decedent's death and that decedent's life expectancy is at issue, information with respect to the bypass surgery is relevant to this action or, at the very least, is reasonably calculated to lead to relevant evidence. We reject the further contention of plaintiff that defendants' informal request for such information constituted an interrogatory, which would not be permitted where, as here, the defendants have also served a demand for a bill of particulars and a notice of intention to depose the plaintiff (*see* CPLR 3130 [1]).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

454.1

KA 10-00186

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM A. MEACHAM, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered December 21, 2009. The judgment convicted defendant, upon a jury verdict, of gang assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of gang assault in the first degree (Penal Law § 120.07), defendant contends that the evidence is legally insufficient to establish that he intended to cause serious physical injury to the victim. We reject that contention (*see People v Chowdhury*, 22 AD3d 596, *lv denied* 6 NY3d 753; *see generally People v Bleakley*, 69 NY2d 490, 495). Multiple witnesses testified at trial that defendant repeatedly punched or kicked the victim while he was on the ground. As a result of the beating, the victim sustained fractures to his face and skull, as well as permanent brain damage. Several relatives and a friend of defendant also struck the victim while he was on the ground. The People presented evidence establishing that defendant spearheaded the assault because he was angry with the victim for posting photographs of individuals identified as registered sex offenders, including defendant, at the apartment complex where defendant and the victim resided. Although defendant did not admit during the assault or anytime thereafter that his intent was to cause serious physical injury to the victim, "[a] defendant may be presumed to intend the natural and probable consequences of his actions" (*People v Mahoney*, 6 AD3d 1104, *lv denied* 3 NY3d 660; *see People v Getch*, 50 NY2d 456, 465). The natural and probable consequences of repeatedly striking a man while he is on the ground defenseless is that he will sustain a serious physical injury within the meaning of Penal Law § 10.00 (10). Defendant's intent may also be "inferred from the totality of [his] conduct" (*People v Horton*, 18 NY2d 355, 359, *mot to amend remittitur granted* 19 NY2d 600, 634, *cert denied* 387 US 934; *see People v Mike*, 283 AD2d 989, *lv denied* 96 NY2d 904), including the anger that

defendant expressed toward the victim for having identified him in the photograph as a registered sex offender.

Contrary to defendant's further contention, the evidence is legally sufficient to establish that he was "aided by two or more persons actually present" in causing serious physical injury to the victim (Penal Law § 120.07; *see generally Bleakley*, 69 NY2d at 495). A friend of defendant who was staying in his apartment at the time of the assault testified that he observed defendant and five other people hitting the victim while he was on the ground. Similar testimony was given by another witness. Such testimony, accepted as true, established that there were at least two other people "in the immediate vicinity of the crime and [that they were] capable of rendering immediate assistance to [defendant]" (*People v Rivera*, 71 AD3d 701, 702). Further, based on our review of the record, we cannot conclude that the testimony of those witnesses was "so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]; *see People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there was a " 'valid line of reasoning and permissible inferences [that] could lead a rational person' to convict" defendant of gang assault in the first degree (*People v Santi*, 3 NY3d 234, 246; *see People v Sanchez*, 13 NY3d 554, 566, *rearg denied* 14 NY3d 750).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although defendant contends that the similar testimony of his friend and another witness is not worthy of belief, it is well settled that issues relating to the credibility of witnesses are primarily within the province of the jury, which observed and heard the witnesses (*see People v Massey*, 61 AD3d 1433, *lv denied* 13 NY3d 746; *People v Sorrentino*, 12 AD3d 1197, *lv denied* 4 NY3d 748).

Defendant failed to preserve for our review his further contention that County Court erred in failing to give a limiting instruction with respect to the evidence establishing that the victim posted defendant's photograph and identified him as a sex offender (*see People v Dandridge*, 26 AD3d 779, 780). 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 also failed to preserve for our review his contention that he was improperly penalized for exercising his right to a jury trial (*see People v Dorn*, 71 AD3d 1523). In any event, that contention is without merit. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial" (*People v*

Murphy, 68 AD3d 1730, 1731, *lv denied* 14 NY3d 843 [internal quotation marks omitted]). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

489

KA 11-00007

PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENEDICT AGOSTINI, DEFENDANT-APPELLANT.

WHITE & WHITE, NEW YORK CITY (DIARMUID WHITE OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered July 15, 2009. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that he was denied a fair trial based on the prosecutor's cross-examination of his wife concerning her prior employment as an exotic dancer. We agree with defendant that such questions were improper. Employment as an exotic dancer does not constitute a prior bad act for the purposes of cross-examination, and those questions were not relevant to any other issue in the case. We conclude, however, "that the prosecutor's misconduct did not cause such substantial prejudice to the defendant that he has been denied due process of law" (*People v Stabell*, 270 AD2d 894, 894, *lv denied* 95 NY2d 804 [internal quotation marks omitted]; *see People v Rubin*, 101 AD2d 71, 77, *lv denied* 63 NY2d 711; *People v Mott*, 94 AD2d 415, 418-419). "In this case, the misconduct was not pervasive and was limited in nature" (*Rubin*, 101 AD2d at 77). Defendant's further contention that he was denied a fair trial based upon two identical instances of prosecutorial misconduct is not preserved for our review (*see* CPL 470.05 [2]) and, in any event, it is without merit. Although County Court overruled defense counsel's objection with respect to the first of those instances, it responded to his subsequent objection by giving the jury a curative instruction. Defense counsel neither objected to that instruction nor moved for a mistrial.

We reject defendant's contention that his right of confrontation was violated when the court limited his cross-examination of a police detective regarding the methods used by the police to take witness statements. That detective interviewed only one witness and was not present for the interviews of other witnesses, and defense counsel was able to cross-examine all witnesses regarding the inconsistencies between their trial testimony and their statements to the police. Thus, under the circumstances of this case, we conclude that the court did not abuse its discretion in limiting defendant's cross-examination of the detective in question (*see generally People v Taylor*, 214 AD2d 757, *lv denied* 87 NY2d 851). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

490

KA 10-02313

PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

ANNE BERNARDO, DEFENDANT-RESPONDENT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR APPELLANT.

MARRIS & BARTHOLOMAE, P.C., SYRACUSE (WILLIAM R. BARTHOLOMAE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated March 23, 2010. The order granted the motion of defendant to dismiss the indictment pursuant to CPL 210.20 (1) (f) and 30.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion seeking to dismiss the indictment is denied, the indictment is reinstated, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings on the indictment.

Memorandum: The People appeal from an order granting defendant's motion to dismiss the indictment. We reverse. Defendant was indicted on October 9, 2009 for endangering the welfare of a child (Penal Law § 260.10 [1]) based on evidence that she suffered from Munchausen syndrome by proxy and had subjected her son to unnecessary medical treatments from 2000 through 2009. Although most of the allegedly unnecessary medical intervention occurred in New York, the child was also hospitalized in Massachusetts for blood poisoning in 2007. The child's medical records indicate that the hospital staff in Massachusetts suspected defendant of intentionally sickening the child. Also, while the child was still hospitalized in Massachusetts in December 2007, the hospital staff suspected defendant of intentionally sickening the child again when a tube of black acrylic paint was found in his stool, and defendant was banned from the hospital. Indeed, a physician at the hospital testified before the grand jury that he believed defendant, who was a nurse, had used the paint in an attempt to make the child's stool appear bloody and thereby generate further medical tests on the child.

We agree with the People that Supreme Court erred in determining that it did not have geographical jurisdiction over the offense. CPL

20.20 codifies the rule that, "for [New York] to have criminal jurisdiction, either the alleged conduct or some consequence of it must have occurred within the State" (*People v McLaughlin*, 80 NY2d 466, 471). Pursuant to CPL 20.20 (1) (a), a person may be prosecuted in New York when an element of the offense occurred in the State. Endangering the welfare of a child is considered a continuing offense because it "does not necessarily contemplate a single act . . . [Rather], a defendant may be guilty of [that offense] by virtue of a series of acts, none of which may be enough by itself to constitute the offense, but each of which when combined make out the crime" (*People v Keindl*, 68 NY2d 410, 421, *rearg denied* 69 NY2d 823; *see People v Hutzler*, 270 AD2d 934, 935-936, *lv denied* 94 NY2d 948).

Here, defendant began abusing her son in New York and continued in that course of conduct in Massachusetts. The record establishes that several tubes were unnecessarily surgically implanted in the child and that at least one of those tubes was implanted in New York before the child ever received any treatment in Massachusetts. Furthermore, the record of the grand jury proceeding establishes that unnecessary biopsies and X rays were conducted on the child in New York. We thus conclude that an element of endangering the welfare of a child occurred in New York and that the court had geographical jurisdiction over the offense pursuant to CPL 20.20 (1) (a) (*see People v Muhammad*, 13 AD3d 120, 121, *lv denied* 4 NY3d 801, 828; *People v Quackenbush*, 98 AD2d 875; *People v Hogle*, 18 Misc 3d 715, 720).

We also agree with the People that the indictment is not time-barred. The offense of endangering the welfare of a child, a class A misdemeanor, is subject to a two-year statute of limitations (*see* CPL 30.10 [2] [c]). The limitations period does not commence until after the last act of abuse occurs (*see People v DeLong*, 206 AD2d 914, 916), which was in December 2007. Thus, the indictment filed in October 2009 is timely.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

491

CA 10-01210

PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

DONALD J. SHARKEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH LIN-YUN CHOW, M.D., CELESTINE J. SZULEWSKI, P.A., SPRINGVILLE PEDIATRICS AND ADULT CARE, AND RONALD G. BASALYGA, M.D., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICES OF LINDA J. MARSH AND ARTHUR J. ZILLER, BUFFALO (ARTHUR ZILLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CARTER, CONBOY, CASE, BLACKMORE, MALONEY & LAIRD, P.C., ALBANY (ADAM H. COOPER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JOSEPH LIN-YUN CHOW, M.D., CELESTINE J. SZULEWSKI, P.A., AND SPRINGVILLE PEDIATRICS AND ADULT CARE.

DAMON MOREY LLP, BUFFALO, MEISELMAN, DENLEA, PACKMAN, CARTON & EBERZ, P.C., WHITE PLAINS (MYRA I. PACKMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT RONALD G. BASALYGA, M.D.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered December 1, 2009 in a medical malpractice action. The order denied the motion of plaintiff to strike defendants' joint answer.

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

Same Memorandum as in *Sharkey v Chow* ([appeal No. 2] ___ AD3d ___ [May 6, 2011]).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

492

CA 10-01211

PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

DONALD J. SHARKEY,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH LIN-YUN CHOW, M.D., CELESTINE J. SZULEWSKI, P.A., SPRINGVILLE PEDIATRICS AND ADULT CARE, DEFENDANTS-RESPONDENTS, AND RONALD G. BASALYGA, M.D., DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

LAW OFFICES OF LINDA J. MARSH AND ARTHUR J. ZILLER, BUFFALO (ARTHUR ZILLER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

CARTER, CONBOY, CASE, BLACKMORE, MALONEY & LAIRD, P.C., ALBANY (ADAM H. COOPER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

DAMON MOREY LLP, BUFFALO, MEISELMAN, DENLEA, PACKMAN, CARTON & EBERZ, P.C., WHITE PLAINS (MYRA I. PACKMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered February 16, 2010 in a medical malpractice action. The order denied that part of plaintiff's motion to strike defendants' joint answer and granted that part of plaintiff's motion for a new trial with respect to defendant Ronald G. Basalyga, M.D.

It is hereby ORDERED that said appeal is dismissed (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985) and the order is otherwise affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for the alleged failure of defendants to diagnose his metastatic colon cancer. Following a trial, the jury found that defendants Joseph Lin-Yun Chow, M.D., Celestine J. Szulewski, P.A. and Springville Pediatrics and Adult Care (Springville) were not negligent and that, although defendant Ronald G. Basalyga, M.D was negligent, his negligence was not a proximate cause of plaintiff's injuries. In appeal No. 1, plaintiff appeals from an order denying his pretrial motion to strike defendants' joint answer for failure to comply with his discovery demands pursuant to CPLR 3101 (f), seeking information regarding insurance coverage with respect to Springville. In appeal

No. 2, plaintiff appeals and Dr. Basalyga cross-appeals from an order that, inter alia, granted that part of plaintiff's motion pursuant to CPLR 4404 (a) for a new trial in the interest of justice with respect to Dr. Basalyga and denied that part of plaintiff's motion to strike defendants' joint answer for failure to disclose insurance coverage. In appeal No. 3, plaintiff appeals from a judgment dismissing the complaint against Dr. Chow, Szulewski and Springville. In appeal No. 4, plaintiff appeals and Dr. Basalyga cross-appeals from an order that, inter alia, granted plaintiff's motion for leave to renew his motion to strike the answer at issue in appeal No. 2 and, upon renewal, adhered to its original determination.

We note at the outset that, in his appellate brief, plaintiff has raised no contentions with respect to Dr. Chow, Szulewski or Springville, and thus plaintiff has abandoned any issues with respect to those defendants (*see Ciesinski v Town of Aurora*, 202 AD2d 984). We therefore dismiss appeal No. 3, and we do not address those defendants in the context of the remaining appeals. We affirm the orders in appeal Nos. 1, 2 and 4.

After the jury began deliberations but before a verdict was rendered, counsel for defendants informed plaintiff that Dr. Basalyga had excess insurance coverage and that Springville did not have a separate policy. That information had not been previously provided in response to plaintiff's demands. With respect to appeal No. 4, we conclude that Supreme Court did not abuse its discretion in determining that the failure to disclose excess coverage was not willful, contumacious or in bad faith and thus refusing to strike the answer (*cf. Perry v Town of Geneva*, 64 AD3d 1225). In the absence of an abuse of discretion that determination will not be disturbed (*see generally Roswell Park Cancer Inst. Corp. v Sodexo Am., LLC*, 68 AD3d 1720, 1721; *Hill v Oberoi*, 13 AD3d 1095).

We conclude in appeal No. 2 that the court did not abuse its discretion in granting that part of plaintiff's post-trial motion for a new trial in the interest of justice with respect to Dr. Basalyga. The court determined that, although the failure to disclose Dr. Basalyga's excess insurance information was not willful, contumacious or in bad faith, plaintiff was "unquestionably entitled to [that information] for use in formulating [his] trial strategy." "The authority to grant a new trial is discretionary in nature and is vested in the trial court predicated on the assumption that the [j]udge who presides at trial is in the best position to evaluate errors therein . . . Notably, [the court's] decision in [that] regard will not be disturbed absent an abuse of discretion" (*Straub v Yalamanchili*, 58 AD3d 1050, 1051 [internal quotation marks omitted]; *see generally Matter of De Lano*, 34 AD2d 1031, 1032, *affd* 28 NY2d 587; *Butler v County of Chautauqua*, 277 AD2d 964), and that is not the case here.

We have reviewed the remaining contentions of plaintiff and Dr. Basalyga with respect to appeal Nos. 1, 2 and 4 and conclude that they are without merit.

All concur except CARNI, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully disagree with the conclusion of my colleagues in appeal No. 2 that Supreme Court did not abuse its discretion in granting that part of plaintiff's post-trial motion for a new trial in the interest of justice with respect to defendant Ronald G. Basalyga, M.D. I otherwise agree with the remaining conclusions of my colleagues in appeal No. 2 and thus dissent only in part in that appeal.

In granting that part of plaintiff's post-trial motion for a new trial concerning Dr. Basalyga, the court simultaneously concluded that Dr. Basalyga's failure to provide complete insurance information "denied the plaintiff the opportunity for a fair trial" but that it would be "speculation" to conclude that plaintiff's preparation for trial or his actions during trial would have been different with such information. Plaintiff, however, has offered no explanation of how his trial preparation or strategy would have been different had he been provided with complete insurance information in advance. Plaintiff has not shown that the absence of Dr. Basalyga's insurance information "distort[ed] the true adversarial nature of the litigation process" (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 8 NY3d 717, 722), or that it was "likely that the verdict [was] . . . affected" by the late disclosure of Dr. Basalyga's excess insurance coverage (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 381). Thus, I cannot conclude that plaintiff was denied a fair trial or that substantial justice has not been done. I would therefore deny that part of plaintiff's post-trial motion for a new trial in the interest of justice with respect to Dr. Basalyga and reinstate the verdict against him.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

493

CA 10-01212

PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

DONALD J. SHARKEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH LIN-YUN CHOW, M.D., CELESTINE J. SZULEWSKI, P.A., SPRINGVILLE PEDIATRICS AND ADULT CARE, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.
(APPEAL NO. 3.)

LAW OFFICES OF LINDA J. MARSH AND ARTHUR J. ZILLER, BUFFALO (ARTHUR ZILLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CARTER, CONBOY, CASE, BLACKMORE, MALONEY & LAIRD, P.C., ALBANY (ADAM H. COOPER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), entered April 30, 2010 in a medical malpractice action. The judgment dismissed the complaint against defendants Joseph Lin-Yun Chow, M.D., Celestine J. Szulewski, P.A. and Springville Pediatrics and Adult Care.

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

Same Memorandum as in *Sharkey v Chow* ([appeal No. 2] ___ AD3d ___ [May 6, 2011]).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

494

CA 10-01868

PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

DONALD J. SHARKEY,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH LIN-YUN CHOW, M.D., CELESTINE J. SZULEWSKI, P.A., SPRINGVILLE PEDIATRICS AND ADULT CARE, DEFENDANTS-RESPONDENTS, AND RONALD G. BASALYGA, M.D., DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

LAW OFFICES OF LINDA J. MARSH AND ARTHUR J. ZILLER, BUFFALO (ARTHUR ZILLER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

CARTER, CONBOY, CASE, BLACKMORE, MALONEY & LAIRD, P.C., ALBANY (ADAM H. COOPER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

DAMON MOREY LLP, BUFFALO, MEISELMAN, DENLEA, PACKMAN, CARTON & EBERZ, P.C., WHITE PLAINS (MYRA I. PACKMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered September 2, 2010 in a medical malpractice action. The order, inter alia, granted plaintiff's motion for leave to renew and, upon renewal, adhered to the court's prior determination denying the motion of plaintiff to strike defendants' joint answer.

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

Same Memorandum as in *Sharkey v Chow* ([appeal No. 2] ___ AD3d ___ [May 6, 2011]).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

503

CA 10-02496

PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF THE ARBITRATION BETWEEN ERIE INSURANCE COMPANY, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

JOSHUA BOSS, RESPONDENT-APPELLANT.

CHIACCHIA & FLEMING, LLP, HAMBURG (TIFFANY M. KOPACZ OF COUNSEL), FOR RESPONDENT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 11, 2010. The judgment determined that the law of Massachusetts applies in the subject arbitration proceeding.

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

Memorandum: Respondent was injured when he was struck by a motor vehicle operated by Melissa Brea, a Massachusetts resident, while he was crossing a street in Boston, Massachusetts. Respondent is insured under an automobile insurance policy issued by petitioner to respondent's father in New York State. The policy provides supplemental uninsured/underinsured motorist (SUM) coverage and, after petitioner gave respondent permission to settle with Brea's insurance carrier, he filed a claim for SUM benefits with petitioner and subsequently demanded arbitration. By order to show cause, petitioner sought, inter alia, a determination that Massachusetts law applies to the issue of respondent's recoverable damages in the pending SUM arbitration. Massachusetts has a modified comparative negligence rule (*see* Mass Gen Laws Ann, tit 2, ch 231, § 85), whereas New York has a pure comparative negligence rule (*see* CPLR 1411).

Respondent contends that Supreme Court erred in determining that Massachusetts law applied with respect to the SUM arbitration. We reject that contention. With respect to issues involving the interpretation of the SUM endorsement or other aspects of the policy, the standard choice of law analysis would result in the application of New York law (*see Matter of Allstate Ins. Co. [Stolarz–New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 225-228; *see generally Cooney v Osgood Mach.*, 81 NY2d 66, 73-78; *Neumeier v Kuehner*, 31 NY2d 121, 125-129).

The purpose of SUM coverage, however, is to compensate an insured party when he or she is injured by an uninsured or underinsured driver (*see Matter of Federal Ins. Co. v Watnick*, 80 NY2d 539, 543). We thus conclude that an individual insured under a New York automobile policy who is injured in an accident in another jurisdiction should not be placed in either a better or worse position when filing a SUM benefits claim than he or she would have been if the tortfeasor had been fully insured. To apply New York law to the measure of damages in this case would not be consistent with the purpose served by SUM coverage, which is to take the place of a tortfeasor's insufficient insurance coverage.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

510

KA 09-01107

PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL MOX, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (WILLIAM T. EASTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered September 18, 2008. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant was indicted for the crime of murder in the second degree (Penal Law § 125.25 [1]), and he now appeals from a judgment convicting him upon his plea of guilty of the lesser included offense of manslaughter in the first degree (§ 125.20 [2]). "Although the contention of defendant that his plea was not knowingly, intelligently and voluntarily entered survives his valid waiver of the right to appeal, defendant failed to preserve that contention for our review by failing to move to withdraw the plea or to vacate the judgment of conviction on the ground[] now raised" (*People v VanDeViver*, 56 AD3d 1118, 1118, *lv denied* 11 NY3d 931, 12 NY3d 788; *see People v McKeon*, 78 AD3d 1617, 1618; *People v Johnson*, 60 AD3d 1496, *lv denied* 12 NY3d 926). We agree with defendant, however, that this is one of those rare cases in which preservation is not required because "the defendant's recitation of the facts underlying the crime pleaded to clearly cast[] significant doubt upon the defendant's guilt or otherwise call[ed] into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666). County Court therefore had a "duty to inquire further to ensure that defendant's guilty plea [was] knowing and voluntary" (*id.*), and we conclude that the court failed to fulfill that duty. "[A]t a minimum the record of the . . . plea proceedings must reflect . . . that defendant's responses to the court's subsequent questions removed the doubt about defendant's guilt" (*People v Ocasio*, 265 AD2d 675, 678). Here, defendant's plea

allocution did not remove such doubt with respect to the intent element of manslaughter in the first degree (§ 125.20 [2]; *see People v McCollum*, 23 AD3d 199). Indeed, defendant's plea allocution suggested that his underlying schizoaffective disorder, for which he was unmedicated, caused him to be in a "psychotic state" at the time of the crime. Thus, defendant's plea allocution in fact negated the element of intent, and the court should not have "accept[ed] the plea without making further inquiry to ensure that defendant [understood] the nature of the charge and that the plea [was] intelligently entered" (*Lopez*, 71 NY2d at 666).

Based on our decision, we see no need to address defendant's remaining contentions.

All concur except SMITH, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent. Even assuming, arguendo, that the majority is correct that this is one of those rare cases for which preservation is not required (*see People v Lopez*, 71 NY2d 662, 666), I nevertheless conclude that County Court conducted a sufficient inquiry to ensure that defendant's plea was entered knowingly and voluntarily, and that defendant's statements during the plea colloquy established all of the elements of the crime to which he pleaded guilty (*see id.*).

As noted by the majority, defendant pleaded guilty to manslaughter in the first degree as a lesser included offense of the crime of murder in the second degree, as charged in the indictment. It is well settled that, in pleading guilty to manslaughter pursuant to Penal Law § 125.20 (2), a defendant must admit that he or she intentionally caused the death of the victim but did so under circumstances demonstrating that he or she was acting under the influence of an extreme emotional disturbance for which there was a reasonable explanation or excuse (*see id.*; § 125.25 [1] [a]). Here, the plea colloquy established all of the elements of the crime of manslaughter in the first degree under that subdivision, inasmuch as defendant admitted during the plea colloquy that he caused the death of the victim, his 80-year-old father, by repeatedly stabbing him and bludgeoning him. Defendant's contention with respect to the alleged insufficiency of the plea colloquy is that County Court failed to make a sufficient inquiry into the defense of not guilty by reason of insanity after defendant made statements indicating that he had stopped taking his medication and was in a psychotic state at the time of the killing. The record establishes, however, that after making those statements, both defendant and his attorney unequivocally waived the defense of not guilty by reason of mental disease or defect. In addition, defendant was evaluated with respect to that defense by a psychiatrist on defendant's behalf, who opined that defendant suffered from chronic schizoaffective disorder with acute exacerbation, i.e., a mental disease or defect that impaired his reason to the point that he did not know the nature and quality of his actions. He was also evaluated by a psychiatrist on behalf of the People, who essentially agreed with the diagnosis of the defense psychiatrist but opined that defendant did in fact understand the nature and quality of his acts. After months of discussion between defense counsel, the prosecutor and

the court, the plea offer to the lesser charge of manslaughter was made. Thus, the record unequivocally establishes that the defense of not guilty by reason of insanity was fully explored by the court and counsel, and that defendant and his attorney waived that defense. Inasmuch as "defendant was competent to stand trial, he was likewise competent to make decisions regarding his defense" (*People v Ciborowski*, 302 AD2d 620, 622, *lv denied* 100 NY2d 579), and the court therefore properly accepted defendant's waiver of that defense (*see People v Boatwright*, 293 AD2d 286, *lv denied* 98 NY2d 673; *People v Saletnik*, 285 AD2d 665, 667; *People v Rogers*, 163 AD2d 337, *lv denied* 76 NY2d 943). In my view, no further inquiry was necessary under these circumstances.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

513

KA 09-01309

PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DIALLO HAMMOND, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (EUGENE T. PARTRIDGE, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered June 9, 2009. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, robbery in the second degree, and criminal possession of stolen property in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]), robbery in the second degree (§ 160.10 [1]), and criminal possession of stolen property in the fifth degree (§ 165.40), defendant contends that reversal is required inasmuch as he proved the affirmative defense of duress pursuant to Penal Law § 40.00 (1) as a matter of law. Although the People are incorrect that defendant failed to preserve his contention for our review (*see People v Gray*, 86 NY2d 10, 19; *People v Bastidas*, 67 NY2d 1006, 1007, *rearg denied* 68 NY2d 907), we nevertheless conclude that defendant's contention lacks merit. The jury was entitled to discredit defendant's self-serving statements that he was coerced into committing the crimes of which he was convicted (*see People v McKinnon*, 78 AD3d 864, *lv denied* 16 NY3d 744) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the jury's rejection of that defense is not against the weight of the evidence (*see id.*; *People v Zilberman*, 297 AD2d 517, 518, *lv denied* 99 NY2d 566; *see generally People v Bleakley*, 69 NY2d 490, 495).

We reject the further contention of defendant that Supreme Court's *Sandoval* ruling constitutes an abuse of discretion. The similarity between the prior convictions and the instant crimes does

not by itself preclude cross-examination concerning those prior convictions (*see People v Hayes*, 97 NY2d 203, 206), and here the prior convictions either concern defendant's credibility or are indicative of his willingness to place his own interests above those of society (*see People v Arguinzoni*, 48 AD3d 1239, 1240-1241, *lv denied* 10 NY3d 859; *People v Rupnarain*, 299 AD2d 498, *lv denied* 99 NY2d 619; *People v Freeney*, 291 AD2d 913, 914, *lv denied* 98 NY2d 637).

Defendant correctly concedes that he failed to preserve for our review his contention with respect to alleged prosecutorial misconduct (*see* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Additionally, we reject defendant's contention that the court committed reversible error based on the manner in which it responded to two jury notes (*see generally People v O'Rama*, 78 NY2d 270, 277-278). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

518

CAF 10-00968

PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND GREEN, JJ.

IN THE MATTER OF MYA B.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

CARRIE S., RESPONDENT,
AND WILLIAM B., JR., RESPONDENT-APPELLANT.

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-APPELLANT.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

CHRISTINA CAGNINA, ATTORNEY FOR THE CHILD, SYRACUSE, FOR MYA B.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered March 29, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent William B., Jr.

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

Memorandum: Respondent father appeals from an order terminating his parental rights on the ground of permanent neglect and transferring guardianship and custody of the child to petitioner. We reject the father's contention that petitioner failed to establish that it had exercised diligent efforts to encourage and strengthen the parent-child relationship during his incarceration as required by Social Services Law § 384-b (7) (a). "Diligent efforts 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 [his or her] care, and informing the parent[] of [the] child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901; *see* § 384-b [7] [f]). Petitioner is not required, however, to "guarantee that the parent succeed in overcoming his or her predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385; *see Matter of Jamie M.*, 63 NY2d 388, 393) but, rather, the parent must "assume a measure of initiative and responsibility" (*Jamie M.*, 63 NY2d at 393). Here, petitioner established by the requisite clear and convincing evidence that it fulfilled its duty to exercise diligent efforts to encourage and strengthen the father's relationship with his child during the relevant time period (*see* § 384-b [3] [g] [i]; [7] [a]; *see generally*

Matter of Star Leslie W., 63 NY2d 136, 142).

Contrary to the father's further contention, Family Court did not abuse its discretion in refusing to enter a suspended judgment. The record supports the court's determination that a suspended judgment, i.e., "a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311), was not in the child's best interests (*see Matter of Shadazia W.*, 52 AD3d 1330, *lv denied* 11 NY3d 706; *Matter of Da'Nasjeion T.*, 32 AD3d 1242). Finally, "[t]he father did not ask the court to consider post-termination contact with the child[ ] . . . or to conduct a hearing on that issue, and we conclude in any event that [he] failed to establish that such contact would be in the best interests of the child[ ]" (*Matter of Christopher J.*, 63 AD3d 1662, *lv denied* 13 NY3d 706 [internal quotation marks omitted]; *see Matter of Diana M.T.*, 57 AD3d 1492, *lv denied* 12 NY3d 708).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

524

CA 10-02314

PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND GREEN, JJ.

IN THE MATTER OF THOMAS H. ROWE, PATRICIA H. ROWE, PAT PECKINPAUGH MCDONALD, DAVID PECKINPAUGH, JANET PECKINPAUGH PRY, JAY SUMMERVILLE, DEBRA A. DINNOCENZO AND RICHARD B. SWEGAN, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF CHAUTAUQUA, JEFFREY M. PADDOCK, IN HIS OFFICIAL CAPACITY AS CODE ENFORCEMENT OFFICER OF TOWN OF CHAUTAUQUA, CHAUTAUQUA INSTITUTION ARCHITECTURAL REVIEW BOARD, CHAUTAUQUA INSTITUTION, CHARLES HEINZ, IN HIS OFFICIAL CAPACITY AS HEAD OF ADMINISTRATIVE AND COMMUNITY SERVICES, ROBERT BOWERS AND PAMELA BOWERS, RESPONDENTS-DEFENDANTS-RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

HARTER SECREST & EMERY LLP, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL), SEACHRIST LAW OFFICES, P.C., WESTFIELD (JOEL H. SEACHRIST OF COUNSEL), PRICE FLOWERS MALIN WESTERBERG, JAMESTOWN, AND SCHAACK & NELSON, MAYVILLE, FOR RESPONDENTS–DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered September 9, 2010 in a CPLR article 78 proceeding and declaratory judgment action. The judgment dismissed the petition/complaint (denominated petition).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the petition/complaint insofar as it seeks declaratory relief and granting judgment in favor of respondents-defendants as follows:

> It is ADJUDGED and DECLARED that respondent-defendant Chautauqua Institution is not a public body and is not subject to the requirements of New York’s Open Meetings Law

and as modified the judgment is affirmed without costs.

Memorandum: Petitioners-plaintiffs (hereafter, petitioners) commenced this hybrid CPLR article 78 proceeding/declaratory judgment action seeking, inter alia, to annul the determination approving the

demolition of an existing cottage and permitting the construction of a two-family home on property owned by respondents-defendants Robert and Pamela Bowers and located on the grounds of respondent-defendant Chautauqua Institution (Institution). As Supreme Court properly determined, the Institution and its Architectural Review Board (ARB), also a respondent-defendant, are not subject to the requirements of New York's Open Meetings Law (Public Officers Law § 100 *et seq.*), and thus cannot be said to have violated any requirements therein.

The Open Meetings Law applies to "[e]very meeting of a public body" (§ 103 [a]) and, in order to constitute a public body, an entity must be "performing a governmental function for the state or for an agency or department thereof" (§ 102 [2]). "While an entity must be authorized pursuant to state law to be within the ambit of the Open Meetings Law and the Freedom of Information Law, not every entity whose power is derived from state law is deemed to be performing a governmental function" (*Matter of Perez v City Univ. of N.Y.*, 5 NY3d 522, 528). Here, the Institution was established by the Legislature in order to create a private, not-for-profit corporation with quasi-governmental functions for purposes of regulating the activity on its grounds in furtherance of the Institution's stated purposes. The Legislature did not, however, empower the Institution to act on the State's behalf with respect to such functions. Because the court dismissed the petition/complaint (denominated a petition) without issuing a declaration concerning the Open Meetings Law, we thus modify the judgment by reinstating the petition/complaint to the extent that it seeks declaratory relief (*see Tumminello v Tumminello*, 204 AD2d 1067), and by declaring that the Institution is not a public body and is therefore not subject to the requirements of the Open Meetings Law.

We reject petitioners' further contention that respondent-defendant Town of Chautauqua and its code enforcement officer (collectively, Town respondents) improperly delegated their zoning authority and effectively granted veto power to the Institution and the ARB with respect to the issuance of building permits. " 'The use that may be made of land under a zoning ordinance and the use of the same land under an easement or restrictive covenant are, as a general rule, separate and distinct matters, the ordinance being a legislative enactment and the easement or covenant a matter of private agreement' " (*Chambers v Old Stone Hill Rd. Assoc.*, 1 NY3d 424, 432, quoting *Matter of Friends of Shawangunks v Knowlton*, 64 NY2d 387, 392). The Town respondents established that they did not delegate their authority to the Institution or the ARB and that, to the extent that the Town respondents determined whether Institution approval was obtained prior to the issuance of a building permit, they did so in order to promote efficiency by reducing the possibility that there would be multiple building permit applications for the same property. We have reviewed petitioners' remaining contentions and conclude that they are without merit.

Entered: May 6, 2011

Patricia L. Morgan
Clerk of the Court

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

533

KA 09-01894

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY J. PADUANO, DEFENDANT-APPELLANT.

LAW OFFICES OF FRANK HOUSH, BUFFALO (FRANK HOUSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered August 11, 2009. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (Penal Law § 155.35), defendant contends that he was denied his right to a speedy trial pursuant to CPL 30.30. By pleading guilty, however, defendant forfeited that contention (*see People v O'Brien*, 56 NY2d 1009, 1010; *People v Suarez*, 55 NY2d 940, 942). In any event, defendant's contention does not survive his valid waiver of the right to appeal (*see People v Barnes*, 41 AD3d 1309, *lv denied* 9 NY3d 920; *People v Tracey*, 13 AD3d 1174, *lv denied* 4 NY3d 836). Defendant mistakenly relies on *People v Seaberg* (74 NY2d 1, 9) in support of his contention that his statutory right to a speedy trial cannot be waived inasmuch as *Seaberg* concerned the *constitutional* right to a speedy trial (*see generally People v Weeks*, 272 AD2d 983, *lv denied* 95 NY2d 872). Even assuming, arguendo, that defendant's contention included a constitutional speedy trial claim, we conclude that such a claim may be voluntarily surrendered or abandoned (*see People v Rodriguez*, 50 NY2d 553, 557; *People v Denis*, 276 AD2d 237, 247, *lv denied* 96 NY2d 782, 861), and the record demonstrates that defendant withdrew his speedy trial motion before pleading guilty.

Defendant's further contention that he was denied effective assistance of counsel does not survive the plea or his valid waiver of the right to appeal "because defendant failed to demonstrate that 'the plea bargaining process was infected by [the] allegedly ineffective

assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance' " (*People v Wright*, 66 AD3d 1334, *lv denied* 13 NY3d 912). In any event, to the extent that defendant contends that defense counsel was ineffective for withdrawing his speedy trial motion, we note that the reasons for withdrawal are not disclosed in the record, and thus defendant's contention involves matters outside the record on appeal and must be raised by way of a motion pursuant to CPL 440.40 (*see generally People v Cobb*, 72 AD3d 1565, 1567, *lv denied* 15 NY3d 803; *People v Griffin*, 48 AD3d 1233, 1236, *lv denied* 10 NY3d 840).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

539

TP 10-02521

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF BRENT JACOBY, PETITIONER,

V MEMORANDUM AND ORDER

ANDREA EVANS, CHAIRWOMAN, NEW YORK STATE DIVISION OF PAROLE, RESPONDENT.

BRENT JACOBY, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR RESPONDENT.

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, Oneida County [Bernadette T. Clark, J.], entered December 22, 2010) to review a determination of respondent. The determination found that petitioner violated the conditions of postrelease supervision and imposed a time assessment of 18 months.

It is hereby ORDERED that the petition is unanimously granted in part by annulling that part of the determination finding that petitioner is a Category 1 violator pursuant to 9 NYCRR 8005.20 and as modified the determination is confirmed without costs.

Memorandum: In this proceeding transferred to us from Supreme Court pursuant to CPLR 7804 (g), petitioner contends that the determination of the Administrative Law Judge (ALJ) following a revocation hearing that petitioner violated the conditions of postrelease supervision (PRS) by possessing a weapon is not supported by substantial evidence. We reject that contention. It is undisputed that a parole officer assigned to supervise petitioner found a Sai, a three-pronged martial arts weapon, in a drawer in petitioner's apartment, where he lived alone. Although petitioner claimed that the weapon belonged to his former girlfriend, who had moved out of his apartment several days before the weapon was found, petitioner admitted at the hearing that he knew the Sai was in his apartment and that he took no steps to return it to his former girlfriend or otherwise to dispose of it. Even assuming, arguendo, that petitioner's former girlfriend owned the Sai, we conclude that such fact alone does not exonerate petitioner inasmuch as he may be found to possess an item that is owned by someone else.

Petitioner further contends that the Sai is not a dangerous instrument or deadly weapon within the meaning of the Penal Law

because it is not readily capable of causing serious physical injury or death. Whether the Sai qualifies as a dangerous instrument or deadly weapon is of no moment, however, because the conditions of petitioner's PRS prohibited him from possessing "any instrument readily capable of causing physical injury without a satisfactory explanation for ownership, possession or purchase." There was ample evidence at the hearing establishing that the Sai was capable of causing physical injury and that petitioner lacked a satisfactory explanation for his possession of it.

We agree with petitioner that the ALJ erred in designating him as a Category 1 violator within the meaning of 9 NYCRR 8005.20. We therefore grant the petition in part and modify the determination accordingly. Contrary to petitioner's contention, however, the 18-month time assessment imposed by the ALJ is neither unauthorized nor illegal. As respondent correctly notes, 9 NYCRR 8005.20 applies to individuals on parole and conditional release, not those serving a period of PRS, such as petitioner (*see* 9 NYCRR 8005.1 *et seq.*). Violators of PRS are subject to Penal Law § 70.45 (1), pursuant to which "a violation of any condition of supervision occurring at any time during such period of [PRS] shall subject the defendant to a further period of imprisonment up to the balance of the remaining period of [PRS], not to exceed five years" (*see* Executive Law § 259–i [3] [f] [x] [D]). Here, the time assessment of 18 months was shorter than the remaining period of PRS.

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

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

544

CA 10-02343

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

ANTHONY QUARCINI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NATIONAL FUEL GAS COMPANY, NATIONAL FUEL GAS CORPORATION, NATIONAL FUEL GAS SUPPLY CORPORATION, NATIONAL FUEL GAS DISTRIBUTION CORPORATION AND NATIONAL FUEL RESOURCES, INC., DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA, LLP, BUFFALO (MARIANNE ARCIERI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a decision of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered February 16, 2010 in a personal injury action. The decision found plaintiff to be entitled to summary judgment on liability pursuant to Labor Law § 240 (1).

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

Memorandum: In this Labor Law and common-law negligence action, defendants purport to appeal from an order granting plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim. The appeal must be dismissed because that order is not included in the record on appeal (*see Rodriquez v Chapman-Perry*, 63 AD3d 645), and " '[n]o appeal lies from a mere decision' " (*Pecora v Lawrence*, 28 AD3d 1136, 1137; *see Harvey v Gaulin* [appeal No. 2], 68 AD3d 1789).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

550

KA 08-00186

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAMON L. BEDELL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SHAMON L. BEDELL, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered January 9, 2008. The judgment convicted defendant, upon a jury verdict, of perjury in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of perjury in the first degree (Penal Law § 210.15). We reject defendant's contention that County Court abused its discretion in denying defendant's request for recusal (*see generally People v Crane*, 294 AD2d 867, *lv denied* 98 NY2d 767). Although the same County Court Judge had presided over the proceedings in which defendant gave the inconsistent testimony underlying the instant perjury charges, the prior proceedings were a matter of record, obviating any need to call the Judge as a witness (*see People v Rodriquez*, 14 AD2d 917; *People v Haran*, 22 Misc 3d 283, 284-285). The sentence is not unduly harsh or severe.

Defendant's remaining contentions are raised in his pro se supplemental brief. Contrary to defendant's contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), we conclude that the jury could rationally find that defendant's contradictory statements were material to the proceedings in which they were given inasmuch as they were " 'circumstantially material or tend[ed] to support and give credit to the witness in respect to the main fact' " of those proceedings (*People v Davis*, 53 NY2d 164, 171; *see also* Penal Law §§ 210.15, 210.20; *People v Perino*,

76 AD3d 456, 460; *People v Kirsh*, 176 AD2d 652, 652-653, *lv denied* 79 NY2d 949).

Defendant failed to preserve for our review his contention that he was denied a fair trial based on judicial bias (*see Kirsh*, 176 AD2d at 653), 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]). Moreover, we conclude that the court's warnings during the proceedings in which defendant gave the inconsistent testimony did not coerce defendant to perjure himself (*see People v Lee*, 58 NY2d 773; *People v Vanluvender*, 35 AD3d 238, 239, *lv denied* 8 NY3d 928). Finally, we have reviewed defendant's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

552

KA 10-00973

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD ROACH, DEFENDANT-APPELLANT.

REDMOND & PARRINELLO, LLP, ROCHESTER (BRUCE F. FREEMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 25, 2010. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of criminal contempt in the second degree (Penal Law § 215.50 [3]), arising from his violation of a temporary order of protection. We reject defendant's contention that the misdemeanor information upon which he was prosecuted was jurisdictionally defective because it contained only a conclusory allegation that he had knowledge of the temporary order of protection. "It is a fundamental and nonwaivable jurisdictional prerequisite that an information state the crime with which the defendant is charged and the particular facts constituting that crime . . . In order for an information to be sufficient on its face, every element of the offense charged and the defendant's commission thereof must be alleged" (*People v Hall*, 48 NY2d 927, 927, *rearg denied* 49 NY2d 918; *see* CPL 100.15 [3]; 100.40 [1] [c]). "So long as the factual allegations of an information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360; *see People v Konieczny*, 2 NY3d 569, 575).

An essential element of a prosecution for the crime of criminal contempt in the second degree is that "the party to be held in contempt must have had knowledge of the court's order" (*Matter of McCormick v Axelrod*, 59 NY2d 574, 583, *mot to amend order granted* 60

NY2d 652). Here, the information alleged that defendant had knowledge of the temporary order of protection. In addition, the victim's supporting deposition that was attached to the information contained the victim's statement that defendant "d[id] not seem to care about the order of protection" as he drove by the victim's house two times within a one-minute period of time. The "fair implication" of the victim's statement is that defendant had knowledge of the temporary order of protection (*Casey*, 95 NY2d at 360). Generally, conclusory allegations are insufficient to meet the statutory requirements, but this is not a case in which additional facts were required to establish the illegality of defendant's conduct (*cf. People v Dreyden*, 15 NY3d 100; *People v Dumas*, 68 NY2d 729). While it may have been preferable for the People to allege in the information the manner in which defendant had been made aware of the temporary order of protection, we conclude that the "core concerns [of *Casey*] were clearly satisfied in this case" (*People v Kalin*, 12 NY3d 225, 230).

Contrary to defendant's further contention, Supreme Court did not engage in premature deliberations in this nonjury trial when it denied his motion for a trial order of dismissal (*see People v Wilson*, 243 AD2d 316, 317, *lv denied* 91 NY2d 1011, 1014). The court merely addressed the alleged evidentiary deficiencies raised by defendant in support of his motion.

All concur except CARNI, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully disagree with the conclusion of my colleagues that the misdemeanor information charging defendant with criminal contempt in the second degree (Penal Law § 215.50 [3]) contained sufficient evidentiary facts showing the basis for the conclusion that defendant had knowledge of the temporary order of protection. I therefore dissent.

The information, insofar as it described the complaining officer's conclusion that defendant had knowledge of the temporary order of protection, "failed to give any support or explanation whatsoever for [that conclusion]" (*People v Dreyden*, 15 NY3d 100, 103). Indeed, the conclusory allegation of defendant's knowledge is contained within the preprinted language of the information form utilized by the complaining officer, and that officer failed to explain how he formed the belief that defendant had knowledge of the temporary order of protection (*see id.* at 104; *People v Dumas*, 68 NY2d 729, 731). Inasmuch as the information contained no factual basis for that conclusion, it was jurisdictionally defective (*see Dreyden*, 15 NY3d at 103). The victim's statement that defendant allegedly "d[id] not seem to care about the order of protection," relied upon by the majority, suffers from the same defect inasmuch as it also fails to provide any factual basis to support the conclusion that defendant had knowledge of the temporary order of protection. Further, the majority's reliance upon that statement confuses the factual allegations with respect to defendant's violation of the temporary order of protection with the factual allegations required to support the conclusion that he had prior knowledge thereof. Indeed, it is plausible to conclude on this record that what the victim perceived as a lack of care with respect to the temporary order of protection was

in fact a lack of knowledge thereof. In any event, the victim's subjective perception of the state of mind of defendant is insufficient to form the basis for the requisite "facts of an evidentiary character . . . demonstrating reasonable cause to believe the defendant committed the crime charged" (*id.* at 102 [internal quotation marks omitted]).

I would therefore reverse the judgment and dismiss the misdemeanor information.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

555

KA 07-02085

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE A. HAWKINS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered August 24, 2007. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree, and burglary in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and burglary in the first degree (§ 140.30 [1], [2], [4]), defendant contends that Supreme Court abused its discretion in denying his request for a missing witness charge. We reject that contention (*see People v Savinon*, 100 NY2d 192, 197). Even assuming, arguendo, defendant met his initial burden in support of his request for that charge by showing, inter alia, that the potential witness would be knowledgeable concerning a material issue at trial and would be expected to provide testimony that would be favorable to the People (*see People v Gonzalez*, 68 NY2d 424, 427-428), we conclude that the People met their burden of establishing "that the charge would not be appropriate" (*id.* at 428). The prosecutor established that the missing witness would have provided certain testimony that was cumulative to that of other witnesses (*see People v White*, 265 AD2d 843, 843-844, *lv denied* 94 NY2d 868), and that the witness otherwise would not be expected to provide testimony that was favorable to the People's case (*see People v Wilson*, 256 AD2d 637, 638, *lv denied* 93 NY2d 880; *People v Congilaro*, 159 AD2d 964, 965, *lv denied* 76 NY2d 786).

Entered: May 6, 2011

Patrick H. NeMoyer
Clerk of the Court

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

561

CA 10-01314

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ.

CLARENCE F. RIORDAN AND JEANNIE RIORDAN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CELLINO & BARNES, P.C., THE BARNES
FIRM, P.C., AND MICHAEL J. COOPER,
DEFENDANTS-RESPONDENTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (JODY E. BRIANDI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered November 20, 2009 in a legal malpractice action. The order, among other things, granted that part of defendants' motion seeking a protective order.

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

Memorandum: Plaintiffs commenced this legal malpractice action seeking damages allegedly resulting from the negligence of defendants in their representation of Clarence F. Riordan (plaintiff) in the underlying Labor Law and common-law negligence action. Plaintiff commenced the underlying action seeking damages for injuries that he sustained when he was working on the reconstruction of a school building in East Rochester. Defendants, however, failed to serve a timely notice of claim against East Rochester Schools (*see Matter of Riordan v East Rochester Schools*, 291 AD2d 922, *lv denied* 98 NY2d 603), and a jury returned a verdict of no cause of action with respect to plaintiff's claims against the remaining defendant in the underlying action. Defendants admit that they were negligent in failing to serve the notice of claim in a timely manner, but they contend that they are not liable for legal malpractice on the ground that the underlying action against East Rochester Schools has no merit.

Plaintiffs served a notice seeking to take the depositions of two attorneys employed by defendants Cellino & Barnes, P.C. and The Barnes

Firm, P.C. and who represented plaintiff in the underlying action, and defendants moved for, inter alia, a protective order in response to such notice. Relying upon our decision in *Long v Cellino & Barnes, P.C.* (59 AD3d 1062, 1063), Supreme Court granted that part of the motion seeking a protective order. We agree with plaintiffs, however, that they are entitled to depose the attorneys who represented plaintiff in the underlying action for approximately eight years, despite defendants' admission of negligence. We therefore modify the order accordingly. We further conclude that, to the extent that our decision in *Long* holds otherwise, it is no longer to be followed.

Pursuant to CPLR 3101 (a) (1), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action . . . by a party[] or . . . employee of a party . . . ." That provision has been liberally construed to permit discovery "of any facts bearing on the controversy [that] will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406; *see Montalvo v CVS Pharmacy, Inc.*, 81 AD3d 611; *Matter of Southampton Taxpayers Against Reassessment v Assessor of Vil. of Southampton*, 176 AD2d 795, 796). "The test is one of usefulness and reason, and CPLR 3101 (a) should be construed to permit discovery of testimony [that] is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable" (*Southampton Taxpayers Against Reassessment*, 176 AD2d at 796 [internal quotation marks omitted]). The depositions sought by plaintiff satisfy that test, and defendants failed to meet their burden of making an "appropriate factual showing" that they are entitled to a protective order limiting discovery (*Willis v Cassia*, 255 AD2d 800, 801; *see State of New York v General Elec. Co.*, 215 AD2d 928, 929).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

570

KA 10-00698

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LESLIE J. BARRETT, DEFENDANT-APPELLANT.

CHRISTOPHER HAMMOND, COOPERSTOWN, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered February 19, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary 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 burglary in the third degree (Penal Law § 140.20). Defendant's contention that his guilty plea was not voluntary because the presentence report suggested that he may not have been competent at the time of the plea is not preserved for our review, and the narrow exception to the preservation requirement does not apply inasmuch as defendant did not make any statements during the plea allocution "that were inconsistent with his guilt or otherwise called into question the voluntariness of his plea" (*People v Coons*, 73 AD3d 1343, 1344, *lv denied* 15 NY3d 803; *see People v Carpenter*, 13 AD3d 1193, *lv denied* 4 NY3d 797). In any event, that contention is without merit. County Court did not abuse its discretion in failing sua sponte to order a competency exam based on the information presented in the presentence report concerning defendant's mental health and substance abuse issues (*see Coons*, 73 AD3d at 1345; *People v Ortiz*, 62 AD3d 1034; *People v Jermain*, 56 AD3d 1165, *lv denied* 11 NY3d 926). The sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

574

KA 09-01627

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBIN KALINOWSKI, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered February 25, 2009. 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 reversed on the law and a new trial is granted.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting her upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and, in appeal No. 2, defendant appeals from a judgment convicting her upon her plea of guilty of conspiracy in the second degree (§ 105.15). With respect to appeal No. 1, defendant contends that she is entitled to a new trial based on County Court's failure to comply with CPL 310.30 in handling the first note from the jury. We agree. At the commencement of jury deliberations, the attorneys and the court agreed that, if the jury requested certain items of evidence, the court would provide the jury with the evidence without first reassembling the parties in the courtroom. The first jury note read: "The jury would like further clarification of the path of the bullet. Does the autopsy report clarify the exact path of the bullet wound in the decedent['s] head - if so, can we please hear/see the path of the wound and/or autopsy report." The court did not read the jury note into the record, nor did it respond to the note on the record. In fact, there is no indication in the record that defendant or her attorney was even apprised of the note or its content. Thus, it is clear that the court failed to comply with the mandates of CPL 310.30 (*see generally People v O'Rama*, 78 NY2d 270, 276-278).

We reject the contention of the People that the court's handling of the jury note was proper pursuant to the stipulation entered at the commencement of jury deliberations. The jury did not merely request

the autopsy report or another exhibit in its first note. Rather, as defendant correctly notes, the note can fairly be interpreted as requesting a readback of the testimony of the Chief Medical Examiner, who testified extensively concerning the path of the bullet in the victim's head. At the very least, the note is ambiguous as to whether the jury was requesting a readback of certain testimony, as opposed to or in addition to the autopsy report, and we conclude that the court should therefore have notified the attorneys of the note and afforded them an opportunity to be heard with respect to an appropriate response. Although defendant did not object to the court's handling of the first jury note, preservation is not required because the court failed to comply "with its core responsibilities under CPL 310.30" and thereby committed a mode of proceedings error (*People v Tabb*, 13 NY3d 852, 853; *see People v Kisoon*, 8 NY3d 129, 135; *see generally O'Rama*, 78 NY2d at 276-277).

Defendant further contends in appeal No. 1 that the indictment should be dismissed because the evidence is legally insufficient to establish that she intended to kill the victim. We reject that contention inasmuch as the People presented ample evidence of defendant's intent to kill. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we also reject defendant's contention that the verdict is against the weight of the evidence. Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*see People v Kalen*, 68 AD3d 1666, 1667, *lv denied* 14 NY3d 842; *see generally People v Bleakley*, 69 NY2d 490, 495). Because defendant is entitled to a new trial based on the court's failure to comply with CPL 310.30, we need not address her remaining contentions in appeal No. 1.

With respect to appeal No. 2, defendant contends that, in the event that she is entitled to a new trial on the murder charge, her plea of guilty to conspiracy in the second degree must be vacated. We reject that contention. Defendant was charged with conspiracy in the second degree and criminal solicitation in the second degree (Penal Law § 100.10) based on her efforts to hire someone to kill her former paramour so that he would be unable to testify at the murder trial. After defendant was convicted of murder and sentenced to a term of imprisonment of 25 years to life, defendant pleaded guilty to conspiracy in the second degree and the court promised to sentence her to a concurrent term of imprisonment. Defendant was informed prior to sentencing that her conspiracy conviction would stand even in the event that she was successful on her appeal from the judgment convicting her of murder, and defense counsel acknowledged that defendant was aware of the same when she pleaded guilty. Defendant therefore is not entitled to vacatur of her plea inasmuch as reversal of the murder conviction and removal of the sentence imposed thereupon does not nullify "a benefit that was expressly promised and was a

material inducement to the guilty plea" (*People v Rowland*, 8 NY3d 342, 345; *see generally People v Pichardo*, 1 NY3d 126,129-130).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

575

KA 09-02443

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBIN KALINOWSKI, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered October 14, 2009. The judgment convicted defendant, upon her plea of guilty, of conspiracy in the second degree.

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

Same Memorandum as in *People v Kalinowski* ([appeal No. 1] ___ AD3d ___ [May 6, 2011]).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

576

KA 09-00308

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY HILL, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered April 2, 2001. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, assault in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [3]). We reject defendant's contention that he was not afforded the opportunity to testify at trial and that he did not knowingly, voluntarily and intelligently waive his right to testify at trial. Even assuming, arguendo, that defendant was not required to preserve that contention for our review, we conclude that it is without merit. Defendant waived his constitutional right to be present at the material stages of the criminal proceedings when he requested to be excused from the last part of his trial (*see generally People v Epps*, 37 NY2d 343, 348-351, *cert denied* 423 US 999). Prior to defense counsel's cross-examination of the final prosecution witness, defendant repeatedly requested to be excused from the proceedings and promised to cause a disruption if he was not allowed to leave. Although County Court did not specifically ask defendant if he was waiving his right to testify, defendant's responses to the questions of the court demonstrated that he knowingly, voluntarily, and intelligently waived his right to be present at the remainder of the trial (*see id.* at 350). Also, defense counsel indicated that she discussed defendant's request with him and that he wished to be excused from the remainder of his trial. Although a court must " 'indulge every reasonable presumption against waiver' " of a constitutional right (*Johnson v Zerbst*, 304 US 458, 464), we conclude that defendant was well aware of the "likely consequence[]" that he

would not be able to testify based on his absence from the proceedings (*Brady v United States*, 397 US 742, 748) and that he thereby waived his right to testify (*see Taylor v United States*, 414 US 17, 19-20; *People v Menner*, 2 AD3d 650, *lv denied* 3 NY3d 678; *People v Price*, 240 P3d 557, 563 [Colo]).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

577

KA 09-01479

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK L. DICKESON, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered October 29, 2008. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony (two counts).

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

Memorandum: On appeal from a judgment convicting him, following a jury trial, of two counts of driving while intoxicated as a felony (Vehicle and Traffic Law § 1192 [2], [3]; § 1193 [1] [c] [former (i)]), defendant contends that he was denied effective assistance of counsel. We reject that contention. Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's alleged shortcomings (*see People v Marcial*, 41 AD3d 1308, *lv denied* 9 NY3d 878).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

579

CA 10-01996

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

EARTH ENERGY CONSULTANTS, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY,
SENECA COUNTY ECONOMIC DEVELOPMENT CORPORATION,
AND ROBERT J. ARONSON, EXECUTIVE DIRECTOR,
SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY,
DEFENDANTS-RESPONDENTS.

ZDARSKY SAWICKI & AGOSTINELLI LLP, BUFFALO (DONALD G. POWELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (DALE A. WORRALL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered June 2, 2010 in a declaratory judgment action. The judgment granted the motion of defendants for summary judgment dismissing the complaint and denied the cross motion of plaintiff to compel disclosure.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the provision dismissing the complaint and granting judgment in favor of defendants as follows:

> It is ADJUDGED and DECLARED that defendants have no duty to execute or to record an assignment to plaintiff of a portion of the overriding royalty interest in any oil and/or natural gas produced from the subject property

and as modified the judgment is affirmed without costs.

Memorandum: We conclude that Supreme Court properly resolved the merits of the action in favor of defendants for the reasons stated in its decision. The court erred, however, in granting judgment to defendants dismissing the complaint rather than declaring the rights of the parties (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954). We therefore modify the judgment accordingly.

Entered: May 6, 2011

Patricia L. Morgan
Clerk of the Court

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

580

CA 10-02527

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

NICOLE M. ENZINNA, AMY L. BORYNSKI-KURTZ AND HEATHER L. MAHLEY, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

D'YOUVILLE COLLEGE, DEFENDANT-APPELLANT.

SCHRÖDER, JOSEPH & ASSOCIATES, LLP, BUFFALO (LINDA H. JOSEPH OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered June 15, 2010. The order, insofar as appealed from, denied defendant's motion to dismiss the amended complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages based on defendant's allegedly deceptive advertising, which allegedly induced plaintiffs to enroll in the Doctor of Chiropractic program offered by defendant. Defendant appeals from an order denying its motion to dismiss the amended complaint. We affirm. We conclude that Supreme Court properly denied the motion with respect to the causes of action for false advertising (General Business Law § 350), false and deceptive business practices (§ 349) and negligent misrepresentation on the ground that they are time-barred. The General Business Law causes of action must be asserted within three years of when the plaintiff "has been injured by a deceptive act or practice" (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210; *see* CPLR 214 [2]; *Beller v William Penn Life Ins. Co. of N.Y.*, 8 AD3d 310, 314). Here, contrary to defendant's contention, plaintiffs were not injured when they initially enrolled in defendant's Doctor of Chiropractic program and began paying tuition. Rather, the injury occurred when plaintiffs graduated and allegedly learned that their degrees did not render them "eligible for licensure examination in all states," as stated in defendant's promotional catalog. It was at that point and not sooner that plaintiffs' "expectations were actually not met" (*Gaidon*, 96 NY2d at 212).

The cause of action for negligent misrepresentation is governed

by the six-year statute of limitations applicable to equitable actions in general (*see* CPLR 213 [1]; *Fandy Corp. v Lung-Fong Chen*, 262 AD2d 352; *Milin Pharmacy v Cash Register Sys.*, 173 AD2d 686). We conclude that this action was commenced within six years of the accrual of that cause of action, i.e., the dates on which plaintiffs relied upon defendant's alleged misrepresentation (*see Lasher v Albion Cent. School Dist.*, 38 AD3d 1197, 1198). Defendant's contention that the unjust enrichment cause of action is time-barred is not preserved for our review because its motion with respect to that cause of action was based solely upon the defense of laches. We note that defendant does not challenge the timeliness of the two remaining causes of action, for breach of contract and promissory estoppel.

We further conclude that the court properly denied defendant's motion to dismiss the amended complaint for failure to state a cause of action and based on documentary evidence pursuant to CPLR 3211 (a) (1) and (7). The documentary evidence upon which defendant relies, i.e., the catalog referred to in the amended complaint as an example of one of defendant's false advertisements, does not "resolve all factual issues as a matter of law and conclusively dispose of the plaintiffs' claim[s]" (*DiGiacomo v Levine*, 76 AD3d 946, 949; *see Leon v Martinez*, 84 NY2d 83, 88). Further, construing the amended complaint liberally and accepting as true the facts alleged therein (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152), we conclude that plaintiffs have stated causes of action for the claims in question.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

581

CA 10-02342

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

SUSAN T. HUGHES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SCOTT H. HUGHES, DEFENDANT-RESPONDENT.

SIEGEL, KELLEHER & KAHN, BUFFALO (MICHELLE G. CHAAS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from a judgment of the Supreme Court, Niagara County (Frank Caruso, J.), entered February 24, 2010 in a divorce action. The judgment, insofar as appealed from, directed defendant to pay plaintiff maintenance for a period of six years.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the 11th decretal paragraph is vacated and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Plaintiff, as limited by her brief, appeals from that part of an order directing defendant to pay plaintiff maintenance for a period of six years. "Although the order is subsumed in the final judgment of divorce subsequently entered and the appeal properly lies from the judgment," we exercise our discretion to treat the notice of appeal as valid and deem the appeal taken from the judgment (*Nichols v Nichols* [appeal No. 1], 291 AD2d 875; *see* CPLR 5520 [c]). According to plaintiff, Supreme Court should not have set a durational limit on the award of maintenance. The record before us does not contain the financial statements of either party, and the testimony of the parties and other evidence does not sufficiently detail the parties' expenses. Domestic Relations Law § 236 (B) (4) (a) requires that, "[i]n all matrimonial actions and proceedings in which . . . maintenance . . . is in issue, there shall be compulsory disclosure by both parties of their respective financial states," including sworn statements of net worth, representative paycheck stubs, recent federal and state tax returns, and W-2 statements. Without sufficient information in the record, we are unable to determine whether the court erred in setting a durational limit on the award of maintenance. We therefore reverse the judgment insofar as appealed from, vacate the award of maintenance and remit the matter to Supreme Court for a new hearing on the amount and duration of

maintenance to be awarded to plaintiff (*see id.*; *see generally Matter of Harvey v Benedict*, ___ AD3d ___ [Apr. 1, 2011]).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

600

CAF 09-02566

PRESENT: SCUDDER, P.J., FAHEY, CARNI, GREEN, AND GORSKI, JJ.

IN THE MATTER OF SOPHIA M.G.-K.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TRACY G.-K., RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR RESPONDENT-APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

BETH A. RATCHFORD, ATTORNEY FOR THE CHILD, ROCHESTER, FOR SOPHIA M.G.-K.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered November 13, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudicated the subject child to be a neglected child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating ordering paragraph 1-C and as modified the order is affirmed without costs.

Memorandum: Respondent mother appeals from an order that adjudicated the child who is the subject of this proceeding to be a neglected child. We conclude that Family Court properly determined that the child is a neglected child based upon the derivative evidence that four of the mother's other children were determined to be neglected children (*see Matter of Sasha M.*, 43 AD3d 1401; *Matter of Amber C.*, 38 AD3d 538, 540-541, *lv denied* 8 NY3d 816, *lv dismissed* 11 NY3d 728; *see generally* Family Ct Act § 1046 [a] [i]), "including the evidence that [the mother] had failed to address the mental health issues that led to those neglect determinations and the placement of the custody of those children with petitioner" (*Sasha M.*, 43 AD3d at 1402; *see Matter of Krystal J.*, 267 AD2d 1097; *Matter of Daequan FF.*, 243 AD2d 922). Further, the finding of neglect with respect to one of the mother's other children was entered approximately two months prior to the birth of the child in question, and thus "the prior finding [with respect to that older child] was so proximate in time to the derivative proceeding[] that it can reasonably be concluded that the condition still exist[ed]" (*Matter of Hannah UU.*, 300 AD2d 942, 944, *lv denied* 99 NY2d 509 [internal quotation marks omitted]; *see Amber*

C., 38 AD3d at 541).

We agree with the mother, however, that the court erred in including in the dispositional order a provision requiring her to comply with the treatment recommendations of a mental health evaluation report that was neither admitted in evidence at the fact-finding hearing nor included in the record on appeal. We therefore modify the order accordingly.

We reject the mother's further contention that the court abused its discretion in denying the request of her attorney for an adjournment so that the mother, who was not present at the time, could testify and he could subpoena an additional witness. In support of that request, the mother's attorney offered nothing beyond a "vague and unsubstantiated claim that the [mother] could not appear due to an emergency" (*Matter of Sanaia L.*, 75 AD3d 554, 555). Further, the mother's attorney failed to demonstrate that the need for the adjournment to subpoena the witness was not based on a lack of due diligence on the part of the mother or her attorney (*see Matter of Venditto v Davis*, 39 AD3d 555).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

607

CA 10-02490

PRESENT: SCUDDER, P.J., FAHEY, CARNI, GREEN, AND GORSKI, JJ.

CNP MECHANICAL, INC., PLAINTIFF-RESPONDENT,

V ORDER

ALLIED BUILDERS, INC., HARTFORD FIRE INSURANCE COMPANY, HARTFORD CASUALTY COMPANY, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

ERNSTROM & DRESTE, LLP, ROCHESTER (JOHN W. DRESTE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GATES & ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered July 30, 2010 in a breach of contract action. The order granted judgment in favor of plaintiff and against defendants.

It is hereby ORDERED that said appeals are unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

608

CA 10-02494

PRESENT: SCUDDER, P.J., FAHEY, CARNI, GREEN, AND GORSKI, JJ.

CNP MECHANICAL, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLIED BUILDERS, INC., HARTFORD FIRE INSURANCE COMPANY, HARTFORD CASUALTY COMPANY, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

ERNSTROM & DRESTE, LLP, ROCHESTER (JOHN W. DRESTE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GATES & ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered August 25, 2010 in a breach of contract action. The judgment, upon a nonjury trial, awarded plaintiff the principal sum of $347,682.14 plus interest and costs against defendants.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the award of damages for those items identified as Construction Change Directive (CCD) #1 to $4,800, CCD #2 to $86,000, CCD #3 to $43,305 and CCD #4 to $55,758, providing that statutory interest on the reduced awards shall run from September 7, 2007 for CCD #1, #2, and #4, and from November 16, 2007 for CCD #3, and as modified the judgment is affirmed without costs in accordance with the following Memorandum: Plaintiff, a plumbing subcontractor on the construction of a Wal-Mart store, commenced this action seeking to recover the balance due on its subcontract with defendant Allied Builders, Inc. (Allied), the general contractor, as well as the value of extra work it allegedly performed on the project. Following a nonjury trial, Supreme Court awarded plaintiff damages in the principal amount of $347,682.14, with statutory interest from February 20, 2007, the date on which the action was commenced.

We agree with defendants that, pursuant to the terms of the subcontract, which incorporates the terms of the contract between Allied and Wal-Mart, the liability of Allied with respect to the extra work initiated by Wal-Mart through a Construction Change Directive (CCD) is limited to the sum approved by Wal-Mart (*see generally Sturdy Concrete Corp. v NAB Constr. Corp.*, 65 AD2d 262, 268-269, *appeal*

dismissed 46 NY2d 938, 940; *Joseph Davis, Inc. v Merritt-Chapman & Scott Corp*., 27 AD2d 114, 117-118). The evidence presented at trial establishes that, with respect to plaintiff's work, Wal-Mart approved $4,800 for CCD #1, $86,000 for CCD #2, $43,305 for CCD #3 and $55,758 for CCD #4. We therefore modify the judgment by reducing the award of damages for those items accordingly. We also agree with defendants that the court erred in directing that statutory interest on those items run from the date on which the action was commenced. The subcontract contains a valid "pay when paid clause," which required Allied to pay plaintiff for its CCD work "no later than 15 calendar days after receipt by [Allied] of corresponding payment from [Wal-Mart] for the Work" (*see generally Otis El. Co. v Hunt Constr. Group, Inc.* [appeal No. 2], 52 AD3d 1315, 1316). We therefore modify the judgment by providing that statutory interest on the sums awarded for the CCDs shall run from the dates on which the payment for each CCD was due, rather than from the date of the commencement of the action.

With respect to the remaining categories of extra work, we agree with plaintiff that Allied waived compliance with the requirement of the subcontract for a written change order authorizing such extra work (*see Care Sys. v Laramee*, 155 AD2d 770, 771; *Mel-Stu Constr. Corp. v Melwood Constr. Corp*., 131 AD2d 823, 824). That requirement is "not applicable where, as here, the conduct of the parties demonstrates an indisputable mutual departure from the written agreement and the changes were clearly requested by [Allied] and executed by [plaintiff]" (*Austin v Barber*, 227 AD2d 826, 828; *see Barsotti's, Inc. v Consolidated Edison Co. of N.Y.*, 254 AD2d 211, 212). In addition, contrary to defendants' contentions, we conclude that plaintiff established that each of the alleged categories of extra work was outside the scope of the work contemplated by the subcontract, and that plaintiff presented sufficient evidence establishing the value of its extra work. Trial testimony provided by a witness with knowledge of the actual value of such extra work is sufficient and documentary evidence with respect thereto is not required (*see Electronic Servs. Intl. v Silvers*, 284 AD2d 367, 368, *lv dismissed* 97 NY2d 700, *lv denied* 99 NY2d 508; *Reed Paving v Glen Ave. Bldrs*., 148 AD2d 934, 935). Here, the testimony of plaintiff's president and its expert was sufficient to establish that plaintiff was entitled to recover in quantum meruit for the categories of extra work that were not encompassed by the CCDs. That testimony established the necessary elements for recovery in quantum meruit, i.e., plaintiff's performance of the extra work in good faith, acceptance of that work by Allied, plaintiff's expectation to be compensated for it and the reasonable value of the work (*see Tesser v Allboro Equip. Co.*, 73 AD3d 1023, 1026; *Capital Heat, Inc. v Buchheit*, 46 AD3d 1419, 1420-1421).

Finally, we conclude that the court properly dismissed defendants' two counterclaims. With respect to the first counterclaim, defendants failed to present sufficient evidence establishing that plaintiff breached the subcontract or that plaintiff owes back charges to Allied for work that was not performed or that was improperly performed (*see generally Mel-Stu Constr. Corp*., 131 AD2d at 825; *Sturdy Concrete Corp*., 65 AD2d at 273). Defendants also

failed to meet their burden of establishing, in support of their second counterclaim, that the amounts set forth by plaintiff in its mechanic's lien were willfully exaggerated (*see Garrison v All Phase Structure Corp.*, 33 AD3d 661, 662; *George A. Fuller Co. v Kensington-Johnson Corp.*, 234 AD2d 265, 267).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

613

KA 09-02049

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MELVIN BOGAR, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MELVIN BOGAR, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered August 23, 2006. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (four counts), course of sexual conduct against a child in the second degree (two counts), course of sexual conduct against a child in the first degree and endangering the welfare of a child (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, inter alia, four counts of sexual abuse in the first degree (Penal Law § 130.65 [3]) and course of sexual conduct against a child in the first degree (§ 130.75 [1] [a]). The conviction arises out of defendant's sexual abuse of three sisters and two of their friends, who were also sisters, ranging in age from 9 to 15 years old. We reject defendant's contention that County Court erred in allowing a police detective to testify that a videotape recorded by defendant depicted some illegal conduct. Although as a general rule a witness should not be permitted to testify with respect to his or her opinion regarding an issue that is within the jury's exclusive province as the ultimate finder of fact (*see generally People v Machiah*, 60 AD3d 1081; *People v Jones*, 51 AD3d 690, 692), defendant opened the door to the challenged testimony on his recross-examination of the detective. Further, " 'the court provided the jury with appropriate limiting instructions immediately after the challenged testimony was elicited,' thus minimizing any potential prejudice to defendant" (*People v Bassett*, 55 AD3d 1434, 1436, *lv denied* 11 NY3d 922; *see People v Johnson*, 45 AD3d 606, *lv denied* 9 NY3d 1035). In any event, any such error is harmless inasmuch as the

evidence of defendant's guilt was overwhelming and there was no significant probability that he would have been acquitted but for the error (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Defendant further contends that the court erred in allowing the People to bolster the testimony of the victims through the testimony of certain witnesses with respect to the victims' out-of-court statements regarding the abuse. Defendant failed to object to several of the challenged statements and thus failed to preserve for our review his contention with respect to them (*see People v Comerford*, 70 AD3d 1305), 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 conclude that the remaining statements fell within recognized exceptions to the rule against hearsay and thus did not constitute improper bolstering (*see Comerford*, 70 AD3d 1305; *see generally People v Buie*, 86 NY2d 501, 510; *People v Stevens*, 57 AD3d 1515, *lv denied* 12 NY3d 822). We reject defendant's contention that the court erred in denying his motion to sever the counts of the indictment involving one set of sisters from the counts involving the other set of sisters. " 'Trial courts must be afforded reasonable latitude in exercising discretion in [severance] matters and[,] in doing so, must weigh the public interest in avoiding duplicative, lengthy and costly trials against defendant's right to a fair trial free of undue prejudice' " (*People v McKinnon*, 15 AD3d 842, 843, *lv denied* 4 NY3d 888). We perceive no abuse of the court's discretion in this case (*see People v Scott*, 32 AD3d 1178, *lv denied* 8 NY3d 884; *People v Daymon*, 239 AD2d 907, *lv denied* 94 NY2d 821).

Contrary to defendant's further contention, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Finally, although defendant was 75 years old when he was sentenced and had no prior sexual offenses on his record, we conclude that the aggregate sentence of 25 years in prison is not unduly harsh or severe in light of the depravity of defendant's conduct and his refusal to accept responsibility.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

614

KA 10-00357

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS TOOLEY, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), dated January 28, 2010. 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*.). Contrary to defendant's contention, County Court properly determined that an upward departure from his presumptive risk level was warranted. During the presentence investigation interview, defendant admitted that he had previously sexually abused two other individuals who were not victims with respect to the underlying conviction, and that aggravating factor was not adequately taken into account by the risk assessment guidelines. Thus, the upward departure that resulted in defendant's classification as a level three risk is supported by the requisite clear and convincing evidence (*see* § 168-n [3]; *People v Farrell*, 78 AD3d 1454, 1455; *People v McCollum*, 41 AD3d 1187, *lv denied* 9 NY3d 807; *see also People v Cummings*, 81 AD3d 1261).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

618

KA 07-01482

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUTHER ADAIR, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered June 6, 2006. The judgment convicted defendant, upon a jury verdict, of attempted criminal possession of a weapon in the second degree, criminal contempt in the first degree, harassment in the second degree (two counts) and resisting arrest.

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, attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [former (2)]) and criminal contempt in the first degree (§ 215.51 [b] [v]), defendant contends that the evidence is legally insufficient to support the conviction of attempted criminal possession of a weapon because the People failed to establish that he attempted to possess the weapon in question or that he intended to use it unlawfully against another person. As defendant correctly concedes, that contention is unpreserved for our review inasmuch as his motion for a trial order of dismissal at the close of the People's proof was not specifically directed at the grounds raised on appeal (*see People v Gray*, 86 NY2d 10, 19).

In any event, defendant's contention is without merit. Defendant was involved in an altercation with several uniformed police officers who responded to a 911 call regarding a domestic dispute between defendant and his girlfriend, on whose behalf an order of protection had been issued against defendant. One of the officers testified at trial that, during the altercation, he felt defendant tugging on the holster for his service revolver and that, when the officer reached down, he felt defendant's hand on the top of the holster. The officer yelled out to the other officers that defendant was trying to grab his gun. After defendant was subdued and handcuffed, the officer observed

that one of the snaps on his holster had been opened. Another officer testified at trial that he heard the snap on the holster open during the altercation. Although defendant contends that his hand inadvertently came into contact with the holster during the altercation, we conclude that there is legally sufficient evidence that defendant attempted to gain possession of the officer's firearm. We further conclude that, considering the circumstances under which defendant was grabbing for the officer's firearm, there is a valid line of reasoning and permissible inferences from which a rational jury could have found that defendant's intent in attempting to possess the weapon was to use it unlawfully against the police officers (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crime of attempted criminal possession of a weapon in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that count is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject the further contention of defendant that County Court's denial of his two requests for an adjournment deprived him of a fair trial. The decision whether to grant an adjournment lies in the sound discretion of the trial court (*see People v Spears*, 64 NY2d 698, 699-700; *People v McNear*, 265 AD2d 810, 810-811, *lv denied* 94 NY2d 864), and the court's exercise of that discretion "in denying a request for an adjournment will not be overturned absent a showing of prejudice" (*People v Arroyo*, 161 AD2d 1127, 1127, *lv denied* 76 NY2d 852; *see People v Bones*, 50 AD3d 1527, *lv denied* 10 NY3d 956). Here, defendant failed to make the requisite showing of prejudice to warrant reversal. We note that defense counsel offered no reason for his first request for an adjournment, which was made on the first day of trial. Defense counsel's second request for an adjournment, made after the People had rested, was based on the unavailability of the officer who arrived at the scene during the altercation. That officer was on the People's witness list but did not testify because she was out of town on vacation. In requesting the adjournment, defense counsel stated that he anticipated that the officer's testimony would be "very favorable" to defendant. The record demonstrates, however, that the officer in question was not present at the scene when defendant attempted to gain possession of the other officer's weapon, and her police report did not indicate in any way that her testimony would have been favorable to defendant. Under those circumstances, it cannot be said that the court abused its discretion in denying defense counsel's requests for an adjournment (*see People v Comfort*, 60 AD3d 1298, 1299, *lv denied* 12 NY3d 924; *People v Povio*, 284 AD2d 1011, *lv denied* 96 NY2d 923).

Defendant contends that he was denied effective assistance of counsel because defense counsel did not have sufficient time to prepare for trial. Although defense counsel was assigned to represent defendant 17 days prior to trial, it is apparent from his thorough cross-examination of prosecution witnesses and his overall performance that defense counsel had adequately prepared for trial. We conclude that defense counsel was not ineffective based on his failure to subpoena the officer who was on vacation at the time of the trial for

the reasons stated above. In addition, defense counsel cannot be deemed ineffective for failing to move for a trial order of dismissal with respect to the count charging defendant with attempted criminal possession of a weapon on the grounds raised on appeal, inasmuch as such a motion would have had "little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *see generally People v Caban*, 5 NY3d 143, 152). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

619

KA 08-00617

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY D. COLBERT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MATTHEW J. CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered September 6, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted rape 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 attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]), defendant contends that his guilty plea was not knowing, voluntary, and intelligent because Supreme Court failed to advise him of the possibility of civil confinement pursuant to the Sex Offender Management and Treatment Act ([SOMTA] Mental Hygiene Law § 10.01 *et seq.*). Defendant failed to move to withdraw the plea or to vacate the judgment of conviction on that ground and thus has failed to preserve his contention for our review (*see generally People v Pendelton*, 81 AD3d 1037, 1038; *People v Ortiz*, 43 AD3d 1348, *lv denied* 9 NY3d 1008). In any event, defendant's contention is without merit (*see People v Harnett*, 16 NY3d 200, 205-207). The possibility of civil confinement pursuant to SOMTA is a collateral consequence of a guilty plea, and the court therefore was not required to advise defendant of SOMTA's potential impact (*see id.* at 206). Although "a plea made in ignorance of [the] consequences [of SOMTA] may sometimes be proved involuntary . . . if a defendant can show that the prospect of SOMTA confinement was realistic enough that it reasonably could have caused him [or her], and in fact would have caused him [or her], to reject an otherwise acceptable plea bargain" (*id.* at 207), defendant failed to meet that burden. Thus, the court was not

required, as a matter of fundamental fairness, to advise defendant of the potential impact of SOMTA.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

623

CAF 10-00755

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF COLINIA D.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

THOMAS F., RESPONDENT-RESPONDENT.

IN THE MATTER OF COLINIA D.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

THOMAS F., RESPONDENT-RESPONDENT.

IN THE MATTER OF THOMAS F., PETITIONER,

V

ERIE COUNTY CHILDREN'S SERVICES, RESPONDENT.

CHARLES D. HALVORSEN, ESQ., ATTORNEY FOR THE
CHILD, APPELLANT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), APPELLANT PRO SE.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

SEAN DENNIS HILL, BUFFALO, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered March 30, 2010 in proceedings pursuant to Social Services Law § 384-b and Family Court Act article 6. The order, inter alia, dismissed the petitions.

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

Memorandum: The Attorney for the Child appeals from an order entered following a fact-finding hearing that, inter alia, dismissed the petitions of Erie County Department of Social Services (petitioner), seeking to terminate the parental rights of the father with respect to the child who is the subject of these consolidated proceedings. The Attorney for the Child contends that, contrary to

Family Court's determination, petitioner established "by clear and convincing evidence that it . . . fulfilled its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and to reunite the family" (*Matter of Sheila G.*, 61 NY2d 368, 373; *see* Social Services Law § 384-b [7] [a]). We reject that contention. To fulfill that duty, petitioner was required to determine the particular problems facing the father with respect to the care of his child and to "make affirmative, repeated, and meaningful efforts to assist [him] in overcoming [those] handicaps" (*Sheila G.*, 61 NY2d at 385). "The agency should mold its diligent efforts to fit the individual circumstances so as to allow the parent to provide for the child's future" (*Matter of Austin A.*, 243 AD2d 895, 897 [internal quotation marks omitted]). The subject child, who is now 18 years old, has severe Down syndrome. Based on the evidence presented by petitioner at the hearing, we agree with the court that petitioner "failed to tailor its efforts to the needs of this particular parent and child" (*Matter of Maria Ann P.*, 296 AD2d 574, 575; *see Matter of Patricia C.*, 63 AD3d 1710, 1711).

We note that the court also dismissed the father's petition seeking custody of the child, whose mother is deceased, and the father has not cross-appealed from the order. Thus, the child remains in foster care with the family that sought to adopt her.

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

626

CA 10-02018

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF SISTERS OF CHARITY HOSPITAL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD F. DAINES, M.D., COMMISSIONER OF HEALTH,
STATE OF NEW YORK, AND LAURA L. ANGLIN, DIRECTOR
OF BUDGET, STATE OF NEW YORK, OR THEIR SUCCESSORS,
RESPONDENTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (THOMAS G. SMITH OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered March 31, 2010 in a proceeding pursuant to CPLR article 78. The judgment granted the petition and remitted the matter for a hearing on the challenge of petitioner to its Medicaid reimbursement rate.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination calculating its Medicaid reimbursement rates for the period from January 1985 through August 2009 following an administrative appeal without a hearing. Supreme Court granted the petition and remitted the matter for a hearing at which petitioner could challenge its Medicaid reimbursement rates and present evidence of any increased costs. We reverse.

We agree with respondents at the outset that the court erred in concluding that petitioner advanced a claim that the calculation of its Medicaid reimbursement rates was not reasonable and adequate pursuant to Public Health Law § 2807 (3). In any event, that claim is without merit (*see generally Matter of Nazareth Home of the Franciscan Sisters v Novello*, 7 NY3d 538, 544-545, *rearg denied* 7 NY3d 922). We note that petitioner correctly concedes that the administrative appeal by which it challenged the calculation of its Medicaid reimbursement rates is time-barred with respect to rate years prior to 2001, and we also agree with respondents that the administrative appeal is time-

barred with respect to rate years 2002 and 2003 (*see* 10 NYCRR former 86-1.61 [b] [4]; [d]). Thus, the court erred in granting the petition insofar as it concerns petitioner's Medicaid reimbursement rates with respect to those years.

We further conclude that the court erred in granting the petition insofar as it concerns petitioner's Medicaid reimbursement rates with respect to the rate years 2004 through 2009. "Petitioner bears a heavy burden in challenging [an agency's] determination with respect to Medicaid reimbursement . . ., and that determination must be upheld if it has a rational basis" (*Matter of Monroe Community Hosp. v Commissioner of Health of State of N.Y.*, 289 AD2d 951, 952; *see Matter of County of Monroe v Kaladjian*, 83 NY2d 185, 189; *Matter of Gignac v Paterson*, 70 AD3d 1310, 1311, *lv denied* 14 NY3d 714). Indeed, "[w]ith regard to [an] agency's application of Medicaid regulations and directives, the fact that the agency's interpretation might not be the most natural reading of [its] regulation, or that the regulation could be interpreted in another way, does not make the interpretation irrational" (*Matter of Padulo v Reed*, 63 AD3d 1687, 1688, *lv denied* 13 NY3d 716 [internal quotation marks omitted]). Contrary to the court's determination, we conclude that the administrative appeal with respect to the rate years 2004 through 2009 was governed by 10 NYCRR former 86-1.61 (b) (2) and (d). On the record before us, we cannot conclude that respondents' interpretation of that regulation was irrational (*see Padulo*, 63 AD3d at 1688; *Matter of University Hgts. Nursing Home v Chassin*, 245 AD2d 776, 777-778; *Matter of Mary Imogene Bassett Hosp. v Axelrod*, 127 AD2d 260, 263).

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

627

CA 10-02358

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF TERRY L. STEVENS,
PETITIONER-RESPONDENT,

V ORDER

ALLIED BUILDERS, INC., CHARLES W. PECORELLA,
MATTEO PECORELLA, JOHN J. PETRONIO,
CARL V. PETRONIO AND GARY L. NANNI,
RESPONDENTS-APPELLANTS.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (ROBERT J. LUNN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

GATES & ADAMS, P.C., ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered November 19, 2010 in an action for the dissolution of respondent Allied Builders, Inc. The order directed respondents to post a $1,000,000 security bond and denied the cross motion of respondents to disqualify counsel for petitioner.

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

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court

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

629

KA 09-01056

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. TYRA, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (NEAL P. MCCLELLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered March 25, 2009. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony, and aggravated driving while intoxicated, a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]) and felony aggravated driving while intoxicated (§ 1192 [2-a]; § 1193 [1] [c] [former (i)]). Defendant contends that County Court abused its discretion in denying his motion for a mistrial after a witness testified that defendant was arrested for driving into a house on the day before the incident at issue occurred. We reject that contention (*see generally People v Ortiz*, 54 NY2d 288, 292). The court instructed the jury to disregard that statement, and "the jury is presumed to have followed" the curative instruction (*People v Woods*, 60 AD3d 1493, 1494, *lv denied* 12 NY3d 922; *see People v Cruz*, 272 AD2d 922, 923, *affd* 96 NY2d 857; *People v Allen*, 78 AD3d 1521). Thus, any prejudice resulting from that statement was thereby adequately alleviated (*see Allen*, 78 AD3d 1521; *People v Young*, 55 AD3d 1234, 1236, *lv denied* 11 NY3d 901).

To the extent that defendant further contends that there is legally insufficient evidence to corroborate his admissions to the police pursuant to CPL 60.50, that contention is not preserved for our review (*see People v Prado*, 1 AD3d 533, 534, *affd* 4 NY3d 725, *rearg denied* 4 NY3d 795; *People v Mosca*, 294 AD2d 938, *lv denied* 99 NY2d 538) and, in any event, it is without merit. Defendant's blood alcohol content was .31%, and his truck was parked so that it was in contact with another vehicle. Defendant stated that no one else drove

his truck, and he admitted that he parked the truck in the location where it was found on the morning of his arrest. Further, defendant admitted that he had been drinking both the previous night and that morning, denied drinking anything since he parked the vehicle and stated that he struck his face "on" his truck. Defendant's face was still bleeding when the police arrived. Thus, defendant's admissions were corroborated by "evidence . . . found in the presence of defendant at the scene of the crime, his guilty appearance afterward, [and] other circumstances supporting an inference of guilt" (*People v Booden*, 69 NY2d 185, 187; *see People v Kestler*, 201 AD2d 955, *lv denied* 83 NY2d 854; *see generally People v Blake*, 5 NY2d 118, 119-120; *People v Spencer*, 289 AD2d 877, 879, *lv denied* 98 NY2d 655).

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

Patricia L. Morgan

Entered: May 6, 2011

Clerk of the Court