SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 10, 2016

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1149

CA 15-00744

PRESENT: SMITH, J.P., PERADOTTO, CARNI, WHALEN, AND DEJOSEPH, JJ.

PETER R. KEPPLER, PLAINTIFF-APPELLANT,

V ORDER

CHARLES E. KEPPLER, JR. AND CULLIGAN WATER CONDITIONING OF AKRON, NEW YORK, INC., DOING BUSINESS AS KEPPLER CULLIGAN WATER TREATMENT, DEFENDANTS-RESPONDENTS.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WILLIAM G. BAUER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 22, 2014. The order, among other things, dismissed plaintiff's amended complaint and granted the relief requested in defendants' counterclaim.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 28 and 29, 2016,

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1308

CA 14-02056

PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ.

GARY CHAMBERLAIN, PLAINTIFF-RESPONDENT,

V ORDER

MAC TRAILER MANUFACTURING, INC., DEFENDANT,
MODERN DISPOSAL SERVICE, INC., DEFENDANT-APPELLANT,
AND CUSTOM CANVAS MFG., CO., INC., DEFENDANT-RESPONDENT.

MODERN DISPOSAL SERVICE, INC. AND MODERN LANDFILL, INC.,
THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

CHAMBERLAIN TRUCKING, LLC AND GARY CHAMBERLAIN,
THIRD-PARTY DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

CARTAFALSA, SLATTERY, TURPIN & LEONOFF, BUFFALO (BRIAN P. MINEHAN OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (BRADLEY D. MARBLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND THIRD-PARTY DEFENDANTS-RESPONDENTS.

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

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered September 4, 2014. The order, among other things, denied in part the motion of defendant-third-party plaintiff Modern Disposal Service, Inc. and third-party plaintiff Modern Landfill, Inc. for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 4, 2016,

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1309

CA 14-02058

PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ.

GARY CHAMBERLAIN, PLAINTIFF-RESPONDENT,

V ORDER

MAC TRAILER MANUFACTURING, INC., DEFENDANT,
MODERN DISPOSAL SERVICE, INC., DEFENDANT-APPELLANT,
AND CUSTOM CANVAS MFG., CO., INC., DEFENDANT-RESPONDENT.

MODERN DISPOSAL SERVICE, INC. AND MODERN LANDFILL, INC.,
THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

CHAMBERLAIN TRUCKING, LLC AND GARY CHAMBERLAIN,
THIRD-PARTY DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

CARTAFALSA, SLATTERY, TURPIN & LEONOFF, BUFFALO (BRIAN P. MINEHAN OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (BRADLEY D. MARBLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND THIRD-PARTY DEFENDANTS-RESPONDENTS.

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

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered October 8, 2014. The order, among other things, denied the cross motion of defendant-third-party plaintiff Modern Disposal Service, Inc. and third-party plaintiff Modern Landfill, Inc. for summary judgment seeking to pierce the corporate veil.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 4, 2016,

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 13-00392

PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN REEVES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD 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 (Donald E. Todd, A.J.), rendered January 11, 2013. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for a hearing pursuant to CPL 710.60 (4).

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). 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 reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We agree with defendant that he was entitled to a pretrial hearing to test the reliability of the police identification of him as the seller of cocaine to an undercover police officer during a transaction that occurred more than a year prior to defendant's arrest. Pursuant to a meeting arranged by a confidential informant, two undercover officers from the Onondaga County Sheriff's Department met with defendant on April 25, 2011 to purchase cocaine. Approximately five minutes prior to the meeting, one of the officers (hereafter, undercover officer) viewed a photograph allegedly depicting defendant. After the transaction, the undercover officer returned to the Sheriff's Department and reviewed the photograph again. The incident report completed by the undercover officer the day after the transaction contained the entry "UNKNOWN" for the

suspect's name. In a subsequent, but undated "Narrative Supplement" report, the undercover officer described the use of the single photograph to identify defendant before and after the transaction. Defendant was not arrested until more than a year later, on May 3, 2012, by a police officer from a different police agency (arresting officer), i.e., the Syracuse Police Department. Importantly, the arresting officer had not participated in the undercover transaction and made the arrest solely on the basis of an outstanding warrant. On the arrest report, in the box reserved for "ID Procedure," the arresting officer checked "None." No postarrest identification procedures were conducted by the People prior to trial. Unlike the typical "buy and bust" operation with a postarrest station house identification, the undercover officer made no effort to "assure himself that [the Syracuse Police Department] had arrested the man he intended" (*People v Morales*, 37 NY2d 262, 271).

Defendant's pretrial motion for discovery demanded "[a]ny photograph . . . purporting to contain the likeness of a human being shown to [prospective] witnesses." The People's response stated "None known to exist." The single photograph allegedly used by the undercover officer to identify defendant has not been produced by the People.

Defendant moved to suppress the People's identification testimony and, in the alternative, requested a hearing to determine the admissibility of any such evidence. County Court summarily denied suppression and defendant's request for a *Wade* hearing on the ground that the identification procedure was "confirmatory."

We begin by recognizing that the primary concern with police identification procedures is that they should provide "assurance that an innocent person [has not been] detained by reason of a mistaken arrest" (*People v Wharton*, 74 NY2d 921, 923). Thus, a contemporaneous postarrest station house viewing or prompt on the scene confrontation generally provides such assurance (*see id.* at 922-923). Here, following the drug transaction, the undercover officer did not observe defendant again until the trial, which was approximately a year and a half after the transaction. That lapse of time is in stark contrast to the typical situation where an undercover officer identifies the arrestee at the police station contemporaneously with the drug transaction (*see e.g. People v Irving*, 162 AD2d 280, 280-281, *lv denied* 76 NY2d 940).

While we recognize that a *"Wade* hearing" is often linked, nearly exclusively, with the concept of "suggestiveness," we conclude that a defendant is entitled to CPL 710.30 (1) (b) notice and the opportunity to move to suppress identification testimony pursuant to CPL 710.60 in order to test the *reliability* of such testimony (*see People v Mato*, 83 NY2d 406, 410). While "suggestiveness" may play an important role in the reliability analysis, it is not the exclusive criterion. The list of criteria involved in making a reliability determination may include, but is not limited to: the lapse of time between the criminal transaction and the arrest, the opportunity to observe the suspect during the transaction, the duration of the interaction, and

the facts and circumstances of the interaction with the suspect. It is well settled that "the mere labelling of an identification as 'confirmatory' will not obviate the need for *Wade* hearings. Case-by-case analyses of the facts and circumstances in each case remains necessary" (*id.* at 410-411). "Comprehensive analysis, not superficial categorization, ultimately governs" (*People v Gordon*, 76 NY2d 595, 601).

Under the circumstances presented here, we conclude that the identification of defendant in this case cannot be said to have the same assurances of reliability that were found to exist in *Wharton* that would justify the summary denial of a hearing pursuant to CPL 710.60 (*see People v Newball*, 76 NY2d 587, 592). We therefore hold the case, reserve decision, and remit the matter to County Court for a hearing pursuant to CPL 710.60 (4) to test the reliability of the People's identification testimony.

All concur except LINDLEY, J., who concurs in the result in the following memorandum: Although I concur in the result reached by the majority, I respectfully disagree in part with its rationale. I agree with the majority that County Court erred in summarily denying defendant's motion to suppress the undercover officer's identification. As the Court of Appeals has made clear (*see People v Boyer*, 6 NY3d 427, 431-432), there are only two types of confirmatory identifications that dispense with the need for a *Wade* hearing: (1) where the witness knows the defendant so well he or she is impervious to suggestiveness by the police (*see People v Rodriguez*, 79 NY2d 445, 453); and (2) where an undercover officer who participates in a buy-and-bust operation identifies the suspect shortly after the purchase to ensure that "an innocent person was not being detained by reason of a mistaken arrest" (*People v Wharton*, 74 NY2d 921, 923). Here, the undercover officer did not know defendant prior to the transaction, and his identification of defendant therefore cannot be deemed confirmatory under *Rodriguez*. Moreover, because the undercover officer was not involved in defendant's arrest, his prior identification of defendant was not confirmatory under *Wharton.* As the majority aptly notes, "[u]nlike the typical 'buy and bust' operation with a postarrest station house identification, the undercover officer made no effort to 'assure himself that [the Syracuse Police Department] had arrested the man he intended' (*People v Morales*, 37 NY2d 262, 271)." It thus follows that the court erred in determining that the identification was confirmatory as a matter of law, and a *Wade* hearing should be conducted.

I respectfully disagree with the majority, however, that defendant is entitled to a *Wade* hearing in order "to test the *reliability*" of the undercover officer's identification. "The accuracy of an eyewitness identification presents an issue of fact for jury resolution and *may not be determined on a motion to suppress*" (*People v Dukes*, 97 AD2d 445, 445 [emphasis added]; *see People v Ross*, 288 AD2d 138, 138, *lv denied* 98 NY2d 655). In my view, there is no basis to suppress identification testimony in the absence of evidence that the identification is tainted by unduly suggestive police

procedures, and concerns about the reliability of an identification—apart from alleged improper suggestiveness—go to the weight of the evidence, not its admissibility (*see People v Gilmore*, 135 AD2d 828, 828, *lv denied* 71 NY2d 896). Thus, a suppression court is not required to make "a threshold inquiry into the reliability of . . . identification testimony" (*People v Reeves*, 120 AD2d 621, 622, *lv denied* 69 NY2d 715).

Indeed, there are many cases where a witness's identification of a defendant may be of questionable reliability, such as where the witness was under the influence of drugs or alcohol when he or she made the identification, where the witness has an extensive criminal record and has proven to be less than trustworthy, or where a witness has poor eyesight or a faulty memory. Would we suppress the identification testimony of those witnesses in the absence of evidence that they were influenced by unduly suggestive police procedures? I do not think that we would or should. As noted, the rule excluding improper pretrial identifications is "designed to reduce the risk that the wrong person will be convicted *as a result of* suggestive identification procedures employed by the police" (*People v Adams*, 53 NY2d 241, 251 [emphasis added]), not to ensure that trial witnesses give accurate identification testimony.

The majority cites *People v Mato* (83 NY2d 406, 410) for the proposition that a defendant is entitled to a suppression hearing to test the reliability of an undercover officer's identification. Although the Court of Appeals in *Mato* referred generally to concerns about the "reliability" of the undercover officer's identifications of the defendant in that case, the Court made clear that it was concerned about the "suggestiveness" of the showup identifications, which occurred while the defendant was in handcuffs standing in front of the building where the drug transaction took place and then again at the police station after defendant was arrested. I do not read *Mato* as permitting a defendant to make a pretrial motion to challenge the reliability of an identification on grounds other than undue suggestiveness. Indeed, such a rule would appear to be inconsistent with *People v Marte* (12 NY3d 583, *cert denied* 559 US 941), where a unanimous Court of Appeals clarified that suppression is warranted *only* when an identification is tainted by suggestive procedures used by the police (*see id.* at 586-590). "Where no one in law enforcement is the source of the problem [relating to a possible misidentification]," the Court explained, there is no basis to suppress identification testimony, and concerns about reliability of an identification are for the trier of fact to consider (*id.* at 589).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

302

CA 15-01563

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

JEREMIAH CULLEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AT&T, INC. AND AMERICAN TOWER, L.P.,
DEFENDANTS-APPELLANTS.

HAVKINS ROSENFELD RITZERT & VARRIALE, LLP, NEW YORK CITY (JARETT L. WARNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered November 17, 2014. The order, among other things, granted the cross motion of plaintiff for partial summary judgment pursuant to Labor Law § 240 (1).

It is hereby ORDERED that the order so appealed from is modified on the law by denying plaintiff's cross motion for partial summary judgment on liability under Labor Law § 240 (1) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained while working on a cell phone tower owned by defendant American Tower, L.P. and leased to New Cingular Wireless PCS, LLC, sued herein as defendant AT&T, Inc. (AT&T). Plaintiff's employer was hired by AT&T's management company to service its towers, and plaintiff and a coworker were dispatched on the date of the accident to investigate and remedy an alarm indicating that the subject tower was not functioning properly. Plaintiff's coworker conducted diagnostic tests from the ground while plaintiff climbed the tower to examine whether the malfunction related to one of six tower mounted amplifiers (TMAs) located on a boom extending out from the center pole of the tower at a height of approximately 180 feet. Plaintiff took approximately 20 to 30 minutes to climb to the top of the tower and, after he stopped to assess the situation, his coworker informed him that the alarm was likely the result of a broken TMA. In order to observe the TMA, plaintiff connected his shock absorbing lanyard to the tower, proceeded onto the boom, and then used two slings or "chokers" to lower himself to the TMA, which was about three or four feet below the boom. After plaintiff and his coworker determined that the TMA needed to be replaced, plaintiff intended to return to the center pole of the

tower and set up a pulley to haul a replacement TMA up to his location. Plaintiff grabbed the slings and pulled himself upward, but he slipped and fell as he attempted to maneuver himself back onto the boom. According to plaintiff, when he fell, both slings latched around his wrists and caused a sudden "jerk and pull" movement, which allegedly caused his injuries. As relevant on appeal, Supreme Court granted plaintiff's cross motion for partial summary judgment on liability under Labor Law § 240 (1) and denied that part of defendants' cross motion for summary judgment dismissing the section 240 (1) cause of action.

Contrary to defendants' contention, the court properly determined that plaintiff was engaged in a protected activity, i.e., repair, at the time of the accident. It is well settled that section 240 (1) " 'does not apply to routine maintenance in a non-construction, non-renovation context' " (*Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1415). "[D]elin[e]ating between routine maintenance and repairs is frequently a close, fact-driven issue . . . , and [t]hat distinction depends upon whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work . . . , and whether the work involved the replacement of components damaged by normal wear and tear" (*Wolfe v Wayne-Dalton Corp.*, 133 AD3d 1281, 1282 [internal quotation marks omitted]).

Here, plaintiff testified that he never performed preventive maintenance on the towers, and that he and his coworkers were dispatched to a tower only when something was in need of repair (*cf. Barbarito v County of Tompkins*, 22 AD3d 937, 938-939, *lv denied* 7 NY3d 701). Indeed, plaintiff's submissions establish that an item on the tower was malfunctioning prior to commencement of the work, and that plaintiff was injured after climbing approximately 180 feet to conduct an investigation into the cause of the alarm and to remedy the malfunction (*see Caraciolo v 800 Second Ave. Condominium*, 294 AD2d 200, 201-202; *Craft v Clark Trading Corp.*, 257 AD2d 886, 887). Where, as here, " 'a person is investigating a malfunction, . . . efforts in furtherance of that investigation are protected activities under Labor Law § 240 (1)' " (*Ozimek*, 83 AD3d at 1415). We reject defendants' contention that liability under section 240 (1) is foreclosed on the ground that the investigation had concluded and plaintiff was in the process of returning to the center pole to haul up the replacement TMA when the fall occurred (*see Pakenham v Westmere Realty, LLC*, 58 AD3d 986, 987-988). As the Court of Appeals has emphasized, " '[i]t is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work' " (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124). Further, the record does not support defendants' contention that replacement of the TMA was necessitated by damage due to normal wear and tear (*see Parente v 277 Park Ave. LLC*, 63 AD3d 613, 614; *cf. Selak v Clover Mgt., Inc.*, 83 AD3d 1585, 1586-1587). Plaintiff's submissions thus establish that he was engaged in the repair of the TMA on the tower rather than routine maintenance, and we conclude that defendants failed to raise a triable issue of fact in that respect (*see Wolfe*, 133 AD3d at 1282-1283; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We agree with defendants, however, that the court erred in granting plaintiff's cross motion for partial summary judgment on liability under section 240 (1). We therefore modify the order accordingly. It is well settled that, "[t]o succeed on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that an owner or contractor failed to provide appropriate safety devices at an elevated work site and that such violation of the statute was the proximate cause of his [or her] injuries" (*Ramsey v Leon D. DeMatteis Constr. Corp.*, 79 AD3d 720, 722; *see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554; *Felker v Corning Inc.*, 90 NY2d 219, 224-225). "[A]n accident alone does not establish a Labor Law § 240 (1) violation or causation" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289). Moreover, " '[t]he question of whether [a] device provided proper protection within the meaning of Labor Law § 240 (1) is ordinarily a question of fact, except in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its [intended] function of supporting the worker and his or her materials' " (*Musselman v Charles A. Gaetano Constr. Corp.*, 277 AD2d 691, 692; *see Trippi v Main-Huron, LLC*, 28 AD3d 1069, 1070).

Even assuming, arguendo, that plaintiff met his initial burden on his cross motion, we conclude that there are issues of fact whether the safety devices provided proper protection, and whether the absence of additional safety devices was a proximate cause of plaintiff's injuries (*see Ortiz v Turner Constr. Co.*, 28 AD3d 627, 629; *see also Ramsey*, 79 AD3d at 722; *Brown v Concord Nurseries, Inc.*, 37 AD3d 1076, 1077). In opposition to plaintiff's cross motion, defendants submitted an expert affidavit sufficient to raise an issue of fact whether the safety devices provided to plaintiff were adequate for his work (*see Miller v Spall Dev. Corp.*, 45 AD3d 1297, 1298). Although the deposition testimony of plaintiff and his coworker and the affidavit of plaintiff's expert indicated that additional safety devices should have been provided, we conclude that the conflicting opinion of defendants' expert raises an issue of fact whether the absence of other safety devices proximately caused plaintiff's injuries (*see Scribner v State of New York*, 130 AD3d 1207, 1209-1210; *Kropp v Town of Shandaken*, 91 AD3d 1087, 1090; *Miller*, 45 AD3d at 1298).

All concur except WHALEN, P.J., and LINDLEY, J., who dissent and vote to affirm in accordance with the following memorandum: We respectfully dissent in part and would affirm because we conclude that Supreme Court properly granted plaintiff's cross motion for partial summary judgment on liability under Labor Law § 240 (1). As noted by the majority, plaintiff was working on a cell phone tower approximately 180 feet above the ground with his full body harness tied off to a part of the tower, he had used "choker slings" that looked like "giant rubber band[s]" to lower himself down from a horizontal boom for access to a tower mounted amplifier, and he sustained injuries when the slings latched around his wrists and "jerk[ed]" him to a stop after he slipped and fell from the boom in the course of climbing back onto it. The record further establishes

that prior to the accident plaintiff had asked his supervisor multiple times for additional safety equipment, including a "self-descending lanyard," to enable him to "get down to where [he] needed to work," that he had made a further request for a synthetic rope ladder to his employer's "safety guy," and that his requests were not granted. In addition, plaintiff testified at his deposition that it had been necessary for him to wrap the slings around his arms and support his own weight in order to pull himself to a position from which he could swing one foot onto the boom, whereas a rope ladder would have enabled him to "stabilize [him]self" and thus would have "made it a lot easier" to climb back onto the boom, and a self-descending lanyard would have "[done] all of the work" itself to raise and lower him.

In support of his cross motion, plaintiff submitted, inter alia, his deposition testimony and the affidavit of an expert who asserted that the use of the slings as described above exposed plaintiff to unreasonable danger, and that defendants' failure to furnish additional safety equipment was a proximate cause of plaintiff's injuries. In opposition to the cross motion, defendants submitted, inter alia, the affidavit of an expert who asserted that the equipment provided to plaintiff was consistent with industry standards, that the adequacy of the protection afforded was evident from "the fact that plaintiff did not fall to the ground when he lost his footing," and that additional equipment "would not have provided plaintiff with any measure of safety materially different from" that which he already had.

In our view, plaintiff made a prima facie showing that the absence of necessary safety equipment, i.e., the inadequacy of the slings alone to protect him against elevation-related risks as he went back up to the boom, was a proximate cause of his injuries, and that he was therefore entitled to partial summary judgment on liability pursuant to Labor Law § 240 (1) (*see Felker v Corning Inc.*, 90 NY2d 219, 224-225; *Gizowski v State of New York*, 66 AD3d 1348, 1349; *see generally Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97, *rearg denied* 25 NY3d 1195), particularly in light of his unheeded requests for additional safety devices (*see Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 588-589).

We also conclude that defendants failed to raise a triable issue of fact in opposition to plaintiff's cross motion. Defendants made no showing that plaintiff misused or failed to use any safety device such that his own conduct may have been the sole proximate cause of his injuries (*see Gallagher v New York Post*, 14 NY3d 83, 88-89; *cf. Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554-555), and we cannot agree with the majority that there is a reasonable view of the evidence in which plaintiff was provided with proper protection. The reliance on industry standards by defendants' expert is unavailing because Labor Law § 240 (1) is a self-executing statute that sets its own standard for liability (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523-524, *rearg denied* 65 NY2d 1054; *Cruz v Cablevision Sys. Corp.*, 120 AD3d 744, 746-747), and the fact that plaintiff's equipment "arrest[ed] his fall before he struck the ground" does not establish that it afforded proper protection inasmuch

as it nonetheless "proved inadequate to shield him from gravity-related injuries" (*Lopez v Boston Props. Inc.*, 41 AD3d 259, 260; *see Rich v West 31st St. Assoc., LLC*, 92 AD3d 433, 434). In other words, the intended function of the safety equipment used by plaintiff was to protect him against any type of gravity-related injury while he worked on the tower, and the fact that the slings themselves caused his injuries while he was using them as intended establishes that they failed to perform that function (*cf. Trippi v Main-Huron, LLC*, 28 AD3d 1069, 1070).

Finally, to the extent that defendants' expert opined that other devices would not have provided plaintiff with any greater protection than the slings provided, i.e., that the accident could have happened the same way even if other devices had been used, we conclude that his opinion is "based on speculation rather than record facts" and thus is insufficient to defeat plaintiff's cross motion (*Urbano v Rockefeller Ctr. N., Inc.*, 91 AD3d 549, 550; *see Strojek v 33 E. 70th St. Corp.*, 128 AD3d 490, 491; *Robinson v NAB Constr. Corp.*, 210 AD2d 86, 87; *see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

312

KA 13-01685

PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT C. LEWIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered June 3, 2013. The judgment convicted defendant, upon a jury verdict, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [2]). We reject defendant's contention that his right to be present during questioning of prospective jurors at sidebar conferences regarding bias, hostility, or predisposition was violated (*see generally People v Antommarchi*, 80 NY2d 247, 250, *rearg denied* 81 NY2d 759). It is well settled that a defendant's attorney may waive that right, which is what occurred here (*see generally People v Velasquez*, 1 NY3d 44, 47-48). Contrary to defendant's contention, a court need not engage in any "*pro forma* inquisition in each case on the off-chance that a defendant who is adequately represented by counsel . . . may nevertheless not know what he is doing" (*People v Francis*, 38 NY2d 150, 154). Defendant failed to preserve for our review his contention that he was deprived of a fair trial based on improper comments made by the prosecutor during voir dire (*see generally People v Addison*, 94 AD3d 1539, 1540, *lv denied* 19 NY3d 994), 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 reject defendant's contention that County Court erred in refusing to suppress his statements to the police. Defendant's reliance on evidence introduced at trial in support of his contention is misplaced. It is well settled that "evidence subsequently admitted [at] trial cannot be used to support [or undermine] the determination of the suppression court denying [a] motion to suppress [an] oral

confession; the propriety of the denial must be judged on the evidence before the suppression court" (*People v Gonzalez*, 55 NY2d 720, 721-722, *rearg denied* 55 NY2d 1038, *cert denied* 456 US 1010; *see People v Carmona*, 82 NY2d 603, 610 n 2). Defendant's further contention that the evidence is legally insufficient to establish his guilt is unpreserved for our review (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678) and, in any event, it lacks merit. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational person to the conclusion reached by the jury based on the evidence at trial, i.e., that defendant had sexual intercourse with the victim, who was incapable of consent by reason of being physically helpless (*see generally People v Bleakley*, 69 NY2d 490, 495). 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 further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "Issues with respect to 'the credibility of prosecution witnesses concerning the voluntariness of the confession were for the jury to decide, and there is no basis in the record to disturb the jury's resolution of those issues' " (*People v Warney*, 299 AD2d 956, 957, *lv denied* 99 NY2d 633).

We reject defendant's further contention that the court failed to comply with the procedures in CPL 310.30 with respect to a jury note (*see People v O'Rama*, 78 NY2d 270, 277-278). The note at issue did not contain a substantive inquiry and necessitated only the ministerial actions of sending certain exhibits into the jury room and thus did not implicate the procedures outlined in *O'Rama* (*see People v Damiano*, 87 NY2d 477, 487). Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct during summation because he failed to object to any of the alleged improprieties (*see People v Lane*, 106 AD3d 1478, 1480, *lv denied* 21 NY3d 1043; *People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967). Although we conclude that defendant was not deprived of a fair trial by the prosecutor's comments, we take this opportunity to emphasize that a prosecutor serves as an officer of the court and a representative of the People of the State (*see generally People v Schaaff*, 71 AD2d 630, 631). Here, the prosecutor engaged in inappropriate rhetoric which, although not warranting reversal, was inconsistent with the standards of conduct expected of prosecutors and all members of the bar. We thus admonish the prosecutor to refrain from using similar inflammatory rhetoric in future proceedings.

We reject defendant's contention that he was denied effective assistance of counsel. With respect to the alleged instances of prosecutorial misconduct, inasmuch as they were not so egregious as to deprive defendant of a fair trial, defense counsel's failure to object thereto did not deprive defendant of effective assistance of counsel (*see People v Koonce*, 111 AD3d 1277, 1279). Inasmuch as we have concluded that the evidence is legally sufficient to support the conviction, it cannot be said that defense counsel's failure to renew the motion for a trial order of dismissal constitutes ineffective

assistance of counsel (*see People v Washington*, 60 AD3d 1454, 1454, *lv denied* 12 NY3d 922; *see generally People v Baldi*, 54 NY2d 137, 147). Nor was counsel ineffective because defendant did not testify at the *Huntley* hearing. The decision whether to testify belongs to the defendant (*see generally People v Ferguson*, 67 NY2d 383, 390). Defendant's remaining claims of ineffective assistance of counsel lack merit.

Defendant's contention that the amount of restitution ordered by the court is not supported by the record "is not properly before this Court for review because [he] did not request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of the restitution order[ ] during the sentencing proceeding" (*People v Butler*, 70 AD3d 1509, 1510, *lv denied* 14 NY3d 886 [internal quotation marks omitted]). In any event, that contention is without merit.

Finally, the sentence is not unduly harsh or severe.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

318

KA 15-01507

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD MEADOW, DEFENDANT-APPELLANT.

LAW OFFICES OF ANDREW J. FRISCH, NEW YORK CITY (ANDREW J. FRISCH OF COUNSEL), AND CUTI HECKER WANG LLP, 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 December 12, 2014. 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: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in admitting hearsay testimony from multiple prosecution witnesses, thereby depriving him of a fair trial. The witnesses in question testified to statements the victim made to them concerning defendant's prior violent and threatening behavior toward the victim. We agree with defendant that the court erred in allowing that testimony over his objection, and we therefore grant defendant a new trial.

On March 6, 1985, the victim's body was found face-first on the floor of her Syracuse apartment with her hands tied behind her back and a cloth belt around her neck. The Medical Examiner determined that she had been strangled to death sometime between 7:00 p.m. on March 4, 1985 and 3:10 a.m. the next morning. Although the apartment had been ransacked, there were no signs of a forced entry, and the victim had not been sexually assaulted. The police questioned several suspects, including defendant, the victim's estranged husband. The couple had separated approximately six months earlier and, according to several of the victim's friends and relatives, the victim said that defendant had beaten her in the past and threatened to kill her. Defendant denied killing the victim and offered an alibi. The investigation thereafter stalled, and defendant moved to Georgia.

Although the police continued to view defendant as a suspect, he

was not arrested until nearly 30 years later, after a Y-STR DNA analysis was performed on a small amount of DNA material found under the victim's fingernails, which had been clipped and preserved during the autopsy. The DNA expert who conducted the testing concluded that defendant's Y-STR profile was consistent with the DNA found under the victim's fingernails, and that neither defendant nor any of his paternal relatives could be excluded as the source of the DNA. According to the expert, one in every 4,600 males chosen at random would have Y-STR DNA consistent with that found under the victim's fingernails. Based on the new evidence, defendant was returned to Syracuse from Georgia and charged with murder in the second degree.

Prior to trial, defendant moved in limine to preclude the People from calling various witnesses to testify that the victim had told them that defendant had beaten her in the past and threatened to kill her. According to defendant, such testimony was not admissible under *People v Molineux* (168 NY 264), and, in any event, constituted inadmissible hearsay. In response, the People argued that the evidence was relevant to "defendant's intent, motive, and identity as [the] killer," and it was admissible because it would "provide the jury with background information regarding the strife-ridden relationship between defendant and the victim." With respect to defendant's hearsay contention, the People asserted that the evidence was admissible under the "state of mind exception" to the rule against hearsay. Following a hearing, the court denied defendant's motion in limine, ruling that "in a domestic violence type of case, or other cases for that matter, that kind of testimony is allowable if it's relevant to the issue of intent, motive, [or] identity."

During the trial, consistent with the court's ruling, the victim's aunt testified that the victim told her in 1979—six years before the murder—that defendant "handcuffed her to a chair and left her there for a little while because he didn't want her to go or do something." The victim's sister testified that she, too, heard the victim say that defendant had handcuffed her. The sister further testified that the victim told her two or three times that defendant had beaten her, and that the victim also said that she was having trouble sleeping because defendant "had threatened to kill her if she didn't come back to him." Finally, a friend of the victim testified that the victim told her over dinner one night that defendant had threatened to kill her.

Defendant repeatedly objected to the above testimony on hearsay grounds, among others, but the court overruled the objections. The court instructed the jurors, however, that the "evidence was not offered and it is not allowed by this Court and must not be considered for the purpose of proving that the defendant, Ron Meadow, had the propensity or predisposition to commit the crimes charged in this case." The court repeated that instruction each time it overruled defendant's hearsay objections. During the charge conference, defense counsel asked the court to instruct the jury that it should not consider the victim's out-of-court statements regarding defendant's prior bad acts for the truth of the matters asserted therein. The People opposed the request, and the court denied it. After

deliberating for more than six hours, the jury convicted defendant of intentional murder, and the court later sentenced him to 25 years to life in prison.

As a preliminary matter, we reject the People's contention that defendant failed to preserve his hearsay contention for our review. As noted, defendant moved in limine to preclude the subject testimony on hearsay grounds, and then objected to the testimony at trial on that same ground. Defendant thereby afforded the court ample "opportunity to correct any error in the proceedings below at a time when the issue can be dealt with most effectively" (*People v Lopez*, 71 NY2d 662, 665; *see* CPL 470.05 [2]).

With respect to the merits, it is well settled that "[o]ut-of-court statements offered for the truth of the matters they assert are hearsay and 'may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable' " (*Nucci v Proper*, 95 NY2d 597, 602, quoting *People v Brensic*, 70 NY2d 9, 14). Here, there is no dispute that the statements of the victim at issue were made out of court, and the People do not contend that an exception to the hearsay rule applies. Instead, the People contend that the statements are not hearsay because they were not offered for the truth of the matters asserted therein. We reject that contention. In our view, the statements were offered to establish that defendant had, in fact, physically abused the victim and threatened to kill her. Indeed, when defense counsel asked the court to instruct the jury that the statements should not be considered for the truth of the matters asserted, the People opposed the request, and the court denied it. Moreover, during his opening and closing statements, the prosecutor used the statements for the truth of the matters asserted. For example, the prosecutor asserted that, following her separation from defendant, the victim "began to disclose certain things to members of her family. Things that she had kept to herself for a number of years. She began to talk about the beatings that she suffered from this defendant. The controlling behavior and conduct that he exhibited. And when she finally got her freedom and an apartment of her own and was anxiously awaiting the start of her life, she finally disclosed that, *in fact*, on more than one occasion the defendant had threatened to kill her" (emphasis added). Similarly, during his summation, the prosecutor stated that "[t]he man who did it was the man who said that he was going to do it." As the statements of the prosecutor illustrate, he assumed the truth of the statements attributed to the victim and used them to argue that defendant committed the murder.

In addition, we note that the court, in its final instructions to the jury, stated that there was "evidence in this case that the defendant made certain alleged threats to kill his wife during the marriage and that he had restrained her by tying her or handcuffing her, and there has been other testimony as well regarding and describing the nature of the relationship during the marriage." That instruction suggested to the jury that the hearsay statements at issue were offered for the truth of the matters asserted therein. Although

the court instructed the jurors that such evidence "was not offered and must not be considered for the purpose of proving that the defendant had a propensity or predisposition to commit the crime of murder in the second degree," that did not address the hearsay problem. Again, the court refused to instruct the jury that it should not consider the subject hearsay statements for the truth of the matters asserted.

Citing *Molineux* and other like cases, including *People v Alvino* (71 NY2d 233), the People argue that evidence of defendant's prior threats and physical abuse of the victim were highly relevant for various nonhearsay purposes, such as establishing background information, revealing the state of mind of the victim and defendant, and demonstrating his motive and intent to kill the victim. As defendant correctly points out, however, there is no *Molineux* exception to the rule against hearsay. It may be true that evidence that defendant beat and threatened to kill the victim is admissible under a *Molineux* theory, but such evidence must still be in admissible form. For instance, a witness could testify that he or she witnessed defendant assault the victim, or heard defendant threaten the victim. That is not hearsay. It is hearsay, however, for a witness to testify that someone else told him or her that defendant beat or threatened the victim.

The People rely on *People v Bierenbaum* (301 AD2d 119, *lv denied* 99 NY2d 626), where, as one trial court has noted, the First Department "essentially creates or recognizes an exception to the hearsay rule which would permit hearsay evidence in domestic violence prosecutions as 'background information' " (*People v Harris*, 15 Misc 3d 994, 1003). Neither we nor the Court of Appeals has recognized a so-called "background exception" to the hearsay rule in criminal cases arising out of incidents of domestic violence, and we decline to do so here. In fact, *Bierenbaum* appears to be inconsistent with *People v Maher* (89 NY2d 456). In that case, the defendant was charged with killing his estranged paramour and the trial court permitted prosecution witnesses to testify about statements made to them by the victim concerning the defendant's violent and threatening behavior. The Court of Appeals held that the testimony regarding the victim's out-of-court statements constituted inadmissible hearsay. Relying on *Maher*, we reached a similar conclusion in *People v Harvey* (270 AD2d 959, *lv denied* 95 NY2d 835, *lv dismissed* 95 NY2d 853), ruling that "the court erred in permitting the People to introduce the statements of decedent to third parties that on previous occasions defendant physically abused her" (*id.* at 960). We perceive no reason in the record to reach a different conclusion here.

The question thus becomes whether the error was harmless. "Under the standard applicable to nonconstitutional errors, an error is harmless if the proof of defendant's guilt is overwhelming and there is no significant probability that the jury would have acquitted defendant had the error not occurred" (*People v Williams*, 25 NY3d 185, 194; *see People v Crimmins*, 36 NY2d 230, 242). Here, it cannot be said that the proof of guilt was overwhelming. There were no eyewitnesses, and defendant, when interrogated at length by the

police, consistently denied his guilt. Although defendant admitted to the police that he had physically abused the victim at times during the marriage, he did not admit to having threatened to kill her. We note that the police did not arrest defendant until almost 30 years after the murder was committed, evidently concluding that there was not enough evidence to charge him. The only new evidence that the police had when defendant was arrested were the DNA test results, which, although incriminating, do not constitute conclusive proof of guilt. In any event, even assuming, arguendo, that the proof of guilt is overwhelming, we cannot conclude that there is no significant probability that the verdict would have been different if the jury had not learned that defendant had threatened to kill the victim. We therefore reverse the judgment and grant a new trial.

We have reviewed defendant's remaining contention and conclude that it lacks merit.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

322

CA 15-01481

PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

BEVERLY A. ZOELLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LAKE SHORE SAVINGS BANK, DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (DANIEL B. MOAR OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROBSHAW & VOELKL, P.C., WILLIAMSVILLE (JEFFREY F. VOELKL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered April 30, 2015. The order, insofar as appealed from, denied defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this negligence and breach of contract action seeking damages for defendant's alleged improper and/or unauthorized removal of her as a beneficiary of three bank accounts maintained by her mother with defendant. Plaintiff's mother (hereafter, decedent) died on January 22, 2008, and the Public Administrator was appointed to administer her estate. The three accounts in question were marshaled by the Public Administrator and listed as assets of the estate in the judicial accountings in Surrogate's Court. Plaintiff appeared in the Surrogate's Court proceeding and raised objections in opposition to the petition for judicial settlement, but her objections did not address the accounts at issue. The Surrogate issued a final decree settling the accounts of the Public Administrator, and the funds from the three accounts were paid to decedent's creditors and otherwise distributed in accordance with the decree. Defendant now appeals from that part of an order denying its motion for summary judgment dismissing plaintiff's complaint on the ground of, inter alia, res judicata. We reverse the order insofar as appealed from, grant the motion, and dismiss the complaint.

Initially, we note that the motion ground advanced by defendant is more specifically characterized as offensive collateral estoppel, which is "a component of the broader doctrine of res judicata"

(*Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485; *see generally Goldstein v Consolidated Edison Co. of N.Y.*, 93 AD2d 589, 590-591, *affd* 62 NY2d 936, *cert denied* 469 US 1210). Here, defendant contends that the prior decree of the Surrogate is conclusive on the issue whether the three bank accounts were assets of decedent's estate or the sole property of plaintiff. It is well settled that an accounting decree is "conclusive as to issues that were decided as well as those that could have been raised in the accounting" (*Matter of Hunter*, 4 NY3d 260, 270; *see Pray v Hegeman*, 98 NY 351, 358). We reject plaintiff's contention that the doctrine of res judicata is not available to defendant as a defense because defendant was not a party to the Surrogate's Court proceeding. The " 'doctrine of mutuality' is a dead letter" in New York (*B. R. DeWitt, Inc. v Hall*, 19 NY2d 141, 147). "[T]he fact that a party has not had his day in court on an issue as *against a particular litigant* is not decisive in determining whether the defense of *res judicata* is applicable" (*Israel v Wood Dolson Co.*, 1 NY2d 116, 119). "New York law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling" (*Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 71).

We conclude that the issue whether the three bank accounts were assets of decedent's estate or the sole property of plaintiff is identical to the issue finally determined by the Surrogate's decree. With respect to the full and fair opportunity to litigate the proper ownership of the accounts, we further conclude that Surrogate's Court was clearly an appropriate forum for plaintiff to have raised and litigated that issue (*see Matter of Magacs*, 227 AD2d 760, 760-761; *Matter of Steinberg*, 107 AD2d 811, 811, *lv denied* 64 NY2d 611; *see also Matter of Liebman*, 189 Misc 282, 283-284). Moreover, plaintiff had available to her the alternate procedural pathway of filing a claim in order to litigate the ownership of the accounts (*see* SCPA 2105; *Matter of Southmayd*, 59 AD2d 956, 956-957; *see generally Matter of Glen*, 247 App Div 518, 519, *affd* 272 NY 530, *rearg denied* 272 NY 640). Nonetheless, plaintiff failed to challenge the ownership of the accounts notwithstanding the full and fair opportunity to do so in Surrogate's Court. We therefore conclude that the Surrogate's decree is conclusive as to the ownership of the accounts and that defendant is entitled to summary judgment dismissing the complaint.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

365

KA 14-00499

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY C. MAIER, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (TIMOTHY J. GARVIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered May 13, 2013. The judgment convicted defendant, upon a jury verdict, of assault in the third degree, burglary in the first degree and criminal trespass in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the third degree (Penal Law § 120.00 [1]), burglary in the first degree (§ 140.30 [2]), and criminal trespass in the second degree (§ 140.15 [1]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction with respect to burglary in the first degree and assault in the third degree inasmuch as defendant failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we conclude that defendant's contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495).

In particular, defendant contends that the evidence with respect to the burglary conviction is legally insufficient because the People did not establish that he entered the victim's dwelling with intent to commit a crime therein. " 'In order to secure a conviction for burglary, the People need only allege and prove a knowing and unlawful entry coupled with an intent to commit a crime therein. There is no requirement that the People allege or establish what particular crime was intended' " (*People v Lewis*, 5 NY3d 546, 552; *see People v James*, 114 AD3d 1202, 1204, *lv denied* 22 NY3d 1199). Additionally, "[a] defendant's intent to commit a crime 'may be inferred from the circumstances of the entry' " (*People v Sterina*, 108 AD3d 1088, 1090),

as well as " 'from defendant's actions and assertions when confronted' " (*People v Jamieson*, 88 AD3d 1298, 1299). Here, contrary to defendant's contention, the People established that defendant intended to commit at least one of three crimes when he entered the victim's residence—i.e., assault in the first degree (Penal Law § 120.10), assault in the third degree (§ 120.00), or menacing in the third degree (§ 120.15)—as demonstrated by the facts that defendant was armed with a knife when he entered the residence through a window, threatened to eject the victim from the residence, and immediately lunged at the victim from the windowsill, initiating a fight in which defendant punched the victim and tore out a handful of the victim's hair.

Viewing the evidence in light of the elements of burglary in the first degree 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). Moreover, inasmuch as " 'the evidence is legally sufficient to support defendant's conviction . . . , it cannot be said that defense counsel's failure to renew the motion for a trial order of dismissal constitutes ineffective assistance of counsel' " (*People v Kaminski*, 109 AD3d 1186, 1186-1187, *lv denied* 22 NY3d 1088; *see generally People v Caban*, 5 NY3d 143, 152). Defendant's sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

368

KA 12-01596

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL HOFFMAN, ALSO KNOWN AS DURRELL,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 16, 2012. The judgment convicted defendant, upon his plea of guilty, of gang assault in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of gang assault in the first degree (Penal Law § 120.07). We agree with defendant that his waiver of the right to appeal is not valid (*see People v Huddleston*, 134 AD3d 1458, 1458-1459, *lv denied* 27 NY3d 966; *see generally People v Lopez*, 6 NY3d 248, 256). Considering the prosecutor's plea colloquy and defendant's written waiver of the right to appeal, we conclude that the record as a whole "fails to establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Huddleston*, 134 AD3d at 1459 [internal quotation marks omitted]; *see Lopez*, 6 NY3d at 256). Furthermore, Supreme Court did not make "clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof" (*People v Guantero*, 100 AD3d 1386, 1387, *lv denied* 21 NY3d 1004 [internal quotation marks omitted]).

We agree with defendant that, during the suppression hearing, the court erred in precluding defendant from cross-examining the police investigator on the issue whether "Witness #1" was sufficiently familiar with defendant in order to render the single photo identification of defendant by that witness "merely confirmatory" (*People v Williamson*, 79 NY2d 799, 801). Although the court conducted a *Wade* hearing, which ordinarily eliminates the need for a *Rodriguez* hearing (*see People v Quinones*, 5 AD3d 1093, 1093, *lv denied* 3 NY3d

646), we conclude that the court's error during the suppression hearing renders a *Rodriguez* hearing necessary in this case (*see Williamson*, 79 NY2d at 800-801). We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a hearing to determine whether the identification by the subject witness was truly confirmatory in nature (*see People v Rodriguez*, 79 NY2d 445, 451-453) and, if the court determines that the identification was not confirmatory, it must further determine whether the single photo identification procedure employed with the subject witness was unduly suggestive (*see generally People v Kairis*, 37 AD3d 1070, 1071, *lv denied* 9 NY3d 846). Because no determination has yet been made that the single photo identification procedure at issue was unduly suggestive, the appeal may be held in abeyance for a postjudgment hearing (*see People v Redding*, 47 AD3d 953, 953-954).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

379

CA 15-01018

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

WEYDMAN ELECTRIC, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOINT SCHOOLS CONSTRUCTION BOARD, CITY OF SYRACUSE AND SYRACUSE CITY SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS.

SHEATS & BAILEY, PLLC, BREWERTON (JASON BAILEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JOHN G. POWERS OF COUNSEL), AND ROBERT P. STAMEY, CORPORATION COUNSEL, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 19, 2015. The order granted defendants' motion for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff subcontractor commenced this action seeking damages for delays allegedly caused by defendants and their construction manager on a school renovation project. Insofar as relevant to this appeal, plaintiff's amended complaint alleges a cause of action for breach of contract for nonpayment. Defendants moved for summary judgment dismissing the amended complaint on the ground, inter alia, that plaintiff's claims are barred by the no-damages-for-delay provisions of the contract. Supreme Court granted the motion on the basis of, inter alia, the exculpatory provisions of the contract. We affirm.

It is well settled that "[a] clause which exculpates a contractee from liability to a contractor for damages resulting from delays in the performance of the latter's work is valid and enforceable and is not contrary to public policy if the clause and the contract of which it is a part satisfy the requirements for the validity of contracts generally" (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309, *rearg denied* 68 NY2d 753; *see McNamee Constr. Corp. v City of New Rochelle*, 60 AD3d 918, 919, *lv denied* 13 NY3d 715). However, "even with such a clause, damages may be recovered for: (1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so

unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract" (*Corinno Civetta Constr. Corp.*, 67 NY2d at 309-310). Initially, we reject plaintiff's contention that there is a material distinction between damages caused by delay and those caused by "disruption," which plaintiff contends are not barred by the exculpatory provisions. That contention rests on nothing more than semantics, and it is clear that plaintiff's claim is that the alleged "disruption" resulted in delayed performance of its work.

Contrary to plaintiff's further contention, we conclude that defendants met their prima facie burden on their motion of establishing that the damages sought by plaintiff for delays in the performance of its work are barred by the no-damages-for-delay exculpatory clause of the parties' contract (*see Aurora Contrs., Inc. v West Babylon Pub. Lib.*, 107 AD3d 922, 923-924). It then became incumbent upon plaintiff in opposition to meet the "heavy burden" of establishing the applicability of one of the exceptions to the general rule that no-damages-for-delay clauses are enforceable (*Bovis Lend Lease [LMB], Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 147; *see LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d 485, 485). In this regard, we note that plaintiff's amended complaint did not plead any of the exceptions set forth in *Corinno* and, in opposition to the motion, "[p]laintiff . . . failed to raise a triable factual issue that the delays cited are exempt from the no-damages-for-delay clause. No evidence was presented that the conduct alleged was the result of [defendants'] gross negligence or willful misconduct. Instead, the conduct amounted to nothing more than inept administration or poor planning, which falls within the contract's exculpatory clause" (*Commercial Elec. Contrs., Inc. v Pavarini Constr. Co., Inc.*, 50 AD3d 316, 317-318). Even assuming arguendo that the project was dysfunctional and poorly managed, as plaintiff contends, we conclude that the exculpatory provisions bar plaintiff's claims (*see LoDuca Assoc., Inc.*, 91 AD3d at 486; *Blue Water Envtl., Inc. v Incorporated Vil. of Bayville, N.Y.*, 44 AD3d 807, 810, *lv denied* 10 NY3d 713). Moreover, plaintiff's claims, inter alia, that the work was performed out of sequence, poorly coordinated, and plagued by design changes were clearly contemplated by the exculpatory provisions of the contract (*see LoDuca Assoc., Inc.*, 91 AD3d at 485-486). We further conclude that plaintiff failed to allege facts and circumstances establishing that defendants breached a fundamental, affirmative obligation of the contract (*see Corinno Civetta Constr. Corp.*, 67 NY2d at 313). Plaintiff's contention that defendants' conduct amounted to an abandonment of the project is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985), and it is in any event without merit.

We reject plaintiff's further contention that the court erred in granting the motion without providing plaintiff the opportunity to complete discovery. Although a motion for summary judgment may be opposed on the ground "that facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212 [f]), "the opposing party

must make an evidentiary showing supporting this conclusion, mere speculation or conjecture being insufficient" (*Pank v Village of Canajoharie*, 275 AD2d 508, 509). Plaintiff failed to make the necessary evidentiary showing.

In light of our determination, we do not consider plaintiff's remaining contentions.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

381

CA 14-01808

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF DANIEL VEGA, CONSECUTIVE NO. 48447, FROM
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO
MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF
MENTAL HEALTH AND NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered September 5, 2014 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, directed that petitioner shall continue to be committed to a secure treatment facility.

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

Memorandum: In appeal No. 1, petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he currently suffers from a mental abnormality as defined by section 10.03 (i) and directing that petitioner continue to be confined to a secure treatment facility (*see* § 10.09 [h]). In appeal No. 2, petitioner appeals from an order, which, among other things, denied petitioner's motion pursuant to CPLR 5015 (a) to vacate the order that is the subject of appeal No. 1. We affirm in both appeals.

We reject petitioner's contention that the evidence is not legally sufficient to show "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense" (Mental

Hygiene Law § 10.03 [i]). Although it is well established that a diagnosis of antisocial personality disorder (ASPD) is, by itself, "insufficient, as a matter of law, to support a 'mental abnormality' finding" (*Matter of Groves v State of New York*, 124 AD3d 1213, 1214), here, both respondents' expert and petitioner's expert agreed that petitioner had a mental abnormality—specifically, that petitioner had diagnoses of ASPD, alcohol and cocaine dependency, and psychopathic traits along with a history of sexual preoccupation. Moreover, respondents' expert indicated that petitioner exhibited "sexually sadistic behavioral indicators." Considering the evidence in the light most favorable to respondents (*see Matter of State of New York v John S.*, 23 NY3d 326, 348, *rearg denied* 24 NY3d 933), we conclude that there is sufficient evidence of petitioner's diagnosis of ASPD, along with sufficient evidence of other diagnoses and/or conditions, to sustain a finding of mental abnormality (*see* § 10.03 [i]; *Matter of State of New York v Williams*, ___ AD3d ___ [May 6, 2016]; *Matter of State of New York v Ian I.*, 127 AD3d 766, 767-768).

Petitioner failed to preserve for our review his contention that the evidence is not legally sufficient to establish that he has serious difficulty in controlling or an inability to control his sexual misconduct inasmuch as he did not move for a directed verdict pursuant to CPLR 4401 or challenge the sufficiency of the evidence on those points in any other way (*see Matter of State of New York v David S.*, 136 AD3d 445, 447). In any event, upon our review of the record, we conclude that respondents established by the requisite clear and convincing evidence that petitioner "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.03 [e]; *see Matter of State of New York v Floyd Y.*, 135 AD3d 70, 72-75; *Matter of Richard TT.*, 132 AD3d 72, 76-78, *lv granted* __ NY3d __ [argued May 31, 2016]).

We reject petitioner's further contention that the determination is against the weight of the evidence. Supreme Court "was in the best position to evaluate the weight and credibility of the conflicting [expert] testimony presented . . . , and we see no reason to disturb the court's decision to credit the testimony of [respondents'] expert[]" (*Matter of State of New York v Parrott*, 125 AD3d 1438, 1439, *lv denied* 25 NY3d 911 [internal quotation marks omitted]).

Finally, petitioner contends that he is entitled to a new hearing because the court violated his due process rights when it rejected his request to remove his shackles and then failed to provide a reasonable justification for the same. Although the court erred in failing to provide a " 'particularized reason for [restraining petitioner] on the record' " (*People v Ashline*, 124 AD3d 1258, 1259), we conclude that the error is "harmless beyond a reasonable doubt because the error did not contribute" to the determination herein (*People v Campbell*, 106 AD3d 1507, 1509, *lv denied* 21 NY3d 1002 [internal quotation marks

omitted]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

382

CA 15-00866

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF DANIEL VEGA, CONSECUTIVE NO. 48447, FROM
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO
MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF
MENTAL HEALTH AND NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered April 29, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, denied petitioner's motion to vacate the order continuing his commitment to a secure treatment facility.

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

Same memorandum as in *Matter of Vega v State of New York* ([appeal No. 1] ___ AD3d ___ [June 10, 2016]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

384

KA 13-01138

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BERNARD J. BUTLER, ALSO KNOWN AS BERNARD FAULKS,
DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 22, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of assault in the second degree (§ 120.05 [2]). Defendant's conviction stems from his conduct in shooting the victim, striking him in the buttocks. Defendant contends that the evidence is legally insufficient to establish that he was the shooter, that the weapon was operable, and that the victim sustained a physical injury. We reject those contentions. Two eyewitnesses identified defendant as the shooter and described the gun. Two cartridge cases were found at the scene, and the People's expert testified that they came from one firearm. That evidence is sufficient to establish defendant's identity and the operability of the firearm (*see People v Ciola*, 136 AD2d 557, 557, *lv denied* 71 NY2d 893). Although there were minor inconsistencies in the testimony of the eyewitnesses, those inconsistencies do not render their testimony incredible as a matter of law (*see People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925). The People further established, through the testimony of the People's witnesses and the victim's medical records, that the victim sustained a physical injury inasmuch as he experienced "substantial pain" from the gunshot (*People v West*, 129 AD3d 1629, 1631, *lv denied* 26 NY3d 972; *see People v Chiddick*, 8 NY3d 445, 447). 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 reject defendant's

further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's contention that the photo arrays were unduly suggestive and thus that Supreme Court erred in refusing to suppress the identification testimony (*see generally People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833). All of the men in the photo arrays were of similar complexion, had similar haircuts and facial hair, and had a teardrop tattoo underneath the left eye, which was either computer-generated or drawn in ink. The fact that defendant was the only one wearing a hooded sweatshirt is of no moment considering that each man was wearing unique clothing. While the background of defendant's photograph was darker than that of the other photographs, we conclude that "[t]he composition and presentation of the photo array[s] were such that there was no reasonable possibility that the attention of the witness[es] would be drawn to defendant as the suspect chosen by the police" (*People v Sylvester*, 32 AD3d 1226, 1227, *lv denied* 7 NY3d 929; *see People v Boria*, 279 AD2d 585, 586, *lv denied* 96 NY2d 781; *People v Floyd*, 173 AD2d 211, 212, *lv denied* 78 NY2d 966).

Contrary to defendant's contention, the court did not err in denying his request for a missing witness charge with respect to two witnesses. Defendant failed to meet his initial burden of establishing that one witness would provide testimony favorable to the prosecution (*see People v Simon*, 71 AD3d 1574, 1575, *lv denied* 15 NY3d 757, *reconsideration denied* 15 NY3d 856; *People v Karas*, 21 AD3d 1360, 1361, *lv denied* 5 NY3d 883, *reconsideration denied* 6 NY3d 814; *see generally People v Gonzalez*, 68 NY2d 424, 427), and the People established with respect to the other witness that his testimony would be cumulative to the testimony of the other witnesses (*see People v Carr*, 59 AD3d 945, 946, *affd* 14 NY3d 808; *People v Hawkins*, 84 AD3d 1736, 1737, *lv denied* 17 NY3d 806).

We agree with defendant that the court erred in refusing to give an adverse inference charge based on the People's failure to preserve surveillance tapes (*see People v Handy*, 20 NY3d 663, 669). Defendant used reasonable diligence in requesting those tapes, which captured "evidence that [was] reasonably likely to be of material importance" (*id.* at 665), i.e., a video in the area where the crime occurred, from cameras operated by the City of Rochester Police Department.

We respectfully disagree with our concurring colleague that the State's duty to preserve surveillance videos is not triggered until a request has been made by the defendant. The Court of Appeals in *Handy* did not make any such pronouncement, but rather held that "when a defendant in a criminal case, acting with due diligence, demands evidence that is reasonably likely to be of material importance, and that evidence has been destroyed by the State, the defendant is entitled to an adverse inference charge" (*id.*). By way of further guidance, and of particular relevance to this case, the Court stated that "the authorities in charge should, when something that will foreseeably lead to criminal prosecution occurs, take whatever steps are necessary to insure that the video will not be erased—whether by

simply taking a tape or disc out of a machine, or by instructing a computer not to delete the material" (*id.* at 669). To conclude that the duty to preserve is not triggered until a request is made by the defendant would only give an incentive to State agents to destroy the evidence before the defendant has a chance to request the tapes. Such a rule would also directly contravene the explicit policy underlying the Court's rationale in *Handy*, namely, to "give[] the State an incentive to avoid the destruction of evidence" and to "raise the consciousness of State employees on this subject" (*id.*).

Although we conclude that the court erred in failing to give the requested adverse inference charge, we further conclude that the error is harmless (*see People v Bradley*, 108 AD3d 1101, 1102, *lv denied* 22 NY3d 1039). The evidence of guilt is overwhelming, and there is no reasonable possibility that the absence of an adverse inference charge contributed to the conviction (*see People v Blake*, 105 AD3d 431, 431, *affd* 24 NY3d 78; *see generally People v Crimmins*, 36 NY2d 230, 237).

Defendant failed to preserve for our review his contention that the court's *Sandoval* ruling constitutes an abuse of discretion (*see People v Tolliver*, 93 AD3d 1150, 1151, *lv denied* 19 NY3d 968; *People v Jackson*, 46 AD3d 1408, 1409, *lv denied* 10 NY3d 841). In any event, we reject that contention. "[T]he court's *Sandoval* compromise, in which it limited questioning on defendant's prior convictions for [ ]related offenses to whether defendant had been convicted of a felony or misdemeanor on the appropriate date, 'reflects a proper exercise of the court's discretion' " (*People v Stevens*, 109 AD3d 1204, 1205, *lv denied* 23 NY3d 1043). Defendant also failed to preserve for our review his contention that the indictment was multiplicitous because it charged criminal possession of a weapon in the second degree in more than one count (*see People v Jefferson*, 125 AD3d 1463, 1464, *lv denied* 25 NY3d 990). In any event, that contention is without merit (*see People v Simmons*, 133 AD3d 1275, 1277). We reject defendant's further contention that we should reverse one of the two convictions of criminal possession of a weapon in the second degree in the interest of justice because the two counts were based upon his possession of the same weapon. We see no reason to do so inasmuch as the "two counts are separate crimes" (*People v Rice*, 5 AD3d 1074, 1074, *lv denied* 2 NY3d 805). Finally, the sentence is not unduly harsh or severe.

All concur except CURRAN, J., who concurs in the result in the following memorandum: I concur in the result reached by the majority, but I write separately because, in my view, an adverse inference charge based on the People's failure to preserve surveillance video(s) is not required by *People v Handy* (20 NY3d 663), as explained in *People v Durant* (26 NY3d 341). I agree with the majority that *People v Handy* (20 NY3d 663) stands for the very broad proposition that the People must preserve evidence as of the time "when something that will foreseeably lead to criminal prosecution occurs" (20 NY3d at 669). Moreover, inasmuch as the record before our Court in *Handy* showed that the subject video evidence pertaining to the first jailhouse arrest was recorded over before a criminal proceeding was commenced, it is

clear that the duty to preserve evidence established in *Handy* arose before the defendant was even charged with a crime for the subject incident. While I fear that such a broad duty to preserve evidence places a huge burden on the People, especially in light of the enormous amount of electronic and digital information that is collected these days, I concur with the majority that *Handy* has such a wide scope.

This case provides a glimpse of the burden created by *Handy*. There are approximately 50 so-called "blue light" cameras strategically placed throughout the City of Rochester (http://www.cityofrochester.gov/article.aspx?id=8589936528). The surveillance video here is from one such camera and involved one brief incident that may or may not have been captured by the camera. In this case, the police thought to look at the video and determined that the assault was not captured on it and therefore did not suspend the video's automatic destruction. The majority and I agree that, based on *Handy*, an adverse inference charge is required here. Thus, the jury would be instructed that it is permitted to "infer that the destroyed evidence would have been favorable to the defense" (CJI2d[NY] Adverse Inference - Destroyed Evidence). Contrary to the pattern jury instructions in civil cases (1A NY PJI3d 1:77, 1:77.1 [2016]), this instruction would be without consideration of whether the jury concluded that the missing evidence was relevant (i.e., significant to its deliberations) and without consideration of whether the jury accepted the People's explanation for the destruction of the evidence, assuming the trial court allowed testimony on that subject (*see People v Cyrus*, 48 AD3d 150, 159, *lv denied* 10 NY3d 763 [police officer's testimony regarding content of videotape "likely inadmissible" under best evidence rule]). I submit that this is a harsh and unwarranted remedy for what occurred here, but the majority and I agree that this is the remedy required by *Handy*.

Nevertheless, perhaps realizing the extraordinary burden on the People created by the breadth of the *Handy* rule, the Court of Appeals in *People v Durant* (26 NY3d 341) explained that, in *Handy*, the defendant had been charged with a crime in a felony complaint, the defendant had filed an omnibus motion demanding the evidence generated by electronic surveillance of the incident, and, "*[d]espite the defendant's demand for such evidence, the police destroyed the surveillance images sometime between the defendant's arraignment on the complaint and the filing of the indictment*" (26 NY3d at 349 [emphasis added]). That explication of the facts is consistent with the interpretation given to *Handy* by the Committee on Criminal Jury Instructions in the adverse inference charge concerning destroyed evidence (*see* CJI2d[NY] Adverse Inference - Destroyed Evidence ["On or about (*date*), the defense requested that evidence. *Thereafter*, the agents of the government destroyed it" (emphasis added)]).

Here, the record shows that the first demand by the defense for the surveillance video(s) was after the video(s) had been destroyed pursuant to the normal business practices of the City of Rochester Police Department. Thus, as compelled by *Durant's* explanation of *Handy*, the duty to preserve the surveillance video(s) was not timely

triggered here and an adverse inference charge is not required.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

386

KA 14-00931

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHAD M. JOHNSTON, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW, FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered April 24, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted assault on a peace officer, police officer, fireman or emergency medical services professional.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault on a peace officer, police officer, fireman or emergency medical services professional (Penal Law §§ 110.00, 120.08), defendant contends that he was denied due process at sentencing when County Court imposed a sentence based on defendant's postplea arrest without determining that the information upon which it was basing the sentence was reliable and accurate. As a preliminary matter, we note that defendant's contention is not encompassed by the waiver of the right to appeal (*see People v Kolata*, 119 AD3d 1376, 1377; *see generally People v Peck*, 90 AD3d 1500, 1501). However, defendant failed to preserve his contention for our review because he "failed to object to the sufficiency of the court's inquiry or to request a hearing, and he did not move to withdraw his plea on that ground" (*People v Hassett*, 119 AD3d 1443, 1444, *lv denied* 24 NY3d 961). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

414

KA 14-02017

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK M. THOMAS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK M. THOMAS, 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. Farkas, J.), rendered July 16, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law, the sentence is vacated, and the matter is remitted to Niagara County Court for further proceedings in accordance with the following memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the third degree (§§ 110.00, 140.20). Initially, we note that defendant waived his right to appeal, but we conclude that the waiver of the right to appeal does not encompass his allegation that County Court improperly enhanced his sentence (*see People v Kelly*, 126 AD3d 1328, 1328; *People v Lighthall*, 6 AD3d 1170, 1171, *lv denied* 3 NY3d 643). Although defendant failed to preserve his contention for our review by failing to object to the enhanced sentence, or by moving to withdraw his plea or to vacate the judgment of conviction (*see People v Fortner*, 23 AD3d 1058, 1058; *People v Sundown*, 305 AD2d 1075, 1076), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

As part of the plea agreement, the court stated that it would sentence defendant to a determinate term of incarceration of five years for the attempted criminal possession of a weapon conviction in

appeal No. 1, and it promised to impose a concurrent, indeterminate term of incarceration of 2 to 4 years for the attempted burglary in the third degree conviction in appeal No. 2. The court did not warn defendant that it could impose an enhanced sentence if he was arrested on new charges, or if he failed to appear for sentencing. While awaiting sentencing, defendant was arrested on new charges and failed to appear for sentencing, and the court imposed the promised sentence in appeal No. 2, but an enhanced sentence of a seven-year term in appeal No. 1. Accordingly, we conclude that the court erred in imposing an enhanced sentence in appeal No. 1 inasmuch as it did not advise defendant at the time of his plea that "a harsher sentence than he bargained for could be imposed if [he] failed to appear at sentencing" (*People v Ortiz*, 244 AD2d 960, 961; *see People v Donald*, 132 AD3d 1396, 1397; *Sundown*, 305 AD2d at 1075-1076), or if he was arrested on new charges while awaiting sentencing (*see generally People v Outley*, 80 NY2d 702, 712-713).

We therefore modify the judgment in each appeal by vacating the sentence in each appeal, and we remit the matters to County Court to impose the promised sentences or to afford defendant the opportunity to withdraw his pleas (*see People v Spencer*, 129 AD3d 1458, 1459; *Fortner*, 23 AD3d at 1058; *see generally People v Ciccarelli*, 32 AD3d 1175, 1176). In light of our determination, we do not address defendant's remaining contentions.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

415

KA 14-02018

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK M. THOMAS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DAVID J. FARRUGIA, DISTRICT ATTORNEY, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK M. THOMAS, 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. Farkas, J.), rendered July 16, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law, the sentence is vacated, and the matter is remitted to Niagara County Court for further proceedings in accordance with the same memorandum as in *People v Thomas* ([appeal No. 1] ___ AD3d ___ [June 10, 2016]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

420

KA 13-02099

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THEODORE TYLER, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM 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 (Thomas J. Miller, J.), rendered August 27, 2013. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the amount of restitution ordered and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for a hearing to determine the amount of restitution.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of grand larceny in the fourth degree (Penal Law § 155.30 [1]) in connection with the theft of jewelry on October 2 and October 4, 2012 from the home of the 74-year-old victim, who had hired defendant to perform work around the house. We reject defendant's contention that he was excluded from a material stage of the trial when defense counsel exercised peremptory challenges to the jury during a sidebar conference with County Court and the prosecutor. The record establishes that defendant was present at every sidebar conference when a prospective juror was questioned (*cf. People v Davidson*, 89 NY2d 881, 882; *People v Antommarchi*, 80 NY2d 247, 250), and "there is nothing in the record to suggest that defendant lacked suitable opportunities to consult with his attorney" about which prospective jurors to strike peremptorily (*People v Quintana*, 80 AD3d 499, 499, *lv denied* 17 NY3d 799; *see People v Green*, 54 AD3d 603, 604, *lv denied* 11 NY3d 899). Indeed, defendant does not contend that he was not given an opportunity to consult with his attorney regarding the use of peremptory challenges or that he disagreed with defense counsel's use of such challenges. We note that, although defendant "was not present when the challenges were discussed, he was present during the entire voir dire and was present

when the challenges were given effect, because the challenged jurors were excused and others were sworn in open court" (*People v Evans*, 207 AD2d 500, 500, *lv denied* 84 NY2d 1031; *see People v Velasco*, 77 NY2d 469, 473).

Defendant failed to preserve for our review his contention that his conviction on the second count of the indictment is not supported by legally sufficient evidence, and he preserved his sufficiency contention with respect to the first count only insofar as it relates to the identity of the person who stole the jewelry to which that count pertains, not the value of that jewelry (*see People v Gray*, 86 NY2d 10, 19; *People v Loomis*, 56 AD3d 1046, 1046). In any event, contrary to defendant's contention, the direct and circumstantial evidence adduced at trial, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), provided a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495). The victim testified that defendant was the only person who had access to the place where the jewelry was kept before it disappeared, defendant admitted in a letter to a judge that he had committed an "act of larceny," defendant's identification was used in a pawn shop transaction involving the jewelry stolen on October 4, 2012, and defendant, allegedly acting suspiciously, was seen near that pawn shop with another man on October 2, 2012, the date the jewelry stolen that day was sold to the pawn shop. We conclude that the above evidence is sufficient to prove the identity of defendant as the person who stole the jewelry (*see generally People v Daniels*, 125 AD3d 1432, 1433, *lv denied* 25 NY3d 1071, *reconsideration denied* 26 NY3d 928). Contrary to defendant's further contention, the testimony of the pawn shop owner concerning the value of the stolen jewelry was sufficient to establish that the value of the jewelry stolen on both October 2 and October 4, 2012 exceeded the statutory threshold (*see People v Helms*, 119 AD3d 1153, 1155, *lv denied* 24 NY3d 1044; *see also* Penal Law § 155.20 [1]). Viewing the evidence in light of the elements of the crime of grand larceny in the fourth degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that the court erred in imposing restitution as part of the sentence. Although the court had jurisdiction to impose restitution despite its failure to order restitution at the time of sentencing (*see People v Swiatowy*, 280 AD2d 71, 72-73, *lv denied* 96 NY2d 868), a hearing was required because defendant contested the amount of restitution at sentencing and, although the request was inartfully articulated, defendant also requested a hearing (*see People v Ippolito*, 89 AD3d 1369, 1370, *affd* 20 NY3d 615; *People v Consalvo*, 89 NY2d 140, 144; *see also* Penal Law § 60.27 [2]). We therefore modify the judgment by vacating the amount of restitution ordered, and we remit the matter to County Court to determine the amount of restitution, after which the uniform sentence and commitment sheet must be amended to reflect the proper amount of restitution (*see People v Deschaine*, 116 AD3d 1303, 1304, *lv denied* 23

NY3d 1019).

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

427

CA 15-01083

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

SARAH BOYLE AND EMILY BOYLE, BY THEIR PARENT
ROBERT W. BOYLE, JR., AND ROBERT W. BOYLE, JR.,
INDIVIDUALLY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CALEDONIA-MUMFORD CENTRAL SCHOOL,
DEFENDANT-RESPONDENT.

E. ROBERT FUSSELL, P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (AIMEE LAFEVER KOCH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered March 5, 2015. The order granted defendant's motion for summary judgment dismissing plaintiffs' complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly resulting from the actions of defendant school district in response to a series of incidents involving infant plaintiffs, Sarah and Emily. The incidents occurred during the 2009-2010 school year, when infant plaintiffs were middle school students. Throughout the 2009-2010 school year, infant plaintiffs were subject to various disciplinary actions, culminating in a proposed one-year suspension for the ensuing school year. In addition, another student at the middle school and her mother reported to the police that Sarah, inter alia, slammed the student's head into a locker and punched her in the face. Following that police report, the Livingston County Attorney filed a petition in Family Court alleging that Sarah had committed an act that, if done by an adult, would constitute the crime of assault in the third degree.

The complaint asserts four causes of action: abuse of process, "outrageous conduct causing emotional distress," prima facie tort, and "intentionally making false statements." In addition, although they are not set forth as distinct causes of action, the complaint alleges that defendant denied infant plaintiffs their rights to due process under the Fourteenth Amendment of the US Constitution and Education

Law § 3214 (3), and denied them rights protected under Education Law § 2801-a.

Supreme Court properly granted defendant's motion seeking summary judgment dismissing the complaint. At the outset, we note that plaintiffs have not raised any contentions in their brief with respect to the causes of action asserting prima facie tort and "intentionally making false statements," and they have thus abandoned any issues concerning the dismissal of those causes of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). Defendant met its burden of establishing that the abuse of process cause of action has no merit by submitting evidence that it did not cause process to be issued against Sarah (*cf. D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 960; *see generally Curiano v Suozzi*, 63 NY2d 113, 116). The cause of action asserting "outrageous conduct causing emotional distress" was properly dismissed inasmuch as "[p]ublic policy bars claims sounding in intentional infliction of emotional distress against a government entity" (*Matter of Gottlieb v City of New York*, 129 AD3d 724, 727). In any event, the court properly concluded as a matter of law that defendant's alleged conduct was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Carpenter v City of Plattsburgh*, 105 AD2d 295, 300, *affd* 66 NY2d 791 [internal quotation marks omitted]; *see Rocco v Town of Smithtown*, 229 AD2d 1034, 1035, *appeal dismissed* 88 NY2d 1065). Contrary to plaintiffs' contention, moreover, defendant's alleged violations of the Education Law do not constitute outrageous conduct and, in any event, plaintiffs have no private right of action based upon those alleged statutory violations (*see generally Uhr v East Greenbush Cent. Sch. Dist.*, 94 NY2d 32, 38-42).

Turning to the alleged procedural due process violations, we agree with plaintiffs that infant plaintiffs had a constitutionally protected interest in the continuation of their education and, when they faced a long-term suspension, they had a right to be heard under the US Constitution (*see Matter of Board of Educ. of Monticello Cent. Sch. Dist. v Commissioner of Educ.*, 91 NY2d 133, 139; *Matter of Board of Educ. of City Sch. Dist. of City of N.Y. v Mills*, 293 AD2d 37, 39), as well as Education Law § 3214 (3) (c) (*see Board of Educ. of Monticello Cent. Sch. Dist.*, 91 NY2d at 139). That right, however, was subject to waiver (*see generally Boddie v Connecticut*, 401 US 371, 378-379), and plaintiff father waived the infant plaintiffs' due process right to a hearing when he opted not to follow through with a hearing and instead enrolled them in another school district (*see generally Green v Green*, 288 AD2d 436, 437). We agree with defendant that the complaint does not assert an equal protection claim. The court nevertheless addressed such a claim, and the record supports the court's conclusion that there was no equal protection violation (*see Acquest Wehrle, LLC v Town of Amherst*, 129 AD3d 1644, 1648-1649, *appeal dismissed* 26 NY3d 1020).

Finally, we reject plaintiffs' contention that summary judgment was premature because they had not completed discovery. Plaintiffs

failed to establish that facts essential to oppose the motion were in defendant's possession, and their "mere hope" that further depositions would disclose evidence to prove their case is insufficient to support denial of the motion (*Ramesar v State of New York*, 224 AD2d 757, 759, *lv denied* 88 NY2d 811; *see Brummer v Barnes Firm, P.C.*, 56 AD3d 1177, 1179).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

429

CA 15-01508

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF ROBERT L. GLANOWSKI,
PETITIONER-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY,
ERIE COUNTY, RESPONDENT-RESPONDENT.

MEMORANDUM AND ORDER

SUSAN HAZELDEAN, CORNELL LAW SCHOOL CLINICAL PROGRAMS, ITHACA, FOR PETITIONER-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered December 2, 2014. The order denied the petition for a name change.

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

Memorandum: Petitioner appeals from an order denying a petition for a change of name. Supreme Court properly denied the petition. The record establishes that petitioner is under postrelease supervision after being released from incarceration on a conviction of first-degree rape of a child. Petitioner remains subject to a 16-year order of protection and sex offender registration under petitioner's current legal name. The court that denied the petition is the same court that had sentenced petitioner on the conviction, and the proposed name change is further objected to by the office of the Erie County District Attorney, which prosecuted petitioner. We conclude that the name change would create record-keeping problems for law enforcement officials and would create potential danger to the victim and the general public (*see Matter of Holman*, 217 AD2d 1012, 1012; *Matter of Gutkaiss*, 11 Misc 3d 211, 212-213; *see also United States v Duke*, 458 F Supp 1188, 1188-1189; *see generally Matter of Powell*, 95 AD3d 1631, 1632; *Matter of Washington*, 216 AD2d 781, 781). Under the circumstances, the court was properly "satisfied . . . that there is [a] reasonable objection to the change of name" and hence a "demonstrable reason not to" grant the petition (*Matter of Anonymous*, 106 AD3d 1503, 1503 [internal quotation marks omitted]; *see Washington*, 216 AD2d at 782; *see generally* Civil Rights Law § 63).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

430

CA 15-01263

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SANDRA A. KOBEE, ALSO KNOWN AS SANDRA KOBEE,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

MORGAN, LEWIS & BOCKIUS LLP, NEW YORK CITY (SIMON CHANG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered December 10, 2014. The order denied the motion of plaintiff for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking to foreclose on a mortgage secured by residential property owned by Sandra A. Kobee (defendant). According to plaintiff, defendant borrowed $87,782.00 from Real Estate Mortgage Network, Inc. (REMN) in November 2007 to purchase a home in Cheektowaga, and signed a promissory note in that amount in favor of REMN. The note was secured by a mortgage, which identified defendant as the mortgagor and stated that the security interest "is given to Mortgage Electronic Registration Systems, Inc. (MERS) (solely as nominee for Lender)," i.e., REMN. Defendant later defaulted on the note, and the mortgage was thereafter assigned to plaintiff by MERS, as nominee for REMN. Following joinder of issue, plaintiff moved for summary judgment. Although defendant did not raise standing as an affirmative defense in her answer and did not submit any papers in opposition to the motion, Supreme Court denied the motion and sua sponte dismissed the complaint, concluding that plaintiff lacks "standing to bring a foreclosure action" because MERS never held the note. The court further concluded that the mortgage was not valid. Plaintiff moved for leave to reargue and renew the motion, but the court denied that motion as well. In appeal No. 1, plaintiff appeals from the order denying its motion and dismissing the complaint, and, in appeal No. 2, plaintiff appeals from the denial of the motion for leave to reargue and renew. We now reverse the order in appeal No. 1, reinstate the complaint, and grant plaintiff's

motion.

By failing to raise standing as an affirmative defense in her answer, defendant waived that defense (*see HSBC Bank USA, NA v Halls*, 136 AD3d 752, 753; *HSBC Bank USA, N.A. v Ashley*, 104 AD3d 975, 975-976, *lv dismissed* 21 NY3d 956; *see generally Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242-244), and the court therefore erred in sua sponte dismissing the complaint on that ground (*see Onewest Bank, FSB v Prince*, 130 AD3d 700, 701; *U.S. Bank, N.A. v Emmanuel*, 83 AD3d 1047, 1048-1049). In any event, we conclude that plaintiff does not in fact lack standing to commence this action. "In an action to foreclose a mortgage, the plaintiff has standing where, at the time the action is commenced, it is the holder or assignee of both the subject mortgage and the underlying note" (*Citimortgage, Inc. v Chow Ming Tung*, 126 AD3d 841, 842; *see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361). Here, plaintiff not only specifically averred in its verified pleading that it owned the mortgage and note at the time the foreclosure action was commenced, it also submitted an affidavit from one of its vice-presidents, who averred that plaintiff had physical possession of the note at the time the action was commenced, which is sufficient to confer standing upon plaintiff (*see Aurora*, 25 NY3d at 361-362; *Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737, 738-740).

We further conclude that the court erred in determining that the mortgage is invalid (*see Ruiz v Mortgage Elec. Registration Sys., Inc.*, 130 AD3d 1000, 1001-1002; *see also First Franklin Fin. Corp. v Norton*, 132 AD3d 1423, 1424). Inasmuch as plaintiff met its initial burden of establishing entitlement to judgment as a matter of law, and defendant did not raise an issue of fact, plaintiff is entitled to summary judgment.

Insofar as the order in appeal No. 2 denied that part of plaintiff's motion seeking leave to reargue, no appeal lies from the order (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984) and, insofar as the order in appeal No. 2 denied that part of the motion seeking leave to renew, the appeal is moot in view of our determination in appeal No. 1 (*see McCabe v CSX Transp., Inc.*, 27 AD3d 1150, 1151).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

431

CA 15-01264

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SANDRA A. KOBEE, ALSO KNOWN AS SANDRA KOBEE,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

MORGAN, LEWIS & BOCKIUS LLP, NEW YORK CITY (SIMON CHANG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered March 12, 2015. The order denied the motion of plaintiff for leave to reargue and renew its motion for summary judgment.

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

Same memorandum as in *JPMorgan Chase Bank, Natl. Assn. v Kobee* ([appeal No. 1] ___ AD3d ___ [June 10, 2016]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

434

TP 15-01734

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF ROY TARBELL, PETITIONER,

V ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, CAPE VINCENT CORRECTIONAL FACILITY AND B. MCAULIFFE, RESPONDENTS.

ROY TARBELL, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENTS.

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, Jefferson County [Hugh A. Gilbert, J.], entered July 31, 2015) to review a determination of respondents. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

435

TP 15-01811

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF DEATRICK MARSHALL, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO 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, Wyoming County [Michael M. Mohun, A.J.], entered October 27, 2015) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

437

KA 15-00046

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT L. GLANOWSKI, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered December 9, 2014. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that defendant is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that Supreme Court erred in assessing 20 points under the risk factor for a continuing course of sexual misconduct. "Although that factor was not an element of the crime[] of which [defendant] was convicted, the court was not limited to considering only such crime[]" (*People v Scott*, 71 AD3d 1417, 1417-1418, *lv denied* 14 NY3d 714). The record establishes that the incident upon which defendant's conviction of rape in the first degree (Penal Law § 130.35 [4]) is based was not the only sexual encounter between defendant and the victim. Defendant's remaining contention with respect to that risk factor is not preserved for our review (*see People v Walter*, 100 AD3d 1442, 1443) and, in any event, we conclude that it is without merit.

Contrary to defendant's further contention, the court did not err in assessing 15 points against defendant under the risk factor for history of drug or alcohol abuse. The instant assertions that defendant did not abuse drugs or alcohol were "contradicted by [defendant's] admissions to the Probation Department, as well as [defendant's] participation in alcohol and substance abuse treatment"

while incarcerated (*People v Englant*, 118 AD3d 1289, 1289).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

438

KA 12-01950

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MONZELL DANGERFIELD, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered January 7, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). As the People correctly concede, defendant did not waive the right to appeal. Although a waiver of the right to appeal was briefly addressed by County Court as a condition of the plea, there was no colloquy with defendant and he did not waive that right (*see generally People v Lopez*, 6 NY3d 248, 256).

We nevertheless reject defendant's contention that the court erred in refusing to suppress identification evidence on the ground that the showup identification procedure was unduly suggestive. Defendant was identified by the owner of the home, who observed defendant leave his house and enter a green minivan. The owner then followed the minivan and informed the 911 operator of the minivan's location. Although the owner lost sight of the minivan at a particular location, a police officer who was responding to the report of the burglary observed a minivan fitting the description given by the owner and driven by a man who fit the description of the person seen leaving the owner's home. Following a high-speed chase, which ended when the minivan entered a drainage ditch, defendant was apprehended. The showup identification occurred at a shopping center one hour after the burglary was reported. Although the distance between the shopping center and the scene of the crime is not set forth in the record, the record establishes that the shopping center is located on the street where defendant was first observed by the

officer, and which the court described as being "two streets over" from the scene of the crime. We therefore conclude that the People established that the showup identification procedure was conducted in "geographic and temporal proximity to the crime" (*People v Ortiz*, 90 NY2d 533, 537; *see People v Harris*, 57 AD3d 1427, 1428, *lv denied* 12 NY3d 817). Also contrary to defendant's contention, the identification procedure was not rendered unduly suggestive because he was in handcuffs and in the presence of a uniformed police officer (*see People v Johnson*, 122 AD3d 1338, 1339, *lv denied* 25 NY3d 1166).

We reject defendant's further contention that he did not voluntarily waive his *Miranda* rights and thus that the court erred in refusing to suppress his statement to the police on that ground. " 'The evidence at the suppression hearing establishes that, after receiving . . . *Miranda* warnings, defendant indicated that he understood his [*Miranda*] rights and agreed to speak with the [police]' " (*People v Lewis*, 93 AD3d 1264, 1265, *lv denied* 19 NY3d 963). The video of the interrogation establishes that defendant stated that he understood his rights and, when asked whether he wished to speak to the police, he nodded in the affirmative and spoke to them. "It is well settled . . . that an explicit verbal waiver is not required; an implicit waiver may suffice and may be inferred from the circumstances" (*People v Harris*, 129 AD3d 1522, 1523 [internal quotation marks omitted]). Even assuming, arguendo, that defendant was under the influence of marihuana during the interview, "the evidence . . . establishes that defendant 'was not intoxicated to such a degree that he was incapable of voluntarily, knowingly, and intelligently waiving his *Miranda* rights' " (*People v John*, 288 AD2d 848, 848, *lv denied* 97 NY2d 705). Further, "there is no evidence in the record to support the contention of defendant that the injuries he [allegedly] sustained in the motor vehicle accident prevented him from knowingly and voluntarily waiving his *Miranda* rights" (*id.*).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

439

KA 14-01613

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELLIOTT I. JAMES, ALSO KNOWN AS PIG,
DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered August 11, 2014. Defendant was resentenced upon his conviction of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law and the matter is remitted to Cattaraugus County Court for the filing of a new predicate felony statement and resentencing.

Memorandum: Defendant appeals from a resentence imposed upon his conviction of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]; *People v James*, 114 AD3d 1312, 1312; *People v James*, 92 AD3d 1207, 1208-1209, *lv denied* 19 NY3d 962). We reject defendant's contention that County Court erred in denying his motion to redact certain information contained in the presentence report (PSR). The PSR for this resentence omitted allegedly inaccurate information concerning defendant's criminal history that had been at issue on his last appeal (*James*, 114 AD3d at 1312), and we conclude that defendant failed to establish that the information that remained in dispute was inaccurate (*see People v Rudduck*, 85 AD3d 1557, 1557-1558, *lv denied* 17 NY3d 861; *see also People v Paragallo*, 82 AD3d 1508, 1510). We note that a PSR may properly include hearsay information and information based on uncharged criminal conduct (*see People v Massmann*, 13 AD3d 808, 809; *People v Thomas*, 2 AD3d 982, 983-984, *lv denied* 1 NY3d 602; *People v Brunner*, 182 AD2d 1123, 1123, *lv denied* 80 NY2d 828; *see generally People v Perry*, 36 NY2d 114, 120). We further conclude that the court was not required to state expressly on the record that it found the information at issue to be reliable (*see generally People v Nicholson*, 26 NY3d 813, 826). Defendant was afforded a reasonable opportunity to challenge the disputed

information (*see People v Bieganowski*, 104 AD3d 1276, 1277, *lv denied* 21 NY3d 1002; *People v Redman*, 148 AD2d 966, 966, *lv denied* 74 NY2d 745), and the court's handling of his objections satisfied the requirements of due process (*see generally People v Hansen*, 99 NY2d 339, 345-346; *People v Naranjo*, 89 NY2d 1047, 1049).

We agree with defendant, however, that he was improperly resentenced as a second felony drug offender inasmuch as the predicate conviction relied upon, under indictment No. 07-123, was one for which he was not sentenced until after he committed the instant crime (*see* Penal Law §§ 70.06 [1] [b] [ii]; 70.70 [1] [b]; *People v Thompson*, 28 AD3d 498, 498-499; *People v LaBrone*, 261 AD2d 416, 416). Defendant's contention does not require preservation because it involves the legality of his resentence (*see People v Samms*, 95 NY2d 52, 56-58; *People v Butler*, 96 AD3d 1367, 1368, *lv denied* 20 NY3d 931), and we reject the People's contention that the error may be deemed harmless (*see People v Coffie*, 272 AD2d 870, 871; *cf. People v Bouyea*, 64 NY2d 1140, 1142). Although the PSR reflects that defendant has at least one other conviction that may render him a predicate felon, the predicate felony statement filed by the People did not include any such convictions, and defendant was not given an opportunity to controvert them, nor did he admit them in open court (*see People v Hale*, 52 AD3d 1177, 1177-1178; *Coffie*, 272 AD2d at 871). We therefore reverse the resentence, and we remit the matter to County Court for resentencing, to be preceded by the filing of a new predicate felony statement (*see James*, 92 AD3d at 1209; *People v Szarban*, 155 AD2d 999, 999). Moreover, because defendant had not been sentenced on his conviction under indictment No. 07-123 when he committed this crime, the court will have the discretion upon resentencing to order that the resentence in this case shall run concurrently with the sentence defendant is serving as a result of that conviction (*see generally* § 70.25 [1], [2-a]; *People v Bernell*, 71 AD3d 1516, 1516).

In light of our determination, we do not address defendant's challenge to the severity of the resentence.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

440

KA 12-00167

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VERNON V. SPEARS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, HARRIS BEACH PLLC, PITTSFORD (KARA E. STODDART OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 11, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon 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, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). At trial, a police officer testified, in violation of Supreme Court's prior *Ventimiglia* ruling, that he became involved in the subject investigation upon receiving "a call for a gun point robbery." Defense counsel objected, and the court struck the testimony, instructed the jury to disregard it, and excused the jury. Defense counsel then moved for a mistrial outside the presence of the jury, and the court determined that it would issue a further curative instruction rather than granting the motion. The jury returned, and the court again instructed it to disregard the testimony. Defendant contends on appeal that the court abused its discretion in denying his motion for a mistrial.

As an initial matter, we conclude that defendant was not required to make a further objection or request for relief following the court's curative instructions in order to preserve for our review his contention that the court erred in denying his motion for a mistrial (*see People v Smith*, 97 NY2d 324, 329-330; *People v Barranco*, 174 AD2d 343, 344-345; *cf. People v Heide*, 84 NY2d 943, 944). To the extent that prior decisions of this Court, including *People v Ielfield* (132 AD3d 1298, 1298-1299), suggest a contrary rule, those decisions are not to be followed. With respect to the merits, however, we conclude

that the court's instructions were sufficient to alleviate any prejudice resulting from the police officer's single statement (*see People v Allen*, 78 AD3d 1521, 1521, *lv denied* 16 NY3d 827; *People v Young*, 55 AD3d 1234, 1236, *lv denied* 11 NY3d 901; *cf. Barranco,* 174 AD2d at 344-345), and we note that "[i]t is well settled that 'the jury is presumed to have followed' th[ose] curative instruction[s]" (*Allen*, 78 AD3d at 1521).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

441

KA 13-00646

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD E. JOHNSON, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered January 31, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon 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: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that County Court erred in refusing to suppress, as the product of an unlawful search and seizure, the gun found by a team of parole warrant enforcement officers on his person and his statements to the officers. According to defendant, his rights under *Payton v New York* (445 US 573) were violated when, about four months after he absconded from parole supervision, the officers entered his house with only a parole violation warrant, but without a judicial arrest or search warrant. We reject that contention. "Under the Federal Constitution, it is clear that a parolee or a probationer may be arrested in his [or her] home without a judicial warrant" (*People v Hernandez*, 218 AD2d 167, 171, *lv denied* 88 NY2d 936, 1068; *see generally Samson v California*, 547 US 843, 850-857). A parole violation warrant by itself justifies the entry of the residence for the purposes of locating and arresting the defendant therein (*see Cook v O'Neill*, 803 F3d 296, 300), provided that, as here, the officers "reasonably believe[d] the defendant to be present" in the premises (CPL 120.80 [4]). In any event, the conduct of the officers in searching the premises for defendant and, following his arrest, in searching his pockets "was rationally and reasonably related to the performance of the parole officer[s'] duty" (*People v*

Huntley, 43 NY2d 175, 181), and thus the officers' conduct would have been permissible even in the absence of a parole violation warrant (*see People v June*, 128 AD3d 1353, 1354, *lv denied* 26 NY3d 931; *People v Nappi*, 83 AD3d 1592, 1593-1594, *lv denied* 17 NY3d 820).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

442

KA 09-01802

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALFRED L. LIGAMMARI, JR., DEFENDANT-APPELLANT.

EVAN LUMLEY, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 26, 2009. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree (six counts), criminal sexual act in the third degree (six counts), sexual abuse in the first degree, attempted rape in the first degree, attempted rape in the third degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed for attempted rape in the first degree to a determinate term of imprisonment of 3½ years and as modified the judgment is affirmed in accordance with the following memorandum: Defendant appeals from a judgment convicting him following a jury trial of six counts each of criminal sexual act in the first degree (Penal Law § 130.50 [1]) and criminal sexual act in the third degree (§ 130.40 [2]), and one count each of sexual abuse in the first degree (§ 130.65 [1]), attempted rape in the first degree (§§ 110.00, 130.35 [1]), attempted rape in the third degree (§§ 110.00, 130.25 [2]), and endangering the welfare of a child (§ 260.10 [1]). By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, defendant's contention is without merit. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences from which the jury could conclude that the elements of the crimes were proven beyond a reasonable doubt (*see generally People v Bleakley*, 69 NY2d 490, 495). We further conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the

evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, Supreme Court did not abuse its discretion by continuing the trial in defendant's absence when defendant did not appear in court on the final day of trial. The record establishes that the court had given defendant the requisite warnings (*see People v Parker*, 57 NY2d 136, 141), and he therefore waived his right to be present at trial (*see People v Zafuto*, 72 AD3d 1623, 1623-1624, *lv denied* 15 NY3d 758; *People v Jones*, 31 AD3d 1193, 1193, *lv denied* 7 NY3d 868). Contrary to defendant's further contention, "[t]he fact that defendant was arrested [in another state] for other charges while the jury was deliberating did not restore his right to be present" (*People v Larkin*, 281 AD2d 915, 916, *lv denied* 96 NY2d 864; *see People v Herrera*, 219 AD2d 511, 511, *lv denied* 87 NY2d 847).

Finally, we agree with defendant that the sentence of incarceration is unduly harsh and severe. Thus, as a matter of discretion in the interest of justice (*see generally* CPL 470.15 [6] [b]), we modify the judgment by reducing the sentence imposed for attempted rape in the first degree to a determinate term of incarceration of 3½ years, with the 10-year period of postrelease supervision imposed by the court, thereby reducing the aggregate sentence to a determinate term of incarceration of 35½ years, with a period of 10 years of postrelease supervision.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

443

KA 13-02199

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER S. VANVLEET, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered June 4, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree, robbery in the first degree, robbery in the second degree (two counts), grand larceny in the fourth degree and petit larceny.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Steuben County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, burglary in the first degree (Penal Law § 140.30 [4]), robbery in the first degree (§ 160.15 [4]), and two counts of robbery in the second degree (§ 160.10 [1], [3]). Defendant's contention that he was denied effective assistance of counsel does not survive his guilty plea because he 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 Lucieer*, 107 AD3d 1611, 1612; *see People v Russell*, 55 AD3d 1314, 1314, *lv denied* 11 NY3d 930). Indeed, we note that the record establishes that defendant was motivated by, among other things, the People's promise not to prosecute a family member for hindering prosecution. We reject defendant's contention that his statement to the police was elicited in violation of his right to counsel. "Where, as here, the right to counsel is alleged to have arisen solely due to the commencement of formal proceedings on another pending charge, the police may question a suspect on an unrelated new matter in the absence of counsel" (*People v Brinson*, 28 AD3d 1189, 1189-1190, *lv denied* 7 NY3d 810).

Contrary to defendant's further contention, "the fact that a witness viewed the photo array while a second witness was in the room did not taint the witness's identification of defendant's photograph in the photo array" (*People v Rodriguez*, 17 AD3d 1127, 1129, *lv denied* 5 NY3d 768). There is no evidence in the record that the second witness participated in the identification procedure or influenced the identification of defendant by the first witness. Defendant failed to preserve for our review his additional contentions that the photo array procedure was unduly suggestive (*see People v Carson*, 126 AD3d 1537, 1538, *lv denied* 26 NY3d 927). In any event, those contentions are without merit. Although the witness was shown the photo array on two occasions within four days, it is well settled that " '[m]ultiple photo identification procedures are not inherently suggestive' " (*People v Dickerson*, 66 AD3d 1371, 1372, *lv denied* 13 NY3d 859). Further, the statement of the police investigator to the witness prior to the second identification procedure that there was a possible suspect in custody did not render the procedure unduly suggestive (*see generally People v Floyd*, 45 AD3d 1457, 1459, *lv denied* 10 NY3d 811).

Defendant failed to preserve for our review his contention that County Court erred in imposing restitution because restitution was not part of the plea agreement (*see* CPL 470.05 [2]). We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Ponder*, 42 AD3d 880, 882, *lv denied* 9 NY3d 925), and we conclude that the court should have "afforded defendant the opportunity to withdraw his plea before ordering him to pay restitution" (*id.*; *see People v Wilson*, 125 AD3d 1303, 1303; *People v Rhodes*, 91 AD3d 1280, 1281). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to impose the promised sentence or to afford defendant the opportunity to withdraw his plea. Finally, we reject defendant's contention that the bargained-for sentence is unduly harsh and severe.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

444

CAF 14-02150

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF AZARIA A., DANTE A., AND KEON W.

---------- MEMORANDUM AND ORDER

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

DESIRE E., RESPONDENT-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-APPELLANT.

ABRAHAM J. PLATT, LOCKPORT, FOR PETITIONER-RESPONDENT.

PATRICIA M. MCGRATH, ATTORNEY FOR THE CHILDREN, LOCKPORT.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered October 27, 2014 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, directed respondent to engage in certain services.

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

Memorandum: Respondent mother appeals from an order for services entered in this neglect proceeding pursuant to Family Court Act article 10. The appeal from that part of the order incorporating a temporary order of protection is moot, inasmuch as the temporary order has expired (*see Matter of Kristine Z. v Anthony C.*, 43 AD3d 1284, 1284, *lv denied* 10 NY3d 705; *Matter of Cadejah AA.*, 25 AD3d 1027, 1028-1029, *lv denied* 7 NY3d 705). The remainder of the appeal from the order for services is also moot, the order having been superseded by a subsequent order directing the removal of the subject children (*see Moody v Sorokina*, 40 AD3d 14, 19, *appeal dismissed* 8 NY3d 978, *reconsideration denied* 9 NY3d 887; *Matter of Chelsea BB.*, 34 AD3d 1085, 1088, *lv denied* 8 NY3d 806). Any decision concerning the propriety of the order for services " 'will not, at this juncture, directly affect the rights and interests of the parties' " (*Kristine Z.*, 43 AD3d at 1284).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

445

CAF 15-00901

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF STEVEN M. GERHARDT,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

MELISSA S. BAKER,
RESPONDENT-PETITIONER-RESPONDENT.

STEVEN M. GERHARDT, PETITIONER-RESPONDENT-APPELLANT PRO SE.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered December 19, 2014 in proceedings pursuant to Family Court Act article 4. The order denied petitioner-respondent's objections to orders of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Livingston County, for further proceedings in accordance with the following memorandum: Petitioner-respondent father appeals from an order denying his objections to two orders of the Support Magistrate finding a violation of a prior support order and modifying the prior support order by, inter alia, requiring respondent-petitioner mother to pay child support to the father based on the subject child's change of residence to that of the father and by imputing income to the father. We agree with the father that Family Court erred in denying his objections to the Support Magistrate's orders because he was not properly advised of his right to an attorney on the violation petition brought by the mother (*see* Family Ct Act § 262 [a] [vi]; *Matter of Soldato v Caringi*, 137 AD3d 1749, 1749), and the Support Magistrate erred in failing to conduct a proper hearing on the father's modification petition. While "[a] hearing on a petition for modification of a support obligation need not follow any particular format" (*Matter of Ademovic v Reid*, 1 AD3d 899, 899), we conclude that the hearing in this matter was " 'inherently flawed' " (*id.*). Here, the father "was not offered an opportunity to testify, nor was he permitted to present the sworn testimony of any other witnesses" (*id.*), and the cursory handling of this matter by the Support Magistrate did not provide a substitute for the " 'meaningful hearing' " to which the father was entitled (*id.* at 900). We therefore reverse the order and remit the matter to Family Court for further proceedings on both petitions in accordance with our

decision.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

446

CAF 14-01539

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF MAXIMILIANO ZAPATA,
PETITIONER-RESPONDENT,

V ORDER

BRITTANY ZAPATA, RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

MINDY L. MARRANCA, BUFFALO, FOR PETITIONER-RESPONDENT.

MELISSA H. THORE, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered July 22, 2014 in a proceeding pursuant to Family Court Act article 6. The order denied the motion of respondent to "reopen" the matter.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

448

CA 15-01764

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

ERIC WHITE AND NATIVE OUTLET,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY, AND THOMAS H. MATTOX, COMMISSIONER, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, IN HIS OFFICIAL CAPACITY,
DEFENDANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PAUL J. CAMBRIA, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered March 12, 2015. The judgment granted the cross motion of defendants to dismiss plaintiffs' complaint and dismissed as moot the motion of plaintiffs for a preliminary injunction.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the complaint to the extent that it seeks a declaration and granting judgment in favor of defendants as follows:

> It is ADJUDGED AND DECLARED that Tax Law § 471 is not inconsistent with Indian Law § 6, the Treaty of 1842 (7 US Stat 586), or the Due Process or Commerce Clauses of the United States Constitution,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this declaratory judgment action, alleging that the enactment and enforcement of Tax Law § 471, which imposes requirements on plaintiffs to pre-pay the amount of the tax to be assessed on the sale of cigarettes to non-Indians and non-members of the Seneca Nation (collectively, non-Indians), violates Indian Law § 6 and certain treaties between the Seneca Nation and the United States of America, particularly the Treaty of 1842 (7 US Stat 586). Plaintiffs sought a preliminary injunction enjoining enforcement of the Tax Law, and Supreme Court granted defendants'

cross motion pursuant to CPLR 3211 (a) (7) and dismissed the complaint. Because the complaint seeks a declaration, the court erred in dismissing the complaint in its entirety and in failing to declare the rights of the parties (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954). We therefore modify the judgment accordingly.

Plaintiffs contend that we erred in determining in *Matter of New York State Dept. of Taxation & Fin. v Bramhall* (235 AD2d 75, *appeal dismissed* 91 NY2d 849) that the Treaty of 1842 and Indian Law § 6 bar the taxation of reservation land, but do not bar the imposition of, inter alia, "sales taxes on cigarettes . . . sold to non-Indians on the Seneca Nation's reservations" (*id.* at 85), and request that we reconsider our determination. We adhere to our determination in *Bramhall.*

The Treaty of 1842, which provided, inter alia, that the Seneca Nation would retain the Allegany and Cattaraugus reservations, stated at article ninth that "[t]he parties to this compact mutually agree to solicit the influence of the Government of the United States to protect *such lands* of the Seneca Indians, within the State of New York, . . . *from all taxes,* and assessments for roads, highways, or any other purpose until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them" (7 US Stat 586, 590 [emphasis added]). We conclude that the plain language of that treaty supports our determination that it prohibited the state from imposing taxes on the "lands" (*id.*), i.e., the real property, of the Seneca Nation.

Indian Law § 6, entitled "Exemption of reservation lands from taxation," states that "[n]o taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same." That section has remained unchanged since 1909 (L 1909, ch 31), and it cites to, inter alia, chapter 45 of the Laws of 1857 as the source of the legislation, and to *Fellows v Denniston* (23 NY 420, *revd sub nom. The New York Indians*, 72 US 761). Chapter 45 of the Laws of 1857, entitled "An Act to relieve the Seneca nation of Indians from certain taxes on the Allegany and Cattaraugus reservations" required, inter alia, that, parcels or lots that were sold by the comptroller for taxes were to be released "by the State to the Seneca nation of Indians residing on said reservation" (L 1857, ch 45, § 1), and that "[n]o tax shall hereafter be assessed or imposed on either of said reservations, or any part thereof, for any purposes whatever, so long as said reservations remain the property of the Seneca nation; and all acts of the legislature of this State conflicting with the provisions of this section[] are hereby repealed" (L 1857, ch 45, § 4). The Supreme Court determined in *The New York Indians* (72 US at 770-772) that the State was without authority to impose taxes on real property to defray the costs of building and repairing roads and bridges. Thus, even construing the statute liberally in favor of the Indians, as we must (*see County of Yakima v Confederated Tribes & Bands of Yakima Indian Nation*, 502 US 251, 269), we conclude that the statutory history of

Indian Law § 6 supports our determination in *Bramhall*, and that the limiting language in the title of the section "effectuate[s] the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes § 94, Comment at 194), i.e., that Indian Law § 6 was enacted to bar taxes on real property that was part of an Indian nation, tribe or band.

Even assuming, arguendo, that we have interpreted the language of the Treaty of 1842 and Indian Law § 6 too narrowly, we nevertheless conclude that the court properly agreed with defendants that plaintiffs are not entitled to the declaratory relief they seek. It is well established that "the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations . . . States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians" (*Department of Taxation & Fin. of N.Y. v Milhelm Attea & Bros., Inc.*, 512 US 61, 73). Although plaintiffs are obligated to pay the amount due as tax from non-Indians who have the tax liability, and from whom the amount is collected at the time of the sale, "this burden is not, strictly speaking, a tax at all" (*Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 US 463, 483).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

449

CA 15-00174

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF DAWUD RAHMAN,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered December 1, 2014 in a CPLR article 78 proceeding. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Sanchez v Evans*, 111 AD3d 1315).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

450

CA 15-01735

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

LISA M. KELLOGG AND RAY L. KELLOGG,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CHARLEEN S. PERNAT AND RONALD J. PERNAT,
DEFENDANTS-RESPONDENTS.

TABNER, RYAN AND KENIRY, LLP, ALBANY (LYNN KNAPP BLAKE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (TERANCE V. WALSH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 2, 2015. The order, among other things, denied the motion of plaintiffs for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Lisa M. Kellogg (plaintiff) in a motor vehicle accident. Plaintiff was traveling in the driving lane of a parking lot when her vehicle collided with a vehicle operated by Charleen S. Pernat (defendant), which was exiting a parking space. We conclude that Supreme Court properly denied plaintiffs' motion for partial summary judgment on the issue of liability. Here, in support of their motion, plaintiffs submitted both plaintiff's own deposition testimony and that of defendant. Plaintiff testified at her deposition that the collision occurred when defendant suddenly pulled out of a parking space, without warning, into the designated driving lane and plaintiff's immediate path. Defendant's deposition testimony, however, provided a conflicting account of the manner in which the accident occurred. We thus conclude that there is an issue of fact whether plaintiff's own conduct and rate of speed may have contributed to the collision and thus whether plaintiff was comparatively at fault (*see Drew v J.A. Carmen Trucking Co., Inc.*, 8 AD3d 1112, 1113; *Fisher v Ciarfella*, 300 AD2d 1028, 1028), precluding partial summary judgment.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

451

CA 15-01777

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

SARAHANN GATTI AND NATHAN GATTI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RODGER J. SCHWAB, DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JOHN R. CONDREN OF COUNSEL), FOR DEFENDANT-APPELLANT.

KLOSS, STENGER & LOTEMPIO, BUFFALO (MITCHELL M. STENGER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 20, 2015. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint, as amplified by the bill of particulars, with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: In this action to recover damages for serious injuries allegedly sustained by Sarahann Gatti (plaintiff) in a motor vehicle accident on December 17, 2012, defendant appeals from an order denying his motion for summary judgment dismissing the complaint. Defendant sought such relief on the ground that plaintiff's claimed spinal injuries were a result not of that accident, but of a work-related motor vehicle accident that occurred on November 30, 2012. We note at the outset that, in opposition to the motion, plaintiff abandoned her claim of serious injury with respect to the 90/180-day category of Insurance Law § 5102 (d) (*see Armella v Olson*, 134 AD3d 1412, 1413), and we thus modify the order by granting defendant's motion with respect to that category.

We otherwise conclude that Supreme Court properly denied the motion with respect to the remaining two categories of serious injury alleged by plaintiffs in their bill of particulars. Defendant established his entitlement to judgment as a matter of law with regard to whether plaintiff, as a result of the subject accident, sustained a permanent consequential limitation of use or a significant limitation of use of her cervical and lumbar spine (*see Hartman-Jweid v*

Overbaugh, 70 AD3d 1399, 1400; *Anania v Verdgeline*, 45 AD3d 1473, 1474; *see generally Carrasco v Mendez*, 4 NY3d 566, 578-580). Defendant submitted, among other evidence, the testimony of plaintiff's treating orthopedic surgeon before the Workers' Compensation Board. That testimony was to the effect that plaintiff's cervical and lumbar injuries were 100% attributable to the November 30, 2012 accident and thus were preexisting (*see Carrasco*, 4 NY3d at 579-580).

In opposition to the motion, however, plaintiffs raised a triable issue of fact with respect to defendant's claim of lack of causation (*see Harrity v Leone*, 93 AD3d 1204, 1206; *Schader v Woyciesjes*, 55 AD3d 1292, 1293). In his affirmation, plaintiff's treating surgeon directly and adequately addressed the matter of causation, opining that the subject collision was the sole cause of plaintiff's C6-7 disc injury, and the cause of an aggravation of her previously sustained neck and lower back injuries. That affirmation also set forth the medical evidence that supported the treating surgeon's evolving opinion as to causation (*see Harrity*, 93 AD3d at 1206). Defendant's challenges to the opinions of plaintiff's surgeon raise issues for the trier of fact (*see generally Cooper v City of Rochester*, 16 AD3d 1117, 1118; *Gedon v Bri-Lyn Hosps.*, 286 AD2d 892, 894, *lv denied* 98 NY2d 601). Indeed, it is well settled that "[t]he court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441; *see Cook v Peterson*, 137 AD3d 1594, 1597).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

452

CA 15-01647

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

CHRISTOPHER STEINHOFF, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MAGDA BAYOUMI, DEFENDANT.

ALEXANDER & CATALANO, LLC, APPELLANT.

ALEXANDER & CATALANO, LLC, EAST SYRACUSE (JAMES L. ALEXANDER OF COUNSEL), FOR APPELLANT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), dated April 29, 2015. The order extinguished the lien of Alexander & Catalano, LLC, and ordered a disbursement of settlement funds.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first ordering paragraph and vacating the second ordering paragraph to the extent that the settlement funds include attorneys' fees and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Appellant, Alexander & Catalano, LLC, appeals from an order that, among other things, extinguished its lien on plaintiff's personal injury settlement. Plaintiff hired appellant law firm to represent him in this action but, during the pendency of settlement negotiations, he discharged appellant and hired his present counsel. We agree with appellant that plaintiff failed to establish that he discharged appellant for cause inasmuch as plaintiff's allegations "consist solely of dissatisfaction with reasonable strategic choices regarding litigation" (*Callaghan v Callaghan*, 48 AD3d 500, 501; *see Nabi v Sells*, 82 AD3d 645, 646). An attorney who has been discharged without cause is entitled to recover the reasonable value of his or her services in quantum meruit (*see La Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 457-458; *Siskin v Cassar*, 122 AD3d 714, 716). We therefore modify the order accordingly, and we remit the matter to Supreme Court for a hearing to determine the reasonable value of appellant's services. We reject appellant's contention that the matter must be remitted to a different Supreme Court justice inasmuch as appellant "failed to show the existence of any actual impropriety, prejudice, or bias with respect to the

aforementioned order" (*Matter of Serkez v Serkez*, 34 AD3d 592, 592; *see* Judiciary Law § 14).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

457

KA 12-02155

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MURIDI M., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

MURIDI M., DEFENDANT-APPELLANT PRO SE.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Erie County Court (Thomas P. Franczyk, J.), rendered October 4, 2012. The appeal was held by this Court by order entered January 2, 2015, decision was reserved and the matter was remitted to Erie County Court for further proceedings. The proceedings were held and completed.

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

Memorandum: We previously held the case in appeal Nos. 1 and 2, reserved decision, and remitted the matters to County Court to make and state for the record a determination in each appeal whether defendant should be afforded youthful offender status. Upon remittal, the court granted youthful offender status in appeal No. 1 and denied such status in appeal No. 2.

We reject defendant's contentions that the sentence imposed in each appeal is unduly harsh and severe. The court did not abuse its discretion in determining that there were no mitigating circumstances that warranted the court, in the interest of justice, to order that the sentences run concurrently (*see* Penal Law § 70.25 [2-b]; *People v Washington*, 124 AD3d 1388, 1388, *lv denied* 25 NY3d 954). Nor did the court abuse its discretion in denying defendant youthful offender status in appeal No. 2, and we decline to exercise our interest of justice jurisdiction to afford such status (*see People v Hall*, 130 AD3d 1495, 1496, *lv denied* 26 NY3d 968; *People v Johnson*, 109 AD3d 1191, 1191-1192, *lv denied* 22 NY3d 997).

The contention in defendant's pro se supplemental brief with

respect to appeal No. 2 was not raised when the appeal was initially heard, and it may not be raised for the first time following our remittal (*see People v Baxter*, 234 AD2d 932, 932-933, *lv denied* 89 NY2d 1009).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

458

KA 12-02156

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MURIDI M., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

MURIDI M., DEFENDANT-APPELLANT PRO SE.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered October 4, 2012. The appeal was held by this Court by order entered January 2, 2015, decision was reserved and the matter was remitted to Erie County Court for further proceedings. The proceedings were held and completed.

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

Same memorandum as in *People v Muridi M.* ([appeal No. 1] ___ AD3d ___ [June 10, 2016]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

459

KA 14-00752

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEBORA K. GRAMZA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered January 22, 2014. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the second degree and falsifying business records in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting her upon her plea of guilty of grand larceny in the second degree (Penal Law § 155.40 [1]) and falsifying business records in the first degree (§ 175.10). Contrary to defendant's contention, the record establishes that she knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256; *People v Frank*, 258 AD2d 900, 900-901, *lv denied* 93 NY2d 924), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see Lopez*, 6 NY3d at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

In appeal No. 2, defendant appeals from a judgment convicting her upon her plea of guilty of offering a false instrument for filing in the first degree (Penal Law former § 175.35). We agree with defendant that her waiver of the right to appeal was invalid inasmuch as she pleaded guilty to the sole count in the superior court information without receiving a sentencing commitment or any other consideration (*see People v Collins*, 129 AD3d 1676, 1676, *lv denied* 26 NY3d 1038; *cf. Frank*, 258 AD2d at 900-901), but we nevertheless reject her

challenge to the severity of the sentence.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

460

KA 14-00753

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEBORA K. GRAMZA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered January 22, 2014. The judgment convicted defendant, upon her plea of guilty, of offering a false instrument for filing in the first degree.

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

Same memorandum as in *People v Gramza* ([appeal No. 1] ___ AD3d ___ [June 10, 2016]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

463

KA 13-01460

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALLEN CEHFUS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ROMANA A. LAVALAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 23, 2013. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony, aggravated unlicensed operation of a motor vehicle in the first degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of driving while intoxicated, a class E felony (Vehicle and Traffic Law § 1192 [3]), aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a]), and resisting arrest (Penal Law § 205.30).

We reject defendant's contention that County Court erred in denying his request for a missing witness charge. Defendant failed to establish that the witness's testimony would have been noncumulative (*see People v Welch*, 307 AD2d 776, 777-778, *lv denied* 100 NY2d 625), and defendant's assertion that the witness "presumably" could have provided noncumulative testimony is speculative (*see People v Gonzalez*, 16 AD3d 283, 284, *lv denied* 5 NY3d 766). In any event, we conclude that any error in the court's refusal to give a missing witness charge is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see People v Fields*, 76 NY2d 761, 763; *People v Comfort*, 31 AD3d 1110, 1112, *lv denied* 7 NY3d 847; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

We reject defendant's further contention that the court issued an erroneous jury instruction. "Generally, in determining whether a jury

charge was proper, the test is 'whether the jury, hearing the whole charge, would gather from its language the correct rules which should be applied' . . . Parts of jury charges cannot be read 'alone and in a vacuum' " (*People v McDaniels*, 19 AD3d 1071, 1071, *lv denied* 5 NY3d 830). Considering the adequacy of the jury charge as a whole against the background of the evidence presented at the trial (*see People v Andujas*, 79 NY2d 113, 118), we conclude that the charge here was proper (*see People v Waldriff*, 46 AD3d 1448, 1448, *lv denied* 9 NY3d 1040; *see also People v Fisher*, 101 AD3d 1786, 1787, *lv denied* 20 NY3d 1098).

Finally, contrary to defendant's assertion, New York's persistent felony offender statute is constitutional on its face and as applied in this case (*see People v Battles*, 16 NY3d 54, 59, *cert denied* ___ US ___, 132 S Ct 123; *People v Tuszynski*, 120 AD3d 1568, 1569, *lv denied* 25 NY3d 954), and the court did not abuse its discretion in sentencing defendant as a persistent felony offender (*see People v Boykins*, 134 AD3d 1542, 1543).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

464

KA 13-01645

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DONNELL L. WILLIAMS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered July 31, 2012. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree (two counts) and burglary in the second degree (two counts).

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

465

KA 14-01505

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC CHANT, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (JOSEPH M. CALIMERI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered February 11, 2013. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [4]). Defendant contends that reversal of the judgment and vacatur of the plea are required because County Court failed to advise him, during the plea allocution, of the specific period of postrelease supervision that would be imposed at sentencing, and that preservation of his contention is not required. We conclude on this record that defendant was required to preserve his contention inasmuch as he had a reasonable opportunity to challenge the validity of his guilty plea on the same ground now advanced on appeal, and that defendant failed to preserve his contention for our review because he did not move to withdraw the plea or otherwise object to the imposition of postrelease supervision (*see People v Williams*, ___ NY3d ___, ___ [Apr. 5, 2016]; *People v Crowder*, 24 NY3d 1134, 1136-1137; *cf. People v Louree*, 8 NY3d 541, 545-546).

Prior to commencement of the scheduled trial, the parties indicated that the People had offered a plea bargain in which defendant would plead guilty to rape in the first degree, a class B violent felony sex offense (*see* Penal Law §§ 70.02 [1] [a]; 70.80 [1] [b]; 130.35), in full satisfaction of the indictment, and that defendant would receive the maximum sentence for that crime. Although the prosecutor correctly placed on the record that the maximum term of imprisonment was 25 years (§ 70.02 [3] [a]), he misstated the applicable period of postrelease supervision as 25 years instead of

the legal maximum period of 20 years (§ 70.45 [2-a] [f]). Without acknowledging that misstatement, defense counsel indicated that the proposed resolution had been discussed in detail with defendant, including all consequences of the proposed plea bargain, and that defendant fully understood such consequences and was prepared to plead guilty. Defendant stated that he understood everything that had been stated, and the court proceeded with a plea allocution in which it did not mention postrelease supervision. Immediately following the allocution, the court set a sentencing date and, in discussing with defense counsel its willingness to adjourn that date if necessary to permit additional time for preparation, the court confirmed that the plea agreement involved a sentence of 25 years of imprisonment with 20 years of postrelease supervision. Defense counsel and the prosecutor both agreed with the court's recitation of the agreed-upon sentence, and neither defendant nor defense counsel objected to the period of postrelease supervision. At an appearance two months later, the prosecutor agreed with the court's statement that there was an agreed-upon sentence in place, but nevertheless did not object to defense counsel's request for an adjournment to further prepare for sentencing. At the outset of the sentencing proceeding more than two months after the appearance, the prosecutor stated that the agreement involved a sentence of 25 years of imprisonment, but misstated the period of postrelease supervision as two years, which was below the legal minimum period of five years (§ 70.45 [2-a] [f]). Defense counsel did not address that misstatement, but nonetheless indicated that he had discussed with defendant all of the collateral consequences of the plea as well as the sentence. The court thereafter imposed the agreed-upon sentence of 25 years of imprisonment with 20 years of postrelease supervision.

Where, as here, "a defect in a plea allocution is clear on the face of the record and implicates due process, the defendant nonetheless must preserve his or her claim that the defect made the plea involuntary unless the defendant has no practical ability to do so" (*Williams*, ___ NY3d at ___). Although the prosecutor initially misstated the period of postrelease supervision prior to the plea allocution and the court failed to mention postrelease supervision during the allocution, defendant was aware that the sentence included a postrelease supervision component at the time of the allocution, the court immediately thereafter confirmed the correct agreed-upon sentence, and neither defendant nor defense counsel objected to the period of postrelease supervision or otherwise indicated that there was any misunderstanding with regard to its length. In addition, while postrelease supervision was not specifically mentioned at the subsequent appearance, there was no objection at that time to the plea or any component of the agreed-upon sentence. The fact that the prosecutor's articulation of the postrelease supervision period at the outset of the sentencing proceeding did not conform with the parties' previously-expressed understanding of the agreed-upon period provided the defense with another opportunity to preserve defendant's current challenge to his plea and seek clarification of the matter (*see id.* at ___). We thus conclude that, "[b]ecause defendant had ample opportunity to raise an objection to the [postrelease supervision]

component prior to and during these proceedings, defendant was required to preserve his claim" (*Crowder*, 24 NY3d at 1136-1137; *see People v Murray*, 15 NY3d 725, 726-727). "By failing to seize upon these opportunities to object or seek additional pertinent information, defense counsel failed to preserve defendant's claim for appellate review" (*Williams*, ___ NY3d at ___; *see Murray*, 15 NY3d at 727). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

We further conclude that defendant, by pleading guilty, forfeited any challenge to the alleged *Brady* violation (*see People v Chinn*, 104 AD3d 1167, 1168, *lv denied* 21 NY3d 1014). Finally, defendant's sentence is not unduly harsh or severe.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

473

TP 15-01708

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF NICHOLAS CASTIGLIA, PETITIONER,

V MEMORANDUM AND ORDER

COUNTY OF ONTARIO AND PHILLIP POVERO, SHERIFF OF ONTARIO COUNTY, RESPONDENTS.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (MATTHEW J. FUSCO OF COUNSEL), FOR PETITIONER.

GARY L. CURTISS, COUNTY ATTORNEY, CANANDAIGUA (LEA T. NACCA OF COUNSEL), FOR RESPONDENTS.

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, Ontario County [Thomas A. Stander, J.], entered October 2, 2015) to annul a determination of respondents. The determination terminated the employment of petitioner.

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

Memorandum: Petitioner commenced this proceeding seeking to annul the determination finding him guilty of disciplinary charges and terminating his employment as a correction officer for respondents. We conclude that the determination is supported by substantial evidence, i.e., "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see* CPLR 7803 [4]; *see generally Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231). We further conclude that, in view of petitioner's extensive disciplinary record, the penalty of terminating his employment is not "so disproportionate to the offense[s] as to be shocking to one's sense of fairness," and thus it does not constitute an abuse of discretion as a matter of law (*Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854; *see Matter of Seltzer v City of Rochester*, 77 AD3d 1300, 1301).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

474

CA 15-00088

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD BREEDEN, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered November 18, 2014 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order revoking his prior regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement, and committing him to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*).

We reject respondent's contention that Supreme Court erred in ruling that the question whether respondent suffers from a mental abnormality is not at issue in a SIST revocation hearing. In a SIST revocation hearing, like in a dispositional hearing following trial on the issue of mental abnormality, the statute gives the court only two dispositional choices—to order civil confinement or to continue a regimen of SIST (*compare* Mental Hygiene Law §§ 10.07 [f] *with* 10.11 [d] [4]), both of which assume that respondent has a mental abnormality. The only issue before the court, therefore, is whether the mental abnormality is such that respondent requires confinement (§ 10.11 [d] [4]; *see generally Matter of State of New York v Michael M.*, 24 NY3d 649, 658-659). In light of that statutory structure, we see no need to address respondent's contentions that the evidence of mental abnormality was insufficient.

We reject respondent's further contention that the evidence is insufficient to support a finding that respondent has "such an

inability to control behavior" that he "is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.07 [f]). At the SIST revocation hearing, respondent's parole officer testified that respondent admitted that he gave an 18-year-old woman a ride in his car in violation of his SIST conditions, ordered her to remove her pants, yelled at her, touched her leg without permission, and did so intending to scare her. Further, petitioner offered the testimony of an expert psychologist, who opined that respondent was a dangerous sex offender requiring confinement. Petitioner's expert testified that, in forming her opinion, she reviewed reports detailing respondent's numerous SIST violations, including the 18-year-old victim's statement, which contained allegations that were sexual in nature. Further, petitioner's expert testified that she considered respondent's STATIC-99 scores showing a "moderate-to-high" risk of recidivism, and she described the documented failure of respondent's relapse prevention plan, his initial refusal to engage in sex offender treatment while incarcerated, and his eventual failed evaluations in and subsequent removal from sex offender treatment. Upon our review of the record, particularly the uncontradicted testimony of petitioner's expert, we conclude that petitioner established by clear and convincing evidence that respondent is a dangerous sex offender requiring confinement (*see Matter of State of New York v DeCapua*, 121 AD3d 1599, 1600, *lv denied* 24 NY3d 913; *see generally Matter of State of New York v Robert F.*, 25 NY3d 448, 454-455).

We reject respondent's contention that the admission of certain hearsay statements into evidence denied him due process. Although the court erred in admitting certain hearsay evidence, i.e., victim statements about alleged inappropriate sexual behavior, the court "is presumed to be able to distinguish between admissible evidence and inadmissible evidence . . . and to render a determination based on the former" (*Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [internal quotation marks omitted], *lv denied* 25 NY3d 911; *see Matter of State of New York v Mark S.*, 87 AD3d 73, 80, *lv denied* 17 NY3d 714). Moreover, we conclude that there is " 'no reasonable possibility' " that, had the statements been excluded, the court would have reached a different determination (*Matter of State of New York v Charada T.*, 23 NY3d 355, 362; *see Parrott*, 125 AD3d at 1439).

Finally, respondent contends that the court erred in allowing petitioner to prosecute SIST violations that occurred approximately three years earlier. That contention is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

476

CA 15-01380

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

RONALD DOUGLAS, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 116196.)
(APPEAL NO. 1.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOGAN WILLIG, PLLC, AMHERST (GEFFREY GISMONDI OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Michael E. Hudson, J.), entered November 6, 2014. The interlocutory judgment apportioned liability and ordered a trial on the issue of damages.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

477

CA 15-01381

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

C. TANISHA BURT, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 116197.)
(APPEAL NO. 2.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

DIFILIPPO, FLAHERTY & STEINHAUS, PLLC, EAST AURORA (ROBERT D. STEINHAUS OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Michael E. Hudson, J.), entered November 6, 2014. The interlocutory judgment apportioned liability and ordered a trial on the issue of damages.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

479

CA 15-01793

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

GDH CONSTRUCTION INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARK A. GUGINO, LINDA M. GUGINO,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

FREID AND KLAWON, WILLIAMSVILLE (WAYNE I. FREID OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BRAUTIGAM & BRAUTIGAM, LLP, FREDONIA (DARYL P. BRAUTIGAM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered January 9, 2015. The order granted the motion of defendants Mark A. Gugino and Linda M. Gugino for summary judgment dismissing the complaint.

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

Memorandum: In this mortgage foreclosure action, plaintiff appeals from an order that granted the motion of Mark A. Gugino and Linda M. Gugino (defendants) for summary judgment dismissing the complaint. Plaintiff contends that defendants' motion should have been denied as premature pursuant to CPLR 3212 (f) because further discovery was necessary. We reject that contention. Because the note and mortgage were a nullity "the discovery sought would [not] produce evidence sufficient to defeat the motion" (*Resetarits Constr. Corp. v Elizabeth Pierce Olmstead, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1456). Plaintiff's contention that defendants' motion should be denied on equitable grounds is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

480

CA 15-01770

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

DAWN M. BUSH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RICKI KOVACEVIC, DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (BENJAMIN R. WOLF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered July 14, 2015. The order denied the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's motion that sought summary judgment with respect to the issues of defendant's negligence and proximate cause and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when, as a pedestrian, she was struck by a vehicle owned and operated by defendant. Following discovery, plaintiff purported to move for partial summary judgment "on the issue of liability," but she did so without raising the issue of serious injury (*see generally Ruzycki v Baker*, 301 AD2d 48, 51). Although not explicitly mentioned in her motion, plaintiff implicitly sought summary judgment dismissing defendant's first affirmative defense, which alleged plaintiff's comparative negligence, i.e., whether plaintiff's own conduct contributed to the accident. Supreme Court denied the motion.

As a preliminary matter, we note that because plaintiff did not raise the issue of serious injury on her motion, we cannot presume that such issue "was necessarily decided" by the court (*Ruzycki*, 301 AD2d at 51). We therefore address plaintiff's motion only with respect to the issues of defendant's negligence and proximate cause (*see Leahey v Fitzgerald*, 1 AD3d 924, 925; *cf. Stevens v Zukowski*, 55 AD3d 1400, 1401). We conclude that the court erred in denying the motion with respect to the issues of defendant's negligence and proximate cause, but properly denied the motion insofar as it

implicitly sought dismissal of the first affirmative defense (*see Brubaker v Houseknecht*, 83 AD3d 1539, 1540). Plaintiff established her prima facie entitlement to judgment as a matter of law on the issues of defendant's negligence and proximate cause by establishing that she was crossing the street within the crosswalk when she was "struck by defendant's vehicle, which was making a left turn" (*Beamud v Gray*, 45 AD3d 257, 257*; see Gyabaah v Rivlab Transp. Corp.*, 129 AD3d 447, 447; *see generally* Vehicle and Traffic Law § 1111 [a] [1]).

In support of her motion, plaintiff submitted defendant's deposition testimony. In that testimony, defendant stated that, because she struck plaintiff on the passenger side of her car, plaintiff "had to have been maybe two feet off of the crosswalk." Although defendant contends that plaintiff may have violated Vehicle and Traffic Law § 1151 (b), which provides that "[n]o pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield," that section "by its plain terms, applies only where there are no traffic signals" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442; *see Wallace v Barody*, 124 AD3d 1172, 1174; *Kochloffel v Giordano*, 99 AD2d 798, 799). Here, there was a traffic signal and, therefore, section 1151 does not apply. Moreover, the fact that the crosswalk was not marked because of the recent repaving of the road is also of no moment where, as here, the undisputed evidence establishes that plaintiff was walking in a crosswalk as defined by section 110 (*see Kochloffel*, 99 AD2d at 798).

In any event, defendant admitted that she did not see plaintiff until the impact had already occurred, and we thus conclude that defendant's claim concerning plaintiff's location in the street is mere speculation and an insufficient basis to deny plaintiff's motion insofar as it relates to defendant's negligence (*see France Herly Bien-Aime v Clare*, 124 AD3d 814, 815; *Sulaiman v Thomas*, 54 AD3d 751, 752). Although defendant contended that she looked for pedestrians before turning left, defendant had both "a statutory duty to use due care to avoid colliding with pedestrians" (*Barbieri v Vokoun*, 72 AD3d 853, 856; *see* Vehicle and Traffic Law § 1146), as well as "a common-law duty to see that which [she] should have seen through the proper use of [her] senses . . . [T]he fact that [defendant] never saw [plaintiff, who was walking slowly with a cane,] does not excuse [defendant's] conduct" (*Domanova v State of New York*, 41 AD3d 633, 634; *see Barbieri*, 72 AD3d at 856).

Contrary to plaintiff's contention, however, we conclude that there are issues of fact concerning plaintiff's comparative negligence (*see Brubaker*, 83 AD3d at 1540). We agree with defendant that the evidence submitted by plaintiff establishes that there are triable issues of fact whether the light for pedestrian traffic had changed before plaintiff commenced walking across the street (*see generally* Vehicle and Traffic Law § 1112 [b]). We thus conclude that "the evidence submitted by plaintiff does not establish a total absence of comparative negligence as a matter of law" (*Dasher v Wegmans Food Mkts.*, 305 AD2d 1019, 1019; *see Tiwari v Tyo*, 106 AD3d 1462, 1463;

Brubaker, 83 AD3d at 1540; *cf. Stevens*, 55 AD3d at 1401).

In opposition to the motion, defendant submitted an uncertified police accident report, wherein the police officer indicated that there was damage to the front passenger side of defendant's vehicle. Although "reports of police officers made upon their own observation and while carrying out their police duties are generally admissible in evidence" (*Yeargans v Yeargans*, 24 AD2d 280, 282; *see Szymanski v Robinson*, 234 AD2d 992, 992), the report submitted by defendant was "not authenticated" and, "[b]ecause the report was not submitted in evidentiary form, it should not have been considered on the summary judgment motion" (*Szymanski*, 234 AD2d at 992; *see Golombek v Marine Midland Bank*, 193 AD2d 1113, 1114). Here, as in *Szymanski*, defendant did not "provide[] an acceptable excuse" for failing to tender the proof in admissible form (234 AD2d at 992; *see generally Grasso v Angerami*, 79 NY2d 813, 814).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

481

KA 11-01995

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY STEWART, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK 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 (William D. Walsh, J.), rendered August 29, 2011. The appeal was held by this Court by order entered June 19, 2015, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (129 AD3d 1700). The proceedings were held and completed (Thomas J. Miller, J.).

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court to make and state for the record its determination whether defendant is a youthful offender (*People v Stewart*, 129 AD3d 1700, 1701). Upon remittal, the court declined to adjudicate defendant a youthful offender, and we now affirm. Inasmuch as defendant was convicted of robbery in the first degree (Penal Law § 160.15 [4]), an armed felony offense (*see* CPL 1.20 [41] [b]), he "is ineligible for a youthful offender adjudication unless the court concludes, insofar as relevant here, that there are 'mitigating circumstances that bear directly upon the manner in which the crime was committed' " (*People v Pulvino*, 115 AD3d 1220, 1223, *lv denied* 23 NY3d 1024; *see* CPL 720.10 [3] [i]). The court properly concluded that there were no such mitigating circumstances in this case and therefore did not abuse its discretion in refusing to afford defendant youthful offender status (*see People v Juliano*, 128 AD3d 1521, 1522, *lv denied* 26 NY3d 931; *People v Smith*, 118 AD3d 1492, 1493-1494, *lv denied* 25 NY3d 953; *People v McPhee*, 116 AD3d 714, 715, *lv denied* 23 NY3d 1040). Contrary to defendant's contention, the fact that he may have used only a BB gun is not a mitigating circumstance inasmuch as the victim testified that it appeared that defendant had a sawed-off shotgun, which he pointed at the victim's head while demanding money (*see*

People v Henry, 76 AD3d 1031, 1031).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

482

KA 15-01285

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEVEN ROBINSON, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 27, 2015. Defendant was resentenced upon remittal (*People v Robinson*, 128 AD3d 1464).

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

483

KA 13-00990

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER MCCREA, DEFENDANT-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael F. Griffith, J.), rendered April 3, 2013. The judgment convicted defendant, upon his plea of guilty, of perjury in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of perjury in the first degree (Penal Law § 210.15). We reject defendant's contention that his waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256). "County Court expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal, and the court did not conflate that right with those automatically forfeited by a guilty plea" (*People v Thompson*, 83 AD3d 1535, 1535 [internal quotation marks omitted]; *see People v Villar*, 115 AD3d 1361, 1361, *lv denied* 23 NY3d 1044). Defendant's challenge to the factual sufficiency of the plea allocution is encompassed by his valid waiver of the right to appeal (*see People v Oberdorf*, 136 AD3d 1291, 1292; *People v Rosado*, 70 AD3d 1315, 1316, *lv denied* 14 NY3d 892). In any event, defendant failed to preserve that contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see Oberdorf*, 136 AD3d at 1292; *People v Wackwitz*, 93 AD3d 1220, 1221, *lv denied* 19 NY3d 868).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

484

KA 14-00927

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JORDAN WILLIAMS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CAITLIN M. CONNELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 12, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree (four counts), attempted robbery in the second degree, and robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]), robbery in the third degree (§ 160.05), and four counts of robbery in the second degree (§ 160.10 [1], [2] [b]). As the People correctly concede, the waiver of the right to appeal does not encompass defendant's challenge to the severity of the sentence (*see People v Peterson*, 111 AD3d 1412, 1412). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

485

KA 15-01650

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER ZINK, ALSO KNOWN AS CHRISTOPHER G. ZINK, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered February 28, 2013. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

486

KA 13-00290

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HECTOR FUENTES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ROMANA A. LAVALAS OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Thomas J. Miller, J.), dated January 15, 2013. The order denied the motion of defendant pursuant to CPL 440.20.

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

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL 440.20 seeking to set aside the sentence imposed upon his conviction of, inter alia, three counts of murder in the second degree (Penal Law § 125.25 [1], [3]). On defendant's direct appeal, we agreed with defendant that County Court (Walsh, J.) erred in imposing consecutive sentences, and we modified the judgment by directing that certain of the sentences imposed shall run concurrently with other sentences (*People v Fuentes*, 52 AD3d 1297, 1301, *lv denied* 11 NY3d 736). Defendant contends that County Court (Miller, J.) erred in denying his instant motion seeking to set aside the sentence because the sentencing court did not substantially comply with CPL 400.21 in determining that he was a second felony offender. Contrary to the People's contention, this issue is not barred because it was not "previously determined on the merits" on defendant's direct appeal (CPL 440.20 [2]). We nevertheless reject defendant's contention.

The record establishes that the People failed to file a statement before sentencing indicating that defendant had a predicate felony offense (*see* CPL 400.21 [2]), and that the court failed to make a finding that defendant "has been subjected to a predicate felony conviction" (CPL 400.21 [4]). The sentencing record establishes, however, that defense counsel acknowledged that defendant had a prior felony conviction of burglary in the third degree and that he pleaded

guilty to receive the benefit of the sentence (*see* CPL 400.21 [3]). We therefore conclude that the error is harmless and that remitting the matter for the filing of a predicate felony statement and the court's finding "would be futile and pointless" (*People v Bouyea*, 64 NY2d 1140, 1142; *see People v Judd*, 111 AD3d 1421, 1423, *lv denied* 23 NY3d 1039; *cf. People v Loper*, 118 AD3d 1394, 1395-1396, *lv denied* 25 NY3d 1204).

Defendant's further contention that the court failed to comply with CPL 390.20 (1) by relying on an insufficient presentence report (PSR) is also without merit. It is undisputed that defendant declined to discuss his conviction with the probation officer, who then terminated the interview. The court, however, had the benefit of a PSR that had been prepared two years earlier and was attached to the PSR prepared in this matter. The earlier PSR provided the requisite history and background information for the court's consideration (*see generally People v Hemingway*, 222 AD2d 1102, 1103, *lv denied* 87 NY2d 1020).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

487

KA 14-00867

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL S. ROUNDS, DEFENDANT-APPELLANT.

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

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Daniel R. King, J.), rendered October 18, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [3]). We note at the outset that the notice of appeal contains an incorrect description of the court from which the appeal is taken. The notice of appeal is otherwise accurate, however, and "we exercise our discretion, in the interest of justice, and treat the notice of appeal as valid" (*People v Mitchell*, 93 AD3d 1173, 1173, *lv denied* 19 NY3d 999). We agree with defendant that his waiver of the right to appeal was not valid. During the plea colloquy, County Court "conflated the appeal waiver with the rights automatically waived by the guilty plea" (*People v Martin*, 88 AD3d 473, 474, *affd* 19 NY3d 914; *see People v Harris*, 125 AD3d 1506, 1506, *lv denied* 26 NY3d 929). Consequently, " 'the record fails to establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Cooper*, 136 AD3d 1397, 1398; *see Martin*, 88 AD3d at 474). Nevertheless, we affirm.

Defendant failed to move to withdraw his plea or to vacate the judgment of conviction, and he thus failed to preserve for our review his contention that he was coerced into pleading guilty based on statements made by the court and counsel prior to the plea (*see People v Boyd*, 101 AD3d 1683, 1683; *People v Lando*, 61 AD3d 1389, 1389, *lv denied* 13 NY3d 746). In any event, "defendant's contention is belied by the record inasmuch as, during the plea proceeding, defendant denied that he had been threatened or otherwise influenced against his

will into pleading guilty" (*People v Hall*, 82 AD3d 1619, 1619-1620, *lv denied* 16 NY3d 895).

Defendant's contention that he was denied effective assistance of counsel survives his guilty plea to the extent that he contends that the plea was infected by the alleged ineffective assistance (*see People v Gimenez*, 59 AD3d 1088, 1089, *lv denied* 12 NY3d 816). After a review of the record, however, we reject that contention (*see generally People v Ford*, 86 NY2d 397, 404; *People v Baldi*, 54 NY2d 137, 147). "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel" (*Ford*, 86 NY2d at 404; *see People v Bonavito*, 121 AD3d 1499, 1500, *lv denied* 25 NY3d 988; *People v Nieves*, 299 AD2d 888, 889, *lv denied* 99 NY2d 631), which is the case here. Indeed, we note that "the record reflects that defendant expressed satisfaction with defense counsel's services" (*People v Martin*, 55 AD3d 1236, 1237-1238, *lv denied* 11 NY3d 927, *reconsideration denied* 12 NY3d 855).

Finally, the sentence, including the period of postrelease supervision, is not unduly harsh or severe.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

488

KA 13-01193

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES KERCE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EVAN HANNAY 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 5, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the first degree (Penal Law § 140.30 [4]) and robbery in the first degree (§ 160.15 [4]). 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). We reject defendant's contention that the photo identification procedure was unduly suggestive, and County Court therefore properly refused to suppress the identification testimony of the victim. The subjects in the photo array were sufficiently similar in appearance, and "[t]he fact that defendant's photograph has a slightly lighter background than the others does not support the conclusion that the identification procedure was unduly suggestive" (*People v Burns*, 186 AD2d 1015, 1016, *lv denied* 81 NY2d 837; *see People v Redding*, 132 AD3d 700, 700). We reject defendant's further contention that the court erred in determining that the identification of defendant by another witness was confirmatory. The testimony of the witness at the *Rodriguez* hearing established that the witness had known defendant for approximately 20 years (*see People v Williams*, 101 AD3d 1730, 1731-1732, *lv denied* 21 NY3d 1021; *People v Whitlock*, 95 AD3d 909, 911, *lv denied* 19 NY3d 978; *see generally People v Rodriguez*, 79 NY2d 445, 452). The court properly refused to preclude the identification testimony of the witness based on the People's failure to provide

notice pursuant to CPL 710.30. Inasmuch as the witness's identification was confirmatory, no notice was required (*see People v Boyer*, 6 NY3d 427, 431-432; *Rodriguez*, 79 NY2d at 452; *People v Tas*, 51 NY2d 915, 916; *cf. People v Pacquette*, 25 NY3d 575, 580).

Contrary to defendant's contention, the court properly allowed a witness to testify to statements made by defendant and another man because the statements qualified as adoptive admissions (*see People v Campney*, 94 NY2d 307, 311-312; *People v Harper*, 132 AD3d 1230, 1234). Defendant further contends that he was deprived of a fair trial by prosecutorial misconduct based on the prosecutor's cross-examination of a witness and defendant and his comments during summation. Defendant's contention is preserved for our review only in part inasmuch as he failed to object to the majority of the prosecutor's alleged improprieties (*see People v Jemes*, 132 AD3d 1361, 1362-1363, *lv denied* 26 NY3d 1110; *People v Jones*, 114 AD3d 1239, 1241, *lv denied* 23 NY3d 1038, 25 NY3d 1166). In any event, defendant's contention is without merit. "Reversal based on prosecutorial misconduct is 'mandated only when the conduct [complained of] has caused such substantial prejudice to the defendant that he has been denied due process of law' " (*People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916) and, here, "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*Jones*, 114 AD3d at 1241 [internal quotation marks omitted]; *see People v Ielfield*, 132 AD3d 1298, 1299-1300). Finally, the sentence is not unduly harsh or severe.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

490

KA 11-02451

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAHLEIF GREEN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK 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 (William D. Walsh, J.), rendered December 1, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the third degree (Penal Law § 160.05) and assault in the second degree (§ 120.05 [3]). We note at the outset that we agree with defendant that the waiver of the right to appeal is not valid. County Court informed defendant that, if he did not sign a written waiver of the right to appeal, the court would not be bound to honor the sentence promise and could impose up to the maximum sentence. We conclude that the court "thereby threatened defendant with a greater term of incarceration in the event that defendant did not sign the waiver, thus rendering the court's colloquy concerning the waiver impermissibly coercive" (*People v Quinones*, 129 AD3d 1699, 1700).

Defendant failed to preserve for our review his contention that his guilty plea was not voluntarily entered, inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Brown*, 305 AD2d 1068, 1068-1069, *lv denied* 100 NY2d 579). In any event, defendant's contention lacks merit. First, "the fact that defendant was required to accept or reject the plea offer within a short time period does not amount to coercion" (*People v Jenkins*, 117 AD3d 1528, 1529, *lv denied* 23 NY3d 1063 [internal quotation marks omitted]). Second, "[t]he fact that the possibility of a federal prosecution may have influenced defendant's decision to plead guilty

is insufficient to establish that the plea was coerced" (*People v Hobby*, 83 AD3d 1536, 1536, *lv denied* 17 NY3d 859).

We agree with defendant's further contention that the court erred in sentencing him as a second felony offender without conducting a hearing. Defendant initially told the court that he wished to challenge the constitutionality of his predicate felony conviction but, when the court stated that it would consider defendant's challenge to be a violation of the plea agreement, defendant agreed not to challenge the predicate felony conviction, essentially waiving his right to a hearing. We agree with defendant that his waiver was the product of impermissible coercion by the court because, although the court " 'did advise defendant during the plea hearing that he was going to be sentenced as a [second] felony offender, it never specifically instructed him that admitting such [second] felony offender status was a condition of the plea agreement and that his failure to do so would result in a more severe sentence' " (*People v VanHooser* [appeal No. 2], 126 AD3d 1531, 1532). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing "following a hearing in which the People will have the burden of proof of establishing . . . whether defendant is a [second] . . . felony offender" (*id.*). In light of our determination, we do not address defendant's challenge to the severity of the sentence.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

491

KA 12-02144

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMEL S. MONTGOMERY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered August 21, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of criminal possession of a weapon in the third degree (§ 265.02 [3]), based on his constructive possession of a firearm. Contrary to defendant's contention, we conclude that, upon weighing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The police found the weapon inside a gym bag in the bedroom of a house in which they were executing a search warrant. The gym bag was in a dresser drawer, and two documents with defendant's name and/or his date of birth and the address of the house that was searched were located either inside the gym bag or next to it. The address and date of birth on the documents matched the pedigree information that defendant provided to the police. In addition, two police witnesses testified that they observed a pair of large pants in the bedroom, and the evidence established that defendant is 5 feet 6 inches tall and weighed 270 pounds. Thus, the jury did not fail to give the evidence the weight that it should be accorded in finding that defendant was in constructive possession of the firearm (*see generally People v Boyland*, 79 AD3d 1658, 1659, *affd* 20 NY3d 879).

Defendant further contends that Supreme Court erred in permitting police witnesses to provide limited testimony regarding the reason for their presence at the premises, without identifying the information upon which the search warrant was based or its purpose, because the evidence was unduly prejudicial. We reject that contention (*see generally People v Alvino*, 71 NY2d 233, 241-242). We conclude that the testimony of the police witnesses that they were part of a unit that investigated narcotics and illegal gun offenses, and that a photograph of defendant had been provided at a briefing, was properly admitted because it was " 'needed as background material' . . . or to 'complete the narrative of the episode' " (*People v Till*, 87 NY2d 835, 837).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

492

CA 15-01234

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

CITIMORTGAGE, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KIP C. CARTER, SALLY ANN CARTER, ALSO KNOWN AS SALLY ANN M. CARTER, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

DAVIDSON FINK LLP, ROCHESTER (LARRY T. POWELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered June 18, 2014. The order and judgment dismissed the complaint.

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

Memorandum: In this mortgage foreclosure action, plaintiff appeals from an order and judgment, issued sua sponte, dismissing the complaint without prejudice based on plaintiff's failure to meet a single court-ordered deadline for filing a motion for a judgment of foreclosure. We reverse. Supreme Court erred in dismissing the complaint sua sponte "inasmuch as '[u]se of the [sua sponte] power of dismissal must be restricted to the most extraordinary circumstances' " (*BAC Home Loans Servicing, LP v Maestri*, 134 AD3d 1593, 1593), such as "a pattern of willful noncompliance with court-ordered deadlines," and no such extraordinary circumstances are reflected in the record before us (*Bank of Am., N.A. v Bah*, 95 AD3d 1150, 1152; *see NYCTL 2008-A Trust v Estate of Locksley Holas*, 93 AD3d 650, 651; *U.S. Bank, N.A. v Guichardo*, 90 AD3d 1032, 1033). "Although 'a litigant cannot ignore court orders with impunity' . . . , we conclude that missing a single deadline by one week does not 'warrant the court's exercise of its power to dismiss a complaint sua sponte' " (*Citimortgage, Inc. v Petragnani*, 137 AD3d 1688, ___).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

493

CA 15-01275

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

JAMES M. HELD AND THERESA M. HELD,
PLAINTIFFS,

V MEMORANDUM AND ORDER

THE PIKE COMPANY, AMTHOR STEEL, INC., AND
CATHOLIC HEALTH SYSTEM, INC., DEFENDANTS.

THE PIKE COMPANY, AMTHOR STEEL, INC., AND
CATHOLIC HEALTH SYSTEM, INC., THIRD-PARTY
PLAINTIFFS-RESPONDENTS,

V

CME ASSOCIATES, INC., THIRD-PARTY
DEFENDANT-APPELLANT.

THE SOBEL LAW GROUP, HUNTINGTON (CURTIS SOBEL OF COUNSEL), AND
GOERGEN, MANSON & MCCARTHY, BUFFALO, FOR THIRD-PARTY
DEFENDANT-APPELLANT.

PILLINGER MILLER TARALLO, LLP, SYRACUSE (JEFFREY D. SCHULMAN OF
COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered October 10, 2014. The judgment directed third-party defendant to pay $1,147,049.14, plus interest, to third-party plaintiffs.

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by James M. Held (plaintiff) when he slipped on a steel beam and fell 15 feet to the ground. Supreme Court granted plaintiffs' motion for partial summary judgment on liability under Labor Law § 240 (1) against defendants-third-party plaintiffs (third-party plaintiffs), who were, respectively, the owner, the general contractor, and a subcontractor on the construction project. Third-party plaintiffs commenced a third-party action against third-party defendant, CME Associates, Inc. (CME), seeking contractual and common-law indemnification and contribution on the ground that CME's negligence in leaving a slippery substance on the beam caused plaintiff's injuries. The court granted

plaintiffs' motion to sever the damages-only trial from the third-party action. Plaintiffs and third-party plaintiffs agreed to submit the issue of damages to the court on papers alone, and the court awarded plaintiffs damages. After a trial on the third-party action, the court issued a judgment against CME, from which it now appeals.

Contrary to CME's contention, it was not held liable under Labor Law § 240 (1) but, rather, it was held liable for its negligence in causing the accident. It is well settled that, where an owner or contractor is held liable to a plaintiff pursuant to Labor Law §§ 240 or 241, the owner or contractor may recover, "under familiar common-law principles, full indemnification . . . from the actor who caused the accident (the active tort-feasor), and, where the cause is shared, contribution" (*Kelly v Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 NY2d 1, 6-7; *see Lapi v Rosewood Home Bldrs.*, 256 AD2d 1008, 1009; *see also Krajnik v Forbes Homes, Inc.*, 120 AD3d 902, 904-905). Contribution is proper where the culpable parties are subject to liability for damages for the same personal injury, "whether or not the culpable parties are allegedly liable for the injury under the same or different theories" (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603).

CME further contends that it was denied the opportunity to litigate the issue of plaintiffs' damages. We agree with third-party plaintiffs that CME waived that contention by not opposing plaintiffs' motion to sever (*see generally Neckles v VW Credit, Inc.*, 23 AD3d 191, 192; *Graziano v 118-17 Liberty Ave. Mgt. Corp.*, 209 AD2d 582, 583). We have considered CME's remaining contentions and conclude that they are without merit.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

495

CA 15-01775

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

ANDREA ROTELLA DIEZ, AS PARENT AND NATURAL GUARDIAN OF A.R., AN INFANT, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

LEWISTON-PORTER CENTRAL SCHOOL DISTRICT, RESPONDENT-APPELLANT.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (JOSHUA BLOOM OF COUNSEL), FOR RESPONDENT-APPELLANT.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MATTHEW T. MOSHER OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 18, 2014. The order granted the application of claimant for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the application is denied.

Memorandum: Supreme Court abused its discretion in granting claimant's application for leave to serve a late notice of claim almost three years and eight months after the accident in question occurred. "In determining whether to grant such leave, the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality" (*Matter of Friend v Town of W. Seneca*, 71 AD3d 1406, 1407). Claimant's excuse that she was "unaware of the severity of [her daughter's] injury is unavailing without supporting medical evidence explaining why the possible permanent effects of the injury took so long to become apparent and be diagnosed" (*Matter of Felice v Eastport/South Manor Cent. Sch. Dist.*, 50 AD3d 138, 151). Thus, claimant's affidavit, without more, is insufficient to demonstrate a reasonable excuse for her failure to serve a timely notice of claim (*see id.* at 150-151). Further, claimant failed to establish that respondent had actual knowledge of the essential facts constituting the claim within the requisite time period (*see Folmar v Lewiston-Porter Cent. Sch. Dist.*, 85 AD3d 1644, 1645). "Respondent's knowledge of the accident and the injury, without more, does not

constitute actual knowledge of the essential facts constituting the claim" (*id.* [internal quotation marks omitted]; *see Le Mieux v Alden High Sch.*, 1 AD3d 995, 996). Finally, respondent was substantially prejudiced by the delay because it could not promptly obtain witness statements and a medical examination of claimant's daughter, which is particularly significant in light of the evidence that there was no serious injury apparent immediately after the incident (*see generally Friend*, 71 AD3d at 1407; *Santana v Western Regional Off-Track Betting Corp.*, 2 AD3d 1304, 1305, *lv denied* 2 NY3d 704).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

497

CA 15-00805

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

INDUS PVR LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MAA-SHARDA, INC., DEFENDANT-APPELLANT,
ROSHAN HOSPITALITY, INC., ET AL., DEFENDANTS.
(APPEAL NO. 1.)

FRANK A. ALOI, ROCHESTER, AND ROBERT J. LUNN, FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Matthew A. Rosenbaum, J.), entered September 16, 2014. The judgment, among other things, adjudged that the mortgaged premises described in the complaint in this action be sold at public auction.

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

Memorandum: These consolidated appeals arise from a foreclosure action commenced by First-Citizens Bank and Trust Co. (First-Citizens) against, inter alia, MAA-Sharda, Inc. (defendant). Plaintiff, Indus PVR LLC, was thereafter substituted as plaintiff for First-Citizens. In appeal No. 1, defendant appeals from a judgment of foreclosure. In appeal No. 2, defendant appeals from an order that granted in part its motion to set an undertaking in appeal No. 1 and, in appeal No. 3, defendant appeals from an order that denied its motion for leave to renew and reargue its opposition to plaintiff's motion for a judgment of foreclosure in appeal No. 1.

Initially, we note that defendant failed to present any argument in its brief regarding the order in appeal No. 2, and thus it has abandoned any contentions with respect to that order (*see Davis v School Dist. of City of Niagara Falls*, 4 AD3d 866, 867; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We therefore dismiss defendant's appeal from the order in appeal No. 2. In addition, it is well settled that "no appeal lies from an order denying leave to reargue" (*Hill v Milan*, 89 AD3d 1458, 1458; *see Empire Ins. Co. v Food City*, 167 AD2d 983, 984), and thus we dismiss the appeal from the order in appeal No. 3 to the extent that defendant sought leave to reargue. We otherwise affirm the order in appeal No. 3 inasmuch as the facts presented by defendant in seeking leave to renew " 'would [not] change

the prior determination' " (*Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1628, quoting CPLR 2221 [e] [2]).

In appeal No. 1, defendant contends that it was entitled to limited discovery on the amount due under the second of the two notes underlying the mortgages upon which foreclosure was sought. We reject that contention. It is well settled that "a defendant forfeits the right to discovery by defaulting in answering the complaint" (*Kolonkowski v Daily News, L.P.*, 112 AD3d 677, 678 [internal quotation marks omitted]; *see Rudra v Friedman*, 123 AD3d 1104, 1105; *Yeboah v Gaines Serv. Leasing*, 250 AD2d 453, 454), and, in this case, defendant failed to serve an answer. In seeking discovery despite that failure, defendant relies on RPAPL 1321 (1), which states in pertinent part that, where a defendant in a foreclosure action "fails to answer within the time allowed . . . , upon motion of the plaintiff, the court . . . [may] direct a referee to compute the amount due to the plaintiff." Based on that statute, a non-answering defendant may "apply to have [its] claim considered by the court . . . to the extent it relates to the amount due on the mortgage debt" (*Federal Natl. Mtge. Assn. v Connelly*, 84 AD2d 805, 806).

Here, notwithstanding defendant's characterization of its contention, we conclude that defendant does not seek discovery to support a challenge to the amount due under the mortgages. To the contrary, defendant seeks discovery in order to establish a defense to the foreclosure action, and thus the court properly denied defendant's discovery request based on its default in answering the complaint (*see Rudra*, 123 AD3d at 1105; *Singh v Friedson*, 36 AD3d 605, 606, *lv dismissed* 9 NY3d 861). Defendant contends that plaintiff may not collect on the second note because that debt was discharged when First-Citizens filed an IRS form 1099-C, and it seeks discovery to establish that First-Citizens took a tax write-off on the second note that, according to defendant, establishes that plaintiff may no longer collect on that debt (*cf. FDIC v Cashion*, 720 F3d 169, 179). We therefore affirm the judgment in appeal No. 1.

Defendant's further contentions are academic in light of our determination.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

498

CA 15-00806

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

INDUS PVR LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MAA-SHARDA, INC., DEFENDANT-APPELLANT,
ROSHAN HOSPITALITY, INC., ET AL., DEFENDANTS.
(APPEAL NO. 2.)

FRANK A. ALOI, ROCHESTER, AND ROBERT J. LUNN, FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Matthew A. Rosenbaum, J.), entered November 5, 2014. The order, among other things, ordered that an undertaking in the sum of two million dollars is required.

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

Same memorandum as in *Indus PVR LLC v MAA-Sharda, Inc.* ([appeal No. 1] ___ AD3d ___ [June 10, 2016]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

499

CA 15-00807

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

INDUS PVR LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MAA-SHARDA, INC., DEFENDANT-APPELLANT,
ROSHAN HOSPITALITY, INC., ET AL., DEFENDANTS.
(APPEAL NO. 3.)

FRANK A. ALOI, ROCHESTER, AND ROBERT J. LUNN, FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Matthew A. Rosenbaum, J.), entered December 26, 2014. The order denied the motion of defendant MAA-Sharda, Inc. for leave to reargue and renew its opposition to plaintiff's motion for a judgment of foreclosure and sale.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Indus PVR LLC v MAA-Sharda, Inc.* ([appeal No. 1] ___ AD3d ___ [June 10, 2016]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

500

CA 15-00447

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF MIGUEL COLON, CONSECUTIVE NO. 177673, FROM
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO
MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF
MENTAL HEALTH, AND NEW YORK STATE DEPARTMENT
OF CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (MICHAEL H. MCCORMICK OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered February 6, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, continued the commitment of petitioner to a secure treatment facility.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

501

CAF 14-02288

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF IAN WALKER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SUNSHINE CARROLL, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

BENNETT SCHECHTER ARCURI & WILL, LLP, BUFFALO (ANDREW F. EMBORSKY OF COUNSEL), FOR PETITIONER-RESPONDENT.

LYDIA V. EVANS, ATTORNEY FOR THE CHILD, FREDONIA.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered June 24, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole custody of the subject child.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order that, inter alia, granted petitioner father's petition seeking sole custody of the parties' child. In appeal No. 2, the mother appeals from an order that denied her motion pursuant to CPLR 4404 (b) and 5015 (a) to vacate the order that is the subject of appeal No. 1.

Contrary to the mother's contention in appeal No. 1, "this proceeding involves an initial court determination with respect to custody and, [a]lthough the parties' informal arrangement is a factor to be considered, [the father] is not required to prove a substantial change in circumstances in order to warrant a modification thereof" (*Matter of DeNise v DeNise*, 129 AD3d 1539, 1539-1540 [internal quotation marks omitted]). Contrary to the mother's further contention, affording great deference to Family Court's assessment of witness credibility, we conclude that the court's determination that the best interests of the child would be best served by awarding custody to the father has a sound and substantial basis in the record (*see Matter of Thillman v Mayer*, 85 AD3d 1624, 1625). We likewise affirm the order in appeal No. 2. Even assuming, arguendo, that the mother's request for relief under CPLR 4404 (b) was timely pursuant to CPLR 4405, we conclude that the court did not abuse its discretion in

denying the motion pursuant to CPLR 4404 (b) and 5015 (a) (*see Matter of Ramsey H. [Benjamin K.]*, 99 AD3d 1040, 1043, *lv denied* 20 NY3d 858; *Marine Midland Bank v Cramer*, 177 AD2d 1009, 1009, *lv dismissed* 79 NY2d 915).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

502

CAF 14-02289

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF IAN WALKER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SUNSHINE CARROLL, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

BENNETT SCHECHTER ARCURI & WILL, LLP, BUFFALO (ANDREW F. EMBORSKY OF COUNSEL), FOR PETITIONER-RESPONDENT.

LYDIA V. EVANS, ATTORNEY FOR THE CHILD, FREDONIA.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 24, 2014 in a proceeding pursuant to Family Court Act article 6. The order denied the motion of respondent to vacate a prior court order awarding sole custody of the subject child to petitioner.

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

Same memorandum as in *Matter of Walker v Carroll* ([appeal No. 1] ___ AD3d ___ [June 10, 2016]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

503

CA 15-01180

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF RESCUE MISSION OF UTICA, INC.,
PETITIONER-RESPONDENT,

V ORDER

CITY OF UTICA, ET AL., RESPONDENTS,
AND MICHAEL S. RIZZO, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

SCHMITT & LASCURETTES, LLC, UTICA (WILLIAM P. SCHMITT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Erin P. Gall, J.), entered March 17, 2014 in a CPLR article 78 proceeding. The judgment granted the petition, adjudged that petitioner's use of its property is legal and reversed the determination of respondent Zoning Board of Appeals of the City of Utica.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

504

CA 15-01181

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF MICHAEL S. RIZZO,
PETITIONER-APPELLANT,

V ORDER

RESCUE MISSION OF THE CITY OF UTICA, INC., CITY OF UTICA, DAVID ROEFARO, AS MAYOR OF CITY OF UTICA AND AS ACTING COMMISSIONER OF CODES, AND JOHN GILBRIDE, AS CHIEF BUILDING INSPECTOR FOR CITY OF UTICA ZONING BOARD OF APPEALS,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

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

SCHMITT & LASCURETTES, LLC, UTICA (WILLIAM P. SCHMITT OF COUNSEL), FOR RESPONDENT-RESPONDENT RESCUE MISSION OF THE CITY OF UTICA, INC.

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (KATHRYN HARTNETT OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CITY OF UTICA, DAVID ROEFARO, AS MAYOR OF CITY OF UTICA AND AS ACTING COMMISSIONER OF CODES, AND JOHN GILBRIDE, AS CHIEF BUILDING INSPECTOR FOR CITY OF UTICA ZONING BOARD OF APPEALS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Erin P. Gall, J.), entered January 26, 2015 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

505

CA 15-01523

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF ELAM SAND & GRAVEL CORP.,
AND GARY EVANS,
PLAINTIFFS-PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF WEST BLOOMFIELD, TOWN BOARD OF TOWN
OF WEST BLOOMFIELD, TOWN OF WEST BLOOMFIELD
PLANNING BOARD, SUE S. STEWART, NEIGHBORS TO
SUPPORT WEST BLOOMFIELD AND CITIZENS TO SUPPORT
WEST BLOOMFIELD,
DEFENDANTS-RESPONDENTS-RESPONDENTS.

HOPKINS SORGI & ROMANOWSKI PLLC, BUFFALO (PETER J. SORGI OF COUNSEL), FOR PLAINTIFFS-PETITIONERS-APPELLANTS.

BOYLAN CODE LLP, ROCHESTER (DAVID K. HOU OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-RESPONDENTS TOWN OF WEST BLOOMFIELD, TOWN BOARD OF TOWN OF WEST BLOOMFIELD, AND TOWN OF WEST BLOOMFIELD PLANNING BOARD.

NIXON PEABODY LLP, ROCHESTER (TERENCE L. ROBINSON, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-RESPONDENTS SUE S. STEWART, NEIGHBORS TO SUPPORT WEST BLOOMFIELD AND CITIZENS TO SUPPORT WEST BLOOMFIELD.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered October 27, 2014 in a CPLR article 78 proceeding and declaratory judgment action. The order granted the cross motion of defendants-respondents Sue S. Stewart, Neighbors to Support West Bloomfield and Citizens to Support West Bloomfield to dismiss the 12th cause of action.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross motion is denied and the 12th cause of action is reinstated.

Memorandum: Plaintiffs-petitioners (petitioners) appeal from an order granting the cross motion of defendants-respondents Sue S. Stewart, Neighbors to Support West Bloomfield and Citizens to Support West Bloomfield (collectively, respondents) pursuant to CPLR 3211 (a) (7) seeking to dismiss the 12th cause of action in this combined declaratory judgment action/CPLR article 78 proceeding. The 12th cause of action alleges that defendants-respondents Town of West Bloomfield (Town), Town Board of Town of West Bloomfield (Town Board) and Town of West Bloomfield Planning Board (Planning Board) acted in

bad faith and intentionally delayed the application of plaintiff-petitioner Elam Sand & Gravel Corp. (Elam) for a special use permit to operate a sand and gravel mine in order to enact a new zoning code that disallowed mining on the property Elam leased from plaintiff-petitioner Gary Evans for that purpose. Petitioners therefore alleged that the special facts exception applies to Elam's application for a special use permit. We agree with petitioners that Supreme Court erred in granting respondents' cross motion to dismiss that cause of action on the ground that the special facts exception does not apply as a matter of law.

"As a general matter, a case must be decided upon the law as it exists at the time of the decision . . . In land use cases, the law in effect when the application is decided applies, regardless of any intervening amendments to the zoning law . . . Under the special facts exception, where the landowner establishes entitlement as a matter of right to the underlying land use application[,] . . . the application is determined under the zoning law in effect at the time the application is submitted . . . In order for a landowner to establish entitlement to the request as a matter of right, the landowner must be in 'full compliance with the requirements at the time of the application,' such that 'proper action upon the permit would have given [the landowner] time to acquire a vested right' . . . In addition to showing entitlement to the request as a matter of right, the landowner must also show 'extensive delays indicative of bad faith' . . . , 'unjustifiable actions' by the municipal officials . . . , or 'abuse of administrative procedures' " (*Rocky Point Drive-In, L.P. v Town of Brookhaven*, 21 NY3d 729, 736). Here, Elam filed its application for a special use permit on September 1, 2010, and the Town issued a moratorium on mining operations on June 8, 2011. After petitioners sought court intervention on two occasions, the Planning Board conducted a public hearing on April 26, 2012, but did not issue a determination. The Town Board adopted a new zoning law on April 10, 2013 that prohibited mining of the subject property and, on June 19, 2013, the Planning Board returned the application to Elam on the ground that mining was not a permitted use.

We agree with petitioners that the special facts exception may be applied to the application for a special use permit (*see Matter of Gardiner v Lo Grande*, 83 AD2d 614, 615, *following remittal* 92 AD2d 611, *affd* 60 NY2d 673 *for the reasons stated in* 83 AD2d 614; *Matter of c/o Hamptons, LLC v Rickenbach*, 98 AD3d 736, 736-737; *see also Matter of Huntington Ready-Mix Concrete v Town of Southampton*, 104 AD2d 499, 499-500), and that our decision in *Morgan v Town of W. Bloomfield* (295 AD2d 902, 904) is not to the contrary. In *Morgan*, the plaintiffs sought a declaration that they were entitled to apply for a special use permit under the former law before an administrative record was created but, here, there is an administrative record that may be reviewed in order to determine whether Elam complied with the requirements for a special use permit before the new zoning law was enacted (*see generally Matter of Pokoik v Silsdorf*, 40 NY2d 769, 772-773, *rearg denied* 42 NY2d 824). We also agree with petitioners that *Matter of Lemir Realty Corp. v Larkin* (11 NY2d 20, 24) does not prohibit the consideration of the special facts exception to an

application for a special use permit. Rather, the Court declined to disturb the determination denying the application for a special use permit because the determination was not arbitrary or capricious and, here, no determination on Elam's application was made. We therefore conclude that petitioners stated a cause of action for applying the special facts exception to Elam's application for a special use permit (*see generally Leon v Martinez*, 84 NY2d 83, 87-88). We therefore reverse the order, deny the cross motion and reinstate that cause of action.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

506

KA 10-02419

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND CARNI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAQUAN CRIMM, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered October 6, 2010. The appeal was held by this Court by order entered November 14, 2014, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (122 AD3d 1300). The proceedings were held and completed.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: We previously held this case, reserved decision and remitted the matter to County Court "to make and state for the record 'a determination of whether defendant is a youthful offender' " based on the court's failure "to determine whether defendant, *an eligible youth* (*see* CPL 720.20 [1]), should be afforded youthful offender status" (*People v Crimm*, 122 AD3d 1300, 1300 [emphasis added]). Upon remittal, the court determined that, "[b]ecause [defendant] had [pleaded] guilty to an armed felony offense," a determination that defendant was an eligible youth required, pursuant to CPL 720.10 (3), a finding of mitigating circumstances bearing directly on the manner in which the crime was committed or that defendant's participation in the crime was relatively minor. Upon finding that neither factor was present, the court, in effect, determined that defendant was not eligible for youthful offender status. That was error.

As the People correctly concede, defendant was not convicted of an armed felony. Although defendant was convicted of, inter alia, two counts of robbery in the first degree (Penal Law § 160.15 [1], [3]), possession of a deadly weapon is not an element of either count (*see* CPL 1.20 [41] [a]; *see generally People v Keiffer*, 207 AD2d 1022, 1022-1023; *People v Drew*, 147 AD2d 411, 412), nor did defendant display what appeared to be a firearm (*see* CPL 1.20 [41] [b]). Defendant also was convicted of assault in the first degree, which

contains the element of causing serious physical injury to another person "by means of a deadly weapon or a dangerous instrument" (Penal Law § 120.10 [1]). Defendant was armed with a golf club, which is not "a loaded weapon from which a shot, readily capable of producing death or other serious physical injury may be discharged" (CPL 1.20 [41] [a]). The court thus erred in limiting its inquiry upon remittal into whether defendant was an eligible youth pursuant to the factors set forth in CPL 720.10 (3), and in failing to address whether defendant, as an eligible youth, should be adjudicated a youthful offender pursuant to the criteria set forth in CPL 720.20 (*see People v Newman*, 137 AD3d 1306, 1307; *People v Boria*, 124 AD3d 467, 468, *lv denied* 25 NY3d 1069; *People v Minemier*, 124 AD3d 1408, 1408). We therefore hold the case, reserve decision, and remit the matter to County Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*see People v Rudolph*, 21 NY3d 497, 503).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

507

KA 12-02098

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW ALLEN, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered September 27, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). As the People correctly concede, defendant did not knowingly, voluntarily, and intelligently waive his right to appeal. "Despite the existence of a written appeal waiver form signed by defendant and his attorney, no questions were asked of defendant about the appeal waiver and his understanding thereof" (*People v Frysinger*, 111 AD3d 1397, 1398; *see People v Briglin*, 125 AD3d 1518, 1518-1519, *lv denied* 26 NY3d 926). The sentence is not unduly harsh or severe.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

510

KA 14-02143

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID A. WITHERSPOON, DEFENDANT-APPELLANT.

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Robert B. Wiggins, J.), dated October 23, 2014. 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: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court's upward departure from his presumptive classification as a level two risk is not supported by clear and convincing evidence. We reject that contention. " 'The court's discretionary upward departure [to a level three risk] was based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument' " (*People v Tidd*, 128 AD3d 1537, 1537, *lv denied* 25 NY3d 913). We reject defendant's further contention that the court improperly admitted a sworn deposition from each of the two victims inasmuch as those depositions constitute "reliable hearsay" that the court could properly consider in making an upward departure (§ 168-n [3]; *see People v Pichcuskie*, 111 AD3d 1344, 1344, *lv denied* 22 NY3d 861).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

511

KA 14-01106

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

NICOLE DESGROSIELLIER, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN 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 (Matthew J. Murphy, III, J.), entered May 12, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

516

KA 12-02276

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL T. ARTERBERRY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered October 24, 2012. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of marihuana in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of marihuana in the third degree (Penal Law § 221.20). Viewing the evidence admitted at trial in light of the elements of the crime in this bench trial (*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 People v Bleakley*, 69 NY2d 490, 495). Here, the confidential informant testified that he had purchased marihuana from defendant at the subject apartment on more than one occasion, and the People presented evidence establishing that "defendant exercised dominion or control over the [marihuana] by a sufficient level of control over the area in which [it was] found" (*People v Mattison*, 41 AD3d 1224, 1225 [internal quotation marks omitted], *lv denied* 9 NY3d 924; *see People v Slade*, 133 AD3d 1203, 1205, *lv denied* 26 NY3d 1150).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

517

KA 15-01130

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL FINOCCHIARO, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Joseph E. Fahey, J.), entered January 27, 2015. 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 designating him a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court did not "summarily adopt[ ]" the recommendation of the Board of Examiners of Sex Offenders in classifying defendant as a level three risk, nor did the court fail to set forth the conclusions of law upon which it based its determination. Moreover, the People did not fail to establish facts supporting the level three risk determination by clear and convincing evidence, as required (*see* § 168-n [3]; *People v Mingo*, 12 NY3d 563, 571; *People v Warrior*, 57 AD3d 1471, 1472; *People v Hamelinck*, 23 AD3d 1060, 1060). In particular, the People adduced clear and convincing proof supporting the assessment of 20 points against defendant under risk factor 7, which covers defendant's relationship with the victim. Given defendant's plea of guilty to disseminating indecent material to a 12-year-old in violation of Penal Law § 235.22, and further considering defendant's plea of guilty to having raped or sexually abused at least four additional underage girls throughout 2010, we conclude that there is ample evidence supporting the finding that defendant established his relationship with the 12-year-old for the purpose of victimizing her.

We reject defendant's contention that the court erred in failing to consider, as a basis for a downward departure from the presumptive

risk level, defendant's expressions of remorse at sentencing. "A departure from the presumptive risk level is warranted where 'there exists an aggravating or mitigating factor of a kind or to a degree, not otherwise adequately taken into account by the guidelines' (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [1997 ed])" (*People v Guaman*, 8 AD3d 545, 545; *see People v Gillotti*, 23 NY3d 841, 861; *Hamelinck*, 23 AD3d at 1060). An offender's acceptance or nonacceptance of responsibility is taken into account by the guidelines (*see People v Filkins*, 128 AD3d 1231, 1232, *lv denied* 26 NY3d 904).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

518

CAF 15-01132

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF LATASHA R. GRANT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. HABALOU, RESPONDENT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

PATRICIA M. MCGRATH, ATTORNEY FOR THE CHILDREN, LOCKPORT.

Appeal from an order of the Family Court, Niagara County (Kathleen M. Wojtaszek-Gariano, J.), entered June 10, 2015 in a proceeding pursuant to Family Court Act article 6. The order directed that respondent's visitation with the subject children be supervised.

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

Memorandum: Respondent father appeals from an order that granted petitioner mother's petition in part and modified a prior order of custody by requiring that the father's visitation with the subject children be supervised. The father failed to preserve for our review his contention that Family Court was biased against him (*see Matter of Reinhardt v Hardison*, 122 AD3d 1448, 1448-1449; *Matter of Brian P. [April C.]*, 89 AD3d 1530, 1531). In any event, that contention is without merit (*see Matter of McDonald v Terry*, 100 AD3d 1531, 1531; *Brian P.*, 89 AD3d at 1531). Contrary to the father's further contention, although the court did not state that it was in the best interests of the children to modify the prior order of custody, the court's findings demonstrate that it made such a determination (*see Matter of Pauline E. v Renelder P.*, 37 AD3d 1145, 1146). We further conclude that the "court's determination that unsupervised visitation would be detrimental to the child[ren] has a sound and substantial basis in the record" (*Matter of Green v Bontzolakes*, 111 AD3d 1282, 1283; *see generally Matter of Procopio v Procopio*, 132 AD3d 1243, 1244, *lv denied* 26 NY3d 915). We have considered the father's remaining contention and conclude that it is without merit.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

522

CAF 14-01120

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF AMANDA M., MISTY M.,
AMBER M., AND JEREMY H.
---------- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

GEORGE M., RESPONDENT-APPELLANT.

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

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

KRISTIN L. ARCURI, ATTORNEY FOR THE CHILDREN, BUFFALO.

WILLIAM D. BRODERICK, JR., ATTORNEY FOR THE CHILD, ELMA.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 16, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order revoked a suspended judgment and terminated respondent's parental rights.

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

Memorandum: Respondent father appeals from an order by which Family Court, inter alia, revoked a suspended judgment entered upon the father's admission that he had abandoned the four children and terminated his parental rights. It is well established that, "[i]f the court determines by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Ronald O.*, 43 AD3d 1351, 1352). Here, there is a sound and substantial basis in the record to support the court's determination that the father failed to comply with the terms of the suspended judgment and that it is in the children's best interests to terminate his parental rights (*see Matter of Ramel H. [Tenese T.]*, 134 AD3d 1590, 1592; *Matter of Savanna G. [Danyelle M.]*, 118 AD3d 1482, 1483).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

523

CA 15-01272

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE SHORE WINDS, LLC, PLAINTIFF-RESPONDENT,

V ORDER

SEBASTIAN CACCAMO, DEFENDANT-APPELLANT.

ELLIOTT STERN CALABRESE, LLP, ROCHESTER (MICHAEL T. ANSALDI OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (CANDACE M. CURRAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order and judgment (one paper) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered October 3, 2014. The amended order and judgment granted the motion of plaintiff for a money judgment pursuant to CPLR 3215.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* CPLR 5511; *Lauer v City of Buffalo,* 53 AD3d 213, 216; *Johnson v McFadden Ford*, 278 AD2d 907, 907).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

528

CA 15-01703

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

MARK DODGE AND KRISTEN DODGE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (THOMAS J. NAVARRO OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROSENTHAL, KOOSHOIAN & LENNON, LLP, BUFFALO (PETER M. KOOSHOIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 16, 2015. The order, insofar as appealed from, denied that part of the motion of defendant County of Erie seeking summary judgment dismissing the complaint of plaintiffs Mark Dodge and Kristen Dodge.

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

Memorandum: The County of Erie (defendant) appeals from an order insofar as it denied that part of its motion for summary judgment dismissing plaintiffs' complaint, which alleges that Mark Dodge (plaintiff) sustained injuries as a result of a motor vehicle collision that occurred on a road owned by defendant. Supreme Court properly denied that part of the motion. Defendant had a duty to maintain its highway and intersection in a condition reasonably safe for motorists (*see Friedman v State of New York*, 67 NY2d 271, 283; *Tomassi v Town of Union*, 46 NY2d 91, 97), and that duty was not negated by plaintiff's failure to heed the stop sign controlling his lane of travel and his failure to yield the right-of-way to the other vehicle. The negligence of a plaintiff in violating the rules of the road will not relieve a municipality of liability for its negligence in the design, construction, or maintenance of a highway (*see Bottalico v State of New York*, 59 NY2d 302, 306; *see also Land v County of Erie*, 138 AD3d 1462, 1463). As we recently concluded in *Land*, "[n]o meaningful legal distinction can be made between a traveler who uses [an intersection] with justification and one who uses it negligently insofar as such conduct relates to whom a duty is owed to maintain the [intersection]. The comparative fault of the driver, of course, is relevant to apportioning liability" (138 AD3d at

1463 [internal quotation marks omitted]). Here, we conclude that there are triable issues of fact concerning whether defendant was negligent and, if so, whether such negligence was a proximate cause of the accident, or whether plaintiff's negligence in running the stop sign was the sole proximate cause of the accident (*see Poveromo v Town of Cortlandt*, 127 AD3d 835, 838; *see also Land*, 138 AD3d at 1463).

We further conclude that defendant failed to establish on its motion its entitlement as a matter of law to the qualified immunity set forth in *Weiss v Fote* (7 NY2d 579, 585, *rearg denied* 8 NY2d 934). Defendant may have demonstrated that the placement of the "stop ahead" sign near the intersection, and possibly also the decision not to reposition the stop sign itself, were the product of an informal study and a resultant plan, but defendant failed to demonstrate that the overall design of the intersection was in fact "the product of any prior study or plan," as necessary to be accorded qualified immunity (*Brown v State of New York*, 79 AD3d 1579, 1582, citing *Cummins v County of Onondaga*, 198 AD2d 875, 877, *affd* 84 NY2d 322). "There is a triable issue of fact concerning whether defendant's [design and maintenance of] the intersection . . . was the product of adequate study and a reasonable planning decision . . . or instead was negligent" (*Drake v County of Herkimer*, 15 AD3d 834, 835).

We have considered the remaining contention of defendant and conclude that it is without merit.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

530

KA 15-01733

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW K. PEYATT, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO, 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. Farkas, J.), rendered April 22, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sexual act in the first degree and attempted course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted course of sexual conduct against a child in the first degree (Penal Law §§ 110.00, 130.75 [1] [a]) and attempted criminal sexual act in the first degree (§§ 110.00, 130.50 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737). We note, however, that both the certificate of conviction and the uniform sentence and commitment form incorrectly recite that defendant was convicted of criminal sexual act in the first degree rather than an attempt to commit that crime. The certificate of conviction and the sentence and commitment form must therefore be amended to correct that clerical error (*see People v Oberdorf*, 136 AD3d 1291, 1292-1293).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

531

KA 14-00408

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT HAIGLER, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered September 5, 2013. The judgment convicted defendant, upon his plea of guilty, of promoting prison contraband in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated and the indictment is dismissed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of promoting prison contraband in the second degree (Penal Law § 205.20 [2]), defendant contends that the judgment of conviction must be reversed because there was no valid accusatory instrument in existence at the time of the plea. We agree. Defendant was indicted in a one-count indictment charging him with promoting prison contraband in the first degree (Penal Law § 205.25 [2]). County Court granted defendant's motion to review the grand jury minutes and, upon that review, concluded that the evidence before the grand jury was not legally sufficient to support that charge but was sufficient to support the lesser included offense of promoting prison contraband in the second degree. Defendant then pleaded guilty to the lesser included offense.

"CPL 210.20 (6) provides that when a court decides to reduce a count contained in an indictment [to a misdemeanor] on the ground that it is not supported by legally sufficient evidence, the People do one of the following: (1) accept the court's order and file a prosecutor's information containing the reduced charge; (2) re-present the [higher count] to a grand jury; or (3) appeal the court's order" (*People v Casey*, 66 AD3d 1128, 1129; *see People v Jackson*, 87 NY2d 782, 784). Here, however, the People did not take any of those three actions, and defendant pleaded guilty to the reduced charge. Inasmuch as " '[a]

valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution' " (*People v Dumay*, 23 NY3d 518, 522, quoting *People v Dreyden*, 15 NY3d 100, 103), the plea must be vacated and the indictment dismissed (*see Casey*, 66 AD3d at 1130; *see also People v Chadick*, 122 AD3d 1258, 1259).

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

533

KA 14-01683

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM J. DOLAN, JR., DEFENDANT-APPELLANT.

THE LAW OFFICE OF GUY A. TALIA, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Daniel R. King, J.), rendered July 18, 2014. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by amending the order of protection to delete the provision prohibiting defendant from having "unsupervised contact with any child under the age of 17 years of age" and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [b]), defendant challenges only the scope of the order of protection issued by County Court pursuant to CPL 530.12 (5). As conceded by the People, the scope of the order of protection prohibiting defendant from having unsupervised contact with any child under the age of 17 years is "overly broad inasmuch as it extends to individuals unrelated to the criminal action" (*People v Shultis*, 61 AD3d 1116, 1118, *lv denied* 12 NY3d 929; *see People v Raduns*, 70 AD3d 1355, 1355, *lv denied* 14 NY3d 891, *reconsideration denied* 15 NY3d 808; *see generally People v Cooke*, 119 AD3d 1399, 1401, *affd* 24 NY3d 1196, *cert denied* ___ US ___, 136 S Ct 542; *People v Konieczny*, 2 NY3d 569, 572). Inasmuch as all individuals under age 17 were not defendant's victims or witnesses in this matter, the order of protection may not require defendant to stay away from all such individuals (*see* CPL 530.12 [5]; *see also* CPL 530.13 [4]). We modify the judgment by amending the order of protection accordingly.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

534

KA 13-00308

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK 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 (Jeffrey R. Merrill, A.J.), rendered November 13, 2012. 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: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (*id.*) under a separate indictment. It is undisputed that, pursuant to the terms of the plea agreement for both convictions, defendant was permitted to participate in the judicial diversion court and County Court would impose consecutive terms of imprisonment in the event that defendant did not successfully complete the drug treatment program. We agree with defendant's contention in both appeals that the written waiver of the right to appeal that he signed as part of the "treatment court contract," approximately two weeks after he pleaded guilty, does not constitute a valid waiver of the right to appeal. It is axiomatic that "[t]he record must establish that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256) and, here, the plea record is silent with respect to the waiver of the right to appeal.

We nevertheless reject defendant's contention in each appeal that the sentence imposed is unduly harsh and severe.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

535

KA 13-00309

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK 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 (Jeffrey R. Merrill, A.J.), rendered November 13, 2012. 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.

Same memorandum as in *People v Brown* ([appeal No. 1] ___ AD3d ___ [June 10, 2016]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

536

KA 14-01314

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE AMOS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CAITLIN M. CONNELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered May 28, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]). We reject defendant's contention that Supreme Court erred in refusing to suppress physical evidence and statements made by defendant as the fruits of an allegedly unlawful approach and pursuit of defendant by the police. Two officers testified at the suppression hearing that they were on patrol together when they observed defendant leaning into a parked vehicle. Inasmuch as the vehicle was illegally parked, the officers had an objective, credible reason to approach it (*see People v Valerio*, 274 AD2d 950, 951, *affd* 95 NY2d 924, *cert denied* 532 US 981; *People v Barrientos*, 84 AD3d 549, 550, *lv denied* 17 NY3d 813). Both officers testified that they were trained to identify controlled substances, including cocaine (*see People v Caldwell*, 197 AD2d 390, 390, *lv denied* 82 NY2d 848), and that they observed a baggie in defendant's hand that they believed to contain cocaine. They further testified that they observed the cocaine before defendant started to run away. Because the officers had probable cause to seize the cocaine and arrest defendant when they observed the baggie in defendant's possession (*see People v Smith*, 134 AD3d 1568, 1568), defendant's act of discarding the baggie and its contents during the subsequent foot chase was not in response to illegal police conduct (*see People v Flemming*, 308 AD2d 385, 386, *lv denied* 1 NY3d 571). Contrary to defendant's contention, moreover, we conclude that "there

is no basis in the record to disturb the suppression court's determination to credit the testimony of the police officers" (*People v Hale*, 130 AD3d 1540, 1541, *lv denied* 26 NY3d 1088).

Finally, the sentence is not unduly harsh or severe.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

537

KA 14-01970

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD H. MOORE, DEFENDANT-APPELLANT.

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD H. MOORE, 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 (Matthew J. Murphy, III, J.), rendered May 2, 2014. 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 unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention in his pro se supplemental brief, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that he understood " 'that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Dames*, 122 AD3d 1336, 1336, *lv denied* 25 NY3d 1162). That valid waiver forecloses any challenge by defendant to the severity of the sentence (*see Lopez*, 6 NY3d at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

539

KA 14-00531

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDERICK SYMONDS, JR., DEFENDANT-APPELLANT.

LAW OFFICES OF JOSEPH D. WALDORF, P.C., ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered March 11, 2014. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the third degree and incest in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal sexual act in the third degree (Penal Law § 130.40 [2]) and two counts of incest in the third degree (§ 255.25). Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct, on summation and otherwise (*see People v Mull*, 89 AD3d 1445, 1446, *lv denied* 19 NY3d 965). We conclude in any event that defendant's contention lacks merit. The complained-of remarks on summation were "not so egregious as to deprive defendant of a fair trial" (*People v Wittman*, 103 AD3d 1206, 1207, *lv denied* 21 NY3d 915; *see People v Eldridge*, 288 AD2d 845, 845-846, *lv denied* 97 NY2d 681). Moreover, we conclude that the prosecutor did not improperly bolster the victim's testimony by presenting the testimony of the victim's father (*see generally People v McDaniel*, 81 NY2d 10, 16), nor did the prosecutor thereby violate CPL 60.42 (*see generally People v Wigfall*, 253 AD2d 80, 81-83, *lv denied* 93 NY2d 981). We likewise reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to object to the alleged instances of prosecutorial misconduct during summation. Because the alleged improper remarks did not deny defendant a fair trial, he was not denied effective assistance of counsel based upon defense counsel's failure to object to those remarks (*see People v Hendrix*, 132 AD3d 1348, 1348, *lv denied* 26 NY3d 1145). With respect to the contention that defendant was denied effective assistance based on

additional alleged failings of defense counsel, we conclude that defendant has failed to establish the absence of any strategic or other legitimate explanation for defense counsel's alleged failings (*see generally People v Caban*, 5 NY3d 143, 152).

Defendant further contends that the People failed to disclose *Brady* material in a timely manner. We agree. We conclude, however, that the *Brady* violation does not require reversal because the information was turned over as *Rosario* material prior to jury selection, thus affording defendant a "meaningful opportunity" to use the information during cross-examination (*People v Middlebrooks*, 300 AD2d 1142, 1143, *lv denied* 99 NY2d 630; *see People v Cortijo*, 70 NY2d 868, 870; *People v Bernard*, 115 AD3d 1214, 1215, *lv denied* 23 NY3d 1018).

Defendant failed to preserve for our review his contention that the indictment was rendered duplicitous by the testimony at trial (*see People v Allen*, 24 NY3d 441, 449-450; *People v Armstrong*, 134 AD3d 1401, 1402, *lv denied* 27 NY3d 962). 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]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

541

KA 13-02011

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE L. GRAHAM, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered February 28, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). We agree with defendant that County Court's statement to him that, " 'by pleading guilty, [he would] give up the right to allege [that] the police unlawfully collected evidence or did anything else illegal' was misleading to the extent that it improperly implied that defendant's right to challenge the suppression ruling on appeal was automatically extinguished upon the entry of his guilty plea" (*People v Braxton*, 129 AD3d 1674, 1675, *lv denied* 26 NY3d 965; *see People v Weinstock*, 129 AD3d 1663, 1663, *lv denied* 26 NY3d 1012). We conclude, however, that the court's "plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Braxton*, 129 AD3d at 1675 [internal quotation marks omitted]). Defendant's valid waiver of the right to appeal encompasses his contention that the court erred in refusing to suppress physical evidence (*see People v Kemp*, 94 NY2d 831, 833;

Weinstock, 129 AD3d at 1663).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

542

CAF 14-01821

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

IN THE MATTER OF JOEY J. AND ANGEL J.

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

ELEANOR J., RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered September 29, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order terminating her parental rights. On appeal, the mother challenges the representation she received at the fact-finding hearing. We reject the mother's contention that she was denied effective assistance of counsel inasmuch as she "did not demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Reinhardt v Hardison*, 122 AD3d 1448, 1449 [internal quotation marks omitted]; *see Matter of Brown v Gandy*, 125 AD3d 1389, 1390). Contrary to the mother's contention, "[i]neffectiveness may not 'be inferred merely because the attorney counseled [her] to admit the allegations in the petition' " (*Matter of Michael W.*, 266 AD2d 884, 884-885; *see Matter of Sean W. [Brittany W.]*, 87 AD3d 1318, 1319, *lv denied* 18 NY3d 802).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

544

CAF 13-02185

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

IN THE MATTER OF TRISHA M. DANIELS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN M. DAVIS, RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET SOMES OF COUNSEL), PRO BONO APPEALS PROGRAM, ALBANY, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Monroe County (Paul M. Riordan, R.), entered October 24, 2013 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to have no offensive contact with petitioner.

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

Memorandum: In this proceeding brought pursuant to Family Court Act article 8, respondent appeals from an order of protection requiring him, inter alia, to refrain from offensive conduct toward petitioner and granting petitioner temporary custody of the parties' three children subject to defined visitation by respondent. We agree with respondent that the appeal has not been rendered moot by the expiration of the order of protection, which "still imposes significant enduring consequences upon respondent, who may receive relief from those consequences upon a favorable appellate decision" (*Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671; *see Matter of Shephard v Ray*, 137 AD3d 1715, 1716). We further agree with respondent that Family Court erred in disposing of the matter on the basis of respondent's purported default. As we have repeatedly held, a respondent who fails to appear personally in a matter but nonetheless is represented by counsel who is present when the case is called is not in default in that matter (*see Matter of Manning v Sobotka*, 107 AD3d 1638, 1638-1639; *Matter of Erie County Dept. of Social Servs. v Thompson*, 91 AD3d 1327, 1328; *Matter of Cleveland W.*, 256 AD2d 1151, 1151-1152).

Finally, we conclude that petitioner failed to establish by a fair preponderance of the evidence that respondent committed the family offense of harassment in the second degree (Penal Law § 240.26 [1], [3]; *see* Family Ct Act § 832; *Shephard*, 137 AD3d at 1716). In this non-default posture, the brief colloquy between the court and

petitioner, who merely "re-verif[ied]" the allegations of the petition, was insufficient to establish respondent's commission of the family offense. Here, the hearing record contains no evidence concerning the content of the telephone calls made and the texts sent by respondent in the context of the parties' custody/visitation dispute, and thus there is no evidentiary basis for a finding that respondent engaged in a course of conduct that was intended to alarm or seriously annoy petitioner and lacked any legitimate purpose (*see* Penal Law § 240.26 [3]; *Shephard*, 137 AD3d at 1716). Nor was evidence presented at the hearing sufficient to support a finding that respondent attempted or threatened to strike, shove or kick petitioner or otherwise subject her to physical contact (*see* § 240.26 [1]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

545

CAF 14-02153

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

IN THE MATTER OF CHRISTOPHER NICHOLSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DONNA M. NICHOLSON, RESPONDENT-RESPONDENT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR PETITIONER-APPELLANT.

GARY MULDOON, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (John B. Gallagher, Jr., J.), entered October 6, 2014 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Petitioner father, who is serving a term of imprisonment (*People v Nicholson*, 118 AD3d 1423, *affd* 26 NY3d 813), filed a petition seeking to modify a prior order permitting him to communicate with the parties' daughter by letter. We previously affirmed an order that, following a hearing, required the father to mail the letters to the Attorney for the Child (AFC), who would forward them to respondent mother's attorney to provide to the mother if, in the AFC's view, it was appropriate to do so (*Matter of Nicholson v Nicholson*, 96 AD3d 1456). In support of the instant petition, the father alleged as a change in circumstances that the mother was intentionally interfering with his ability to maintain a relationship with the child based on the fact that he has not received a response to his letters from the child, although she is capable of reading and writing. Contrary to the father's contention, Family Court did not abuse its discretion in granting the mother's motion to dismiss the petition without first conducting a hearing (*see Matter of Fowler v VanGee*, 136 AD3d 1320, 1320). "To survive a motion to dismiss, a petition seeking to modify a prior order of . . . visitation must contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child" (*Matter of Gelling v McNabb*, 126 AD3d 1487, 1487 [internal quotation marks omitted]). The petition contains only the father's speculation that the mother had interfered with the child's ability to communicate with him, and the record establishes that the AFC presented the child's position to the court, i.e., that she wished to

hear from the father on occasion but did not want any other contact. We reject the father's further contention in his petition that the mother's failure to inform him of the child's well-being constitutes a change in circumstances, inasmuch as the mother was not required to do so.

We also reject the father's contention that he was denied effective assistance of counsel based upon his attorney's failure to file an amended petition and a written response to the motion to dismiss, and her failure to advocate zealously for a hearing on the petition. We note that, " 'because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings' " (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390; *see Matter of VanSkiver v Clancy*, 128 AD3d 1408, 1408). Here, the record establishes that the father's attorney was familiar with the underlying proceedings, communicated with the father, presented the father's position as set forth in his pro se petition and response to the motion to dismiss, and attempted to negotiate a favorable settlement on his behalf, i.e., to permit, inter alia, limited telephone contact with the child. We therefore conclude that the father received meaningful representation (*see generally People v Benevento*, 91 NY2d 708, 712-713; *People v Baldi*, 54 NY2d 137, 147).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

546

CA 15-01332

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

DORI R. (HOBIKA) MARSHALL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GEOFFREY G. HOBIKA, DEFENDANT-RESPONDENT.

FREID AND KLAWON, WILLIAMSVILLE (WAYNE I. FREID OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CHARLES A. MESSINA, BLASDELL (JAMES P. RENDA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 11, 2014. The order determined that each party should contribute equally to the college expenses of their daughter.

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

Memorandum: In this post-divorce proceeding, plaintiff mother and defendant father each sought a determination of their respective obligations to contribute to the cost of their eldest daughter's college education. Pursuant to their "Child Support Agreement" (Agreement), the parties contemplated that their children would attend college, and they agreed that the costs would be divided "between the parties as they shall then agree or as shall then be determined by a Court of competent jurisdiction." The parties further agreed that, "[i]n the event a child shall attend Nichols [School], the respective contributions of the parties to the cost of said schooling shall be a factor in determining the contribution of each party to said child's college expenses."

The record belies the mother's contention that Supreme Court failed to consider the respective contributions of the parties to the cost of each child's attendance at Nichols School as a factor when it directed the parties to contribute equally to the eldest daughter's college expenses (*see Bennett v McGorry*, 34 AD3d 1290, 1291). Contrary to the mother's further contention, the court's statement in its decision concerning the mother's willingness to pay a greater share of the costs of the children's education at Nichols School is also supported by the record, including the terms of the Agreement. In addition, inasmuch as the parties' respective contributions to those costs was but one factor to consider in determining their

obligations to pay college expenses, the court also properly considered "the circumstances of the case, the circumstances of the respective parties, and the best interests of the child" (*Cimons v Cimons*, 53 AD3d 125, 131). Finally, we reject the mother's contention that the order is inconsistent with the court's prior order directing the father to pay 60% and the mother 40% of the eldest son's college expenses. The prior order was based upon different evidence, and it explicitly contemplated "a need for modifications of . . . the parties' obligation to contribute toward college as the younger children[, including the eldest daughter,] matriculate."

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

549

CA 15-00810

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

IN THE MATTER OF DON M. MOORE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

THE CENTRAL NEW YORK VOLLEYBALL OFFICIALS
CORPORATION, RESPONDENT-RESPONDENT.

DON M. MOORE, PETITIONER-APPELLANT PRO SE.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered July 1, 2014 in a CPLR article 78 proceeding. The judgment granted the motion of respondent to dismiss the petition.

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

Memorandum: Petitioner appeals from a judgment that granted respondent's motion to dismiss the petition in this CPLR article 78 proceeding. As Supreme Court determined, petitioner is not a member of respondent and therefore has no right to the relief demanded in the petition (*see e.g.* N-PCL 603, 605, 613). We note in any event that, as respondent contends, the proceeding was time-barred inasmuch as it was commenced more than four months after the determination at issue was made (*see Matter of Wiegand v Crandall*, 118 AD3d 1355, 1356).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

550

CA 15-01661

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ.

SAL BARBIERI, DOING BUSINESS AS NORTHSIDE ROOFING, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID R. MILES, DEFENDANT-APPELLANT.

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS C. SANFILIPO, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered December 19, 2014. The order granted the motion of plaintiff for leave to renew his motion for summary judgment dismissing defendant's counterclaims and, upon renewal, granted the motion for summary judgment and dismissed the counterclaims.

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

Memorandum: Defendant appeals from an order that granted plaintiff's motion for leave to renew his prior motion for summary judgment dismissing defendant's counterclaims and, upon renewal, dismissed the counterclaims. Plaintiff commenced this action asserting a single cause of action for breach of contract, alleging that defendant failed to pay plaintiff for the materials and the work he performed to replace the roof on defendant's residence. In his amended answer, defendant asserted counterclaims for damages based on, inter alia, plaintiff's failure to replace the roof in a workmanlike manner. Plaintiff initially sought summary judgment on his complaint and summary judgment dismissing the counterclaims but, in a letter from his attorney to Supreme Court, he clarified that the motion contained a "typographical error" and that he sought summary judgment only on the counterclaims. The court nevertheless stated in its decision on the original motion that plaintiff "moved for summary judgment, seeking payment for the original roof work." Plaintiff thereafter moved for leave to renew his motion on the grounds that the court had misconstrued his original motion, and that he had obtained new evidence in support of his original motion, i.e., a release that defendant had executed releasing plaintiff "from any and all claims past and future" in consideration of the money paid to defendant by plaintiff's insurance carrier. Defendant opposed the motion for leave

to renew on the ground that plaintiff had the release in his possession several months before he moved for summary judgment dismissing the counterclaims.

We agree with defendant that the court erred in granting plaintiff's motion for leave to renew. Although a court has discretion to grant a motion for leave to renew " 'in the interest of justice, upon facts which were known to the movant at the time the original motion was made' . . . , it may not exercise that discretion unless the movant establishes a 'reasonable justification for the failure to present such facts on the prior motion' " (*Robinson v Consolidated Rail Corp.*, 8 AD3d 1080, 1080). Here, plaintiff failed to provide a reasonable justification for his failure to present the release in support of his original motion for summary judgment dismissing the counterclaims (*see GMAC Mtge., LLC v Spindelman*, 136 AD3d 1366, 1367).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

551

KA 12-00590

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS QUINONES, 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 August 10, 2011. The appeal was held by this Court by order entered June 19, 2015, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (129 AD3d 1699). The proceedings were held and completed in Supreme Court, Onondaga County (John J. Brunetti, A.J.).

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court to determine and state for the record whether defendant is a youthful offender (*People v Quinones*, 129 AD3d 1699, 1700; *see generally People v Middlebrooks*, 25 NY3d 516, 525-527; *People v Rudolph*, 21 NY3d 497, 499-501). The proceedings upon remittal were conducted in Supreme Court (Brunetti, A.J.), and that court denied defendant's request for youthful offender treatment. The court found that there were no mitigating circumstances bearing directly on the manner in which the crime was committed and thus that defendant was not an eligible youth upon his conviction of two counts of criminal possession of a weapon in the second degree, an armed felony offense in which he was the sole participant (*see* CPL 720.10 [2] [a] [ii]; [3]; *People v Lewis*, 128 AD3d 1400, 1400, *lv denied* 25 NY3d 1203). We conclude that the court did not thereby abuse its discretion (*see generally Middlebrooks*, 25 NY3d at 526-527; *People v Garcia*, 84 NY2d 336, 342-343), and we decline to grant defendant's request that we exercise our interest of justice jurisdiction to determine that mitigating circumstances exist and adjudicate him a youthful offender (*see People v Hall*, 130 AD3d 1495, 1496, *lv denied* 26 NY3d 968; *Lewis*, 128 AD3d at 1400-1401; *cf. People v Amir W.*, 107

AD3d 1639, 1640-1641).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

552

KA 13-01077

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL L. TYLER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered April 3, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737), including "his contention that the enhanced sentence is unduly harsh and severe" (*People v Milczakowskyj*, 286 AD2d 928, 928, *lv denied* 97 NY2d 657; *see People v Jackson*, 34 AD3d 1318, 1319, *lv denied* 8 NY3d 923; *People v Melendez*, 291 AD2d 887, 888, *lv denied* 98 NY2d 639).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

553

KA 13-01649

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DANIEL SEITZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 24, 2013. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

554

KA 13-01424

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EARNEST L. BELL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered April 15, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree (three counts).

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

555

KA 15-00638

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL NEWSOME, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ROBERT TUCKER, PALMYRA, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered January 8, 2015. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree (two counts), assault in the second degree and criminal obstruction of breathing or blood circulation.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of assault in the first degree (Penal Law § 120.10 [1], [2]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal contempt in the first degree (§ 215.51 [b] [ii], [iv]).

We reject defendant's contention in each appeal that County Court erred in denying his motion to withdraw his guilty plea without a hearing. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry 'rest[s] largely in the discretion of the Judge to whom the motion is made' and a hearing will be granted only in rare circumstances" (*People v Brown*, 14 NY3d 113, 116, quoting *People v Tinsley*, 35 NY2d 926, 927; *see People v Manor*, ___ NY3d ___, ___ [May 3, 2016]; *People v Green*, 122 AD3d 1342, 1343). Here, the record establishes that, with respect to both appeals, "[d]efendant admitted each element of the offense[s] during his plea allocution and did not claim either that he was innocent or that he had been coerced" (*People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746). Defendant's postplea protestations of innocence, misunderstanding, and "pressure" presented credibility issues that the court could properly resolve without a hearing (*see People v Dixon*, 29 NY2d 55, 56; *Sparcino*, 78 AD3d at 1509; *see also People v Dickerson*,

66 AD3d 1371, 1372, *lv denied* 13 NY3d 859).

We likewise reject defendant's contention in each appeal that the court erred in sentencing him as a second felony offender without first conducting a hearing. In order to obtain a hearing regarding a predicate felony conviction, "a defendant must do more than make conclusory allegations . . . He must support his allegations with facts" (*People v Konstantinides*, 14 NY3d 1, 15; *see People v Brown*, 74 AD3d 1748, 1750, *lv denied* 15 NY3d 802). Defendant's unsubstantiated assertion regarding the alleged "incorrectness" of the sentencing date for his predicate felony conviction is not an allegation supported by facts sufficient to entitle him to a hearing (*see Brown*, 74 AD3d at 1750).

Defendant's contention in each appeal that his guilty plea was not sufficiently allocuted is without merit. "There is no requirement that defendant personally recite the facts underlying the crime[s] to which he pleaded guilty" (*People v Singletary*, 307 AD2d 779, 779, *lv denied* 100 NY2d 599; *see People v Brown*, 305 AD2d 1068, 1069, *lv denied* 100 NY2d 579; *see also People v Seeber*, 4 NY3d 780, 781). Here, "[t]he record establishes that defendant admitted the essential elements of the . . . count[s] of the indictment[s] [to which he pleaded guilty,] and thus his factual allocution [in each appeal] is legally sufficient" (*People v Dorrah*, 50 AD3d 1619, 1619, *lv denied* 11 NY3d 736 [internal quotation marks omitted]; *see People v Emm*, 23 AD3d 983, 984, *lv denied* 6 NY3d 775).

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

556

KA 15-00637

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL NEWSOME, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROBERT TUCKER, PALMYRA, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered January 8, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree (two counts).

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

Same memorandum as in *People v Newsome* ([appeal No. 1] ___ AD3d ___ [June 10, 2016]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

557

KA 15-00431

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN B. LEWIS, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (DAVID M. PARKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (Daniel G. Barrett, J.), dated March 5, 2015. 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 reversed on the law without costs and the matter is remitted to Wayne County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). We agree with defendant that County Court erred in determining that his "participation in treatment is adequately taken into account by the risk assessment instrument" and, thus, cannot constitute "a mitigating factor which may form the basis for a downward departure" (*People v Migliaccio*, 90 AD3d 879, 880; *see People v Smith*, 122 AD3d 1325, 1326; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 17 [2006]). "In view of the [court's] conclusion that treatment is adequately taken into account in the risk assessment instrument, it did not determine whether . . . defendant had established, by a preponderance of the evidence, that he made an exceptional response to treatment, and, if so, whether it should exercise its discretion to grant a downward departure based upon an examination of all circumstances relevant to the offender's risk of reoffense and danger to the community" (*Migliaccio*, 90 AD3d at 880 [internal quotation marks omitted]). We therefore remit the matter to County Court to determine those issues (*see id.*).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

559

KA 15-02114

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. TYO, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered May 5, 2014. The judgment convicted defendant, upon his plea of guilty, of forgery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of forgery in the second degree (Penal Law § 170.10 [1]). Contrary to defendant's contention, we conclude that he knowingly, intelligently, and voluntarily waived his right to appeal as a condition of the plea (*see generally People v Lopez*, 6 NY3d 248, 256). "County Court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v James*, 71 AD3d 1465, 1465 [internal quotation marks omitted]), and the record establishes that he "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Lopez*, 6 NY3d at 256). Defendant's contention with respect to the factual sufficiency of the plea allocution is encompassed by the valid appeal waiver (*see People v Thousand*, 96 AD3d 1439, 1439-1440, *lv denied* 19 NY3d 1002).

We conclude that defendant's plea was knowing, voluntary, and intelligent notwithstanding his erratic behavior at a previous hearing. Nothing on the record of the plea proceeding indicates that defendant lacked the capacity to plead guilty (*see People v Hayes*, 39 AD3d 1173, 1175, *lv denied* 9 NY3d 923). We reject defendant's contention that the court sua sponte was required to conduct a hearing to assess his competency to proceed with the criminal action (*see* CPL 730.30 [2]). Defense counsel did not request a hearing, and the court was entitled to rely on its own observations and the reports of two

psychiatric examiners, both of whom found defendant competent (*see People v Cipollina*, 94 AD3d 1549, 1549-1550, *lv denied* 19 NY3d 971). Contrary to defendant's further contention, the record establishes that he entered a valid waiver of indictment (*see People v Lugg*, 108 AD3d 1074, 1074-1075).

Defendant's contention that the court erred in failing to redact his presentence report is not preserved for our review. Although defendant noted various alleged errors in the presentence report at the time of sentencing, he did not move to redact the report or request that the court conduct a hearing concerning its accuracy (*see People v Jones*, 114 AD3d 1239, 1242, *lv denied* 23 NY3d 1038, *reconsideration denied* 25 NY3d 1166; *People v Keiser*, 100 AD3d 927, 929, *lv denied* 20 NY3d 1062). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

We reject defendant's additional contention that the court abused its discretion in declining to order judicial diversion instead of incarceration (*see People v Hines*, 132 AD3d 1385, 1385, *lv denied* 26 NY3d 1109). The court properly considered the threat defendant posed to the public and whether further treatment would likely be successful (*see People v Landry*, 132 AD3d 1351, 1352, *lv denied* 26 NY3d 1089).

Finally, defendant's contention that the sentence is unduly harsh and severe is not encompassed by his valid waiver of the right to appeal inasmuch as the court enhanced defendant's sentence because of postplea conduct and failed to advise defendant prior to his waiver " 'of the potential period of incarceration that could be imposed' for an enhanced sentence" (*see People v Huggins*, 45 AD3d 1380-1381, *lv denied* 9 NY3d 1006; *cf. People v Jackson*, 34 AD3d 1318, *lv denied* 8 NY3d 923). We conclude, however, that the sentence is not unduly harsh or severe.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

562

KA 14-00525

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEROY SAVAGE SMITH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD 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 May 20, 2013. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the fourth 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 assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). Contrary to defendant's contention, we conclude that County Court did not abuse its discretion in denying his request for substitution of counsel inasmuch as "defendant failed to proffer specific allegations of a 'seemingly serious request' that would require the court to engage in a minimal inquiry" (*People v Porto*, 16 NY3d 93, 100; *see People v Wilson*, 112 AD3d 1317, 1318, *lv denied* 23 NY3d 1069; *People v Woods*, 110 AD3d 748, 748, *lv denied* 23 NY3d 969). The sentence is not unduly harsh or severe.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

563

CAF 14-02135

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF ALEXUS R.L.

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

ASHLEY K., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

PAULA A. CAMPBELL, BATAVIA, FOR PETITIONER-RESPONDENT.

SARA E. ROOK, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered October 28, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order that terminated her parental rights with respect to her child Alexus on the ground of permanent neglect, and in appeal No. 2, she appeals from an identical order that terminated her parental rights with respect to her child Jordin on the same ground. We affirm.

On appeal, the mother does not challenge Family Court's determination that she permanently neglected the subject children, and the record of the dispositional hearing supports the court's determination that the best interests of the children would be served by terminating the mother's parental rights and freeing them for adoption (*see Matter of La'Derrick J.W. [Ashley W.]*, 85 AD3d 1600, 1602, *lv denied* 17 NY3d 709; *Matter of Eleydie R. [Maria R.]*, 77 AD3d 1423, 1424). Contrary to the mother's contention in both appeals, the record supports the court's determination that she made only minimal progress in addressing the issues that resulted in the children's removal from her custody, which was " 'not sufficient to warrant any further prolongation of the child[ren]'s unsettled familial status' " (*Matter of Alexander M. [Michael A.M.]*, 106 AD3d 1524, 1525; *see Matter of Joanna P. [Patricia M.]*, 101 AD3d 1751, 1752, *lv denied* 20 NY3d 863; *Matter of Keegan JJ. [Amanda JJ.]*, 72 AD3d 1159, 1161-1162). Consequently, we agree with the court's determination that a suspended

judgment would not serve the best interests of the children (*see Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150, *lv denied* 23 NY3d 901; *Matter of Tiara B. [Torrence B.]*, 70 AD3d 1307, 1307-1308, *lv denied* 14 NY3d 709; *see generally Matter of Mercedes L.*, 12 AD3d 1184, 1185).

The mother failed to preserve for our review her further contention that the court should have awarded custody of the subject children to their maternal grandmother, because she did not seek that result at the dispositional hearing (*see generally Matter of Atreyu G. [Jana M.]*, 91 AD3d 1342, 1343, *lv denied* 19 NY3d 801; *Matter of Christian A.*, 6 AD3d 1177, 1178, *lv denied* 3 NY3d 604).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

564

CAF 14-02136

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF JORDIN K.

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

ASHLEY K., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

PAULA A. CAMPBELL, BATAVIA, FOR PETITIONER-RESPONDENT.

SARA E. ROOK, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered October 28, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Same memorandum as in *Matter of Alexus R.L.* (___ AD3d ____ [June 10, 2016]).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

565

CAF 14-01936

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF CHARISE R. TELLES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TODD J. DEWIND, RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET SOMES OF COUNSEL), PRO BONO APPEALS PROGRAM, GLENS FALLS, FOR RESPONDENT-APPELLANT.

SCHIANO LAW OFFICE, P.C., ROCHESTER (CHARLES A. SCHIANO, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.H.O.), entered October 8, 2014 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: Respondent appeals from an order of protection issued in favor of petitioner, his girlfriend, in connection with Family Court's determination that he committed acts constituting various family offenses (*see* Family Ct Act § 812 [1]), including reckless endangerment in the second degree (Penal Law § 120.20). We affirm.

Although the court found that respondent committed various family offenses and sufficiently "state[d] the facts it deem[ed] essential" to its decision (*Matter of Tin Tin v Thar Kyi*, 92 AD3d 1293, 1293, *lv denied* 19 NY3d 802 [internal quotation marks omitted]; *see Matter of Rocco v Rocco*, 78 AD3d 1670, 1671), it did not specify the subsections of the criminal statutes upon which it based its findings that respondent had committed the family offenses of forcible touching, harassment in the second degree, and disorderly conduct. Nevertheless, exercising our independent review power, we conclude that the proof is sufficient to establish, by a preponderance of the evidence, that respondent committed the family offenses of forcible touching under Penal Law § 130.52 (1), disorderly conduct under section 240.20 (1), and harassment in the second degree under section 240.26 (1) (*see Matter of Lynn TT. v Joseph O.*, 129 AD3d 1129, 1130; *see generally Matter of Yaddow v Bianco*, 115 AD3d 1338, 1339).

We reject respondent's contention that the evidence did not support the finding that he committed the family offense of disorderly conduct because he did not intend to create a public disturbance. A person is guilty of disorderly conduct "when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . [h]e engages in fighting or in violent, tumultuous or threatening behavior" (Penal Law § 240.20 [1]). The conduct does not have to take place in public, so long as the person recklessly creates a risk of a public disturbance (*see Matter of McLaughlin v McLaughlin*, 104 AD3d 1315, 1315-1316). Here, the testimony presented at the fact-finding hearing established that respondent, in the parties' home, threw petitioner against a wall, forced his fingers in her mouth and caused bleeding, slapped her face, punched her legs, forcibly touched her vagina, and grabbed her by the hair when she tried to get away, all of which ultimately resulted in petitioner leaving the home with her three children, thereby sufficiently establishing a risk of public disturbance (*see Matter of Kiani v Kiani*, 134 AD3d 1036, 1037-1038; *Matter of Dietzman v Dietzman*, 112 AD3d 1370, 1370). That testimony also supports, by a preponderance of the evidence, the court's conclusion that respondent committed the family offenses of reckless endangerment in the second degree, forcible touching, and harassment in the second degree.

We reject respondent's further contention that he was denied a fair trial by the admission of testimony regarding conduct not alleged in the family offense petition. The court's decision was explicitly based solely on the conduct alleged in the petition. In any event, sitting as the trier of fact, the "judge . . . is ordinarily presumed to be able to base a determination on admissible evidence while ignoring inadmissible evidence" (*Matter of Czop v Czop*, 21 AD3d 958, 959; *see People v Lamphier*, 302 AD2d 864, 865, *lv denied* 99 NY2d 656).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

567

CA 15-01719

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, AND CURRAN, JJ.

CHESLEY A. O'BRYAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TONAWANDA HOUSING AUTHORITY,
DEFENDANT-RESPONDENT.

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

COUTU LANE, PLLC, BUFFALO (KEVIN A. LANE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered February 10, 2015. The order granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint insofar as the complaint alleges that defendant had constructive notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he slipped and fell on ice in a parking lot on property owned by defendant, Tonawanda Housing Authority. Plaintiff appeals from an order granting defendant's motion for summary judgment dismissing the complaint. At the outset, we note that plaintiff, by briefing the issue of constructive notice only, has abandoned any claim that defendant had actual notice of or created the dangerous condition (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We agree with plaintiff that Supreme Court erred in granting that part of defendant's motion seeking summary judgment dismissing the complaint insofar as the complaint alleges that defendant had constructive notice of the allegedly dangerous condition. We therefore modify the order accordingly.

It is well established that, "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the] defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). Here, defendant failed to establish that the ice was not visible upon a reasonable inspection (*see Derosia v Gasbarre & Szatkowski Assn.*, 66 AD3d 1423, 1424; *see*

also Gwitt v Denny's, Inc., 92 AD3d 1231, 1231-1232; *cf*. *Ferington v Dudkowski*, 49 AD3d 1267, 1267; *Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 857-858). In support of its motion, defendant submitted, inter alia, the deposition testimony of three of its maintenance employees, which, taken together, demonstrates that defendant had not inspected the parking lot for nearly two days prior to plaintiff's fall. Thus, by its own submissions, defendant raised an issue of fact "whether the condition was visible and apparent [upon a reasonable inspection] and had existed for a sufficient length of time before plaintiff's accident to permit defendant to discover and remedy it" (*Merrill v Falleti Motors, Inc.*, 8 AD3d 1055, 1056; *see Derosia*, 66 AD3d at 1424-1425).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

573

CA 15-01861

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

LARRY WEST, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

TIME CAP DEVELOPMENT CORP., SHAMUS LOFTUS,
GOLPARA, LLC, DEFENDANTS-RESPONDENTS-APPELLANTS,
AND CHITTENANGO DENTAL, P.C., DEFENDANT-RESPONDENT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS AND DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered July 13, 2015. The order, among other things, denied plaintiff's motion for partial summary judgment and denied in part defendants' cross motion for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on May 23, 2016,

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

574

KA 13-02107

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. AGEE, DEFENDANT-APPELLANT.

ROBERT M. GRAFF, LOCKPORT, FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered March 14, 2013. The appeal was held by this Court by order entered June 19, 2015, decision was reserved and the matter was remitted to Niagara County Court for further proceedings (129 AD3d 1559). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter for County Court to make and state for the record a determination of whether defendant is a youthful offender (*People v Agee*, 129 AD3d 1559, 1561; *see generally People v Middlebrooks*, 25 NY3d 516, 525-527; *People v Rudolph*, 21 NY3d 497, 499-501). Upon remittal, the court declined to grant defendant youthful offender treatment, stating that it was "not persuaded" of the existence of "any mitigating factor or factors" that would render defendant an eligible youth notwithstanding his conviction of armed felonies (*see* CPL 720.10 [2] [a] [ii]; [3]). We conclude that the court did not thereby abuse its discretion (*see generally Middlebrooks*, 25 NY3d at 526-527). Defendant's participation in the crimes cannot be deemed "relatively minor" (CPL 720.10 [3] [ii]), and we conclude that the court properly determined that there are no "mitigating circumstances that bear directly upon the manner in which the [crimes were] committed" (CPL 720.10 [3] [i]; *see People v Juliano*, 128 AD3d 1521, 1522, *lv denied* 26 NY3d 931; *People v Smith*, 118 AD3d 1492, 1493-1494, *lv denied* 25 NY3d 953). In any event, even assuming, arguendo, that there is sufficient evidence of mitigating circumstances to render defendant eligible for youthful offender treatment, we nevertheless conclude, based on our review of the record and the factors relevant in making a youthful offender determination (*see People v Thomas R.O.*, 136 AD3d 1400, 1402; *see generally* CPL 720.20 [1] [a]), that the court's refusal to adjudicate defendant a youthful offender was not an

abuse of discretion (*see People v Lewis*, 128 AD3d 1400, 1400, *lv denied* 25 NY3d 1203), and we decline to exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see People v Hall*, 130 AD3d 1495, 1496, *lv denied* 26 NY3d 968; *cf. Thomas R.O.*, 136 AD3d at 1403).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

575

KA 13-01653

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KESHAWN M. JENNINGS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered July 29, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

576

KA 13-02012

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARCUS LOCKWOOD, 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 Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 17, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal sale of a firearm in the third degree.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

578

KA 15-00274

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE L. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (James J. Piampiano, J.), entered December 12, 2014. 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: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court abused its discretion in refusing to grant a downward departure from his presumptive risk level. We reject that contention. " 'A departure from the presumptive risk level is warranted where there exists an aggravating or mitigating factor of a kind or to a degree, not otherwise taken into account by the guidelines' " (*People v Sells*, 115 AD3d 1345, 1346, *lv denied* 23 NY3d 905). Here, defendant failed to establish his entitlement to a downward departure from his presumptive risk level inasmuch as he failed to establish the existence of any mitigating factors by the requisite preponderance of the evidence (*see People v Gillotti*, 23 NY3d 841, 860-861).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

579

KA 15-00095

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KEVIN STEVENS, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), entered December 2, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

580

KA 11-01833

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD BECRAFT, JR., DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD BECRAFT, JR., DEFENDANT-APPELLANT PRO SE.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered May 11, 2010. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against 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 two counts of predatory sexual assault against a child (Penal Law § 130.96). Defendant contends that the disparity between the plea offer and the sentence he received after trial establishes that he was punished for asserting his right to a jury trial. Defendant failed to preserve that contention for our review (*see People v Garner*, 136 AD3d 1374, 1374; *People v Coapman*, 90 AD3d 1681, 1683-1684, *lv denied* 18 NY3d 956), and it is without merit in any event. " 'Given that the *quid pro quo* of the bargaining process will almost necessarily involve offers to moderate sentences that ordinarily would be greater, it is also to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea' " (*People v Martinez*, 26 NY3d 196, 200). Furthermore, the plea offer here was to a class B violent felony, and defendant was convicted of a class A-II felony. In addition, "[d]efendant's rejection of the plea offer . . . required the victim to testify about the sexual abuse at trial, a factor . . . recognized as a legitimate basis for the imposition of a more severe sentence after trial than that which the defendant would have received upon a plea of guilty" (*id.*). The imposition of the maximum sentence was not an act of vindictiveness, but was a reflection of the heinous nature of the crime, the enduring harm to the victim, and defendant's

unwillingness to accept responsibility for the crime (*see id.*; *People v Lombardi*, 68 AD3d 1765, 1765-1766, *lv denied* 14 NY3d 802). We reject defendant's further contention that the sentence is unduly harsh and severe.

Defendant contends in his pro se supplemental brief that County Court erred in admitting a recorded telephone conversation between defendant and the victim because the People failed to establish a proper chain of custody of the recording. That contention is not preserved for our review (*see People v Gibson*, 106 AD3d 834, 835; *People v Gales*, 28 AD3d 1163, 1163, *lv denied* 7 NY3d 756) and, in any event, it lacks merit. The People laid a proper foundation for the admission of the recording through the testimony of both the victim and the officer who conducted the controlled telephone call that the recording accurately reflected the complete conversation between the victim and defendant (*see People v Ely*, 68 NY2d 520, 527). Under those circumstances, the People were not required to show a chain of custody before seeking to admit the recording in evidence (*see id.* at 527-528; *People v Dicks*, 100 AD3d 528, 528). Defendant's further contention in his pro se supplemental brief that he was denied effective assistance of counsel is based on matters outside the record and therefore must be raised by a motion pursuant to CPL article 440 (*see People v Cooper*, 134 AD3d 1583, 1586; *People v Washington*, 122 AD3d 1406, 1406, *lv denied* 25 NY3d 1173). We have examined the remaining contentions of defendant raised in his pro se supplemental brief and conclude that none requires reversal or modification of the judgment.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

585

CA 15-01779

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THOMAS J. PIERONI, MPDK, LLC, DOING BUSINESS AS ADOBE CAR & TRUCK RENTAL OF TUCSON, ADOBE CAR & VAN RENTAL OF TUCSON, AND/OR ADOBE CAR AND VAN RENTALS AND BENTLEY HOLDINGS, INC., DOING BUSINESS AS AUTOMOTIVE FLEET LEASING CO., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PHILLIPS LYTLE LLP, CRAIG A. LESLIE, ESQ., AND JOANNA DICKINSON, ESQ., DEFENDANTS-RESPONDENTS.

AMIGONE, SANCHEZ & MATTREY, LLP, BUFFALO (B.P. OLIVERIO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CONNORS LLP, BUFFALO (RANDALL D. WHITE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered July 8, 2015. The order granted defendants' motion to dismiss the complaint.

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

Memorandum: Plaintiffs commenced this fraud and Judiciary Law § 487 action against two individual attorneys and their law firm in connection with their representation of Ford Motor Credit Company LLC, formerly known as Ford Motor Credit Company (Ford Credit), in an underlying action (2007 action) commenced by Ford Credit. In the 2007 action, Ford Credit sought damages for breach of a floor plan and security agreement with an automobile dealership. In connection with the 2007 action, Ford Credit obtained an order of seizure with respect to certain vehicles. Ford Credit later amended the complaint therein to add as defendants the plaintiffs in this action, who were the purported buyers or participants in the transfer of those vehicles. In 2010, plaintiffs commenced an action (2010 action) against Ford Credit alleging causes of action for intentional infliction of economic harm, conversion, fraud, and tortious interference with contractual relations. Plaintiffs alleged that Ford Credit knew of the bona fide claims of plaintiffs to the vehicles and submitted false statements in support of its order to show cause to seize the vehicles. Plaintiffs later moved for leave to amend the complaint to

add defendants to the 2010 action and to add a cause of action pursuant to Judiciary Law § 487. Supreme Court (Bannister, J.) denied the motion with respect to the individual defendants, and denied the motion with respect to the law firm without prejudice for reconsideration in the event plaintiffs submitted additional proof, as set forth in the court's bench decision. Plaintiffs did not submit any additional proof, and their subsequent motion for leave to reargue was denied. Although plaintiffs appealed, that appeal was not decided before both the 2007 action and the 2010 action were transferred to federal court.

In March 2013, plaintiffs commenced the present action. The complaint is essentially identical to the proposed amended complaint they submitted in support of their motion for leave to amend the complaint in the 2010 action. Supreme Court (Caruso, J.) granted defendants' motion to dismiss the complaint, and we now affirm.

We agree with defendants that this action is barred by collateral estoppel, and thus that the court properly granted their motion. The doctrine of collateral estoppel has two requirements: "[f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455; *see Ackman v Haberer*, 111 AD3d 1378, 1379). The proposed amended complaint in the 2010 action and the complaint in the present action raise identical issues, and the court decided those issues when it denied the motion for leave to amend.

It is well settled that " '[l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit' " (*Holst v Liberatore*, 105 AD3d 1374, 1374; *see Tag Mech. Sys., Inc. v V.I.P. Structures, Inc.*, 63 AD3d 1504, 1505). A review of the decision of the court (Bannister, J.) shows that the court denied the motion because "the proposed amendment was palpably insufficient or patently devoid of merit" (*Holst*, 105 AD3d at 1374); the motion was not denied based on technical pleading defects (*see Jericho Group Ltd. v Midtown Dev., L.P.*, 67 AD3d 431, 431, *lv denied* 14 NY3d 712; *cf. Hodge v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 269 AD2d 330, 330-331). In addition, although the motion was denied without prejudice with respect to the law firm, plaintiffs never submitted any additional proof in their subsequent motion for leave to reargue. We reject plaintiffs' further contention that they did not have a full and fair opportunity to contest the determination.

In any event, even if collateral estoppel did not apply here, the court properly granted defendants' motion on the ground that this action constitutes an improper collateral attack on a prior order, i.e., the order of seizure issued in the 2007 action. It is well settled that "the courts of this State will not entertain civil actions for damages arising from alleged subornation of perjury in a prior civil proceeding" (*Newin Corp. v Hartford Acc. & Indem. Co.*, 37 NY2d 211, 217; *see Serrante v Moses & Singer LLP*, 137 AD3d 697, 697).

Therefore, " 'a party who has lost a case as a result of alleged fraud or false testimony cannot collaterally attack the judgment in a separate action for damages against the party who adduced the false evidence' " (*Stewart v Citimortgage, Inc.*, 122 AD3d 721, 722). The exception to that general rule is "where the perjury is merely a means to the accomplishment of a larger fraudulent scheme" (*Newin Corp.*, 37 NY2d at 217). Plaintiffs' action must be dismissed because it does not fall within the exception to the general rule (*see Yalkowsky v Shedler*, 94 AD2d 684, 684, *appeal dismissed and lv dismissed in part and denied in part* 60 NY2d 700; *cf. Specialized Indus. Servs. Corp. v Carter*, 68 AD3d 750, 751-752).

Moreover, the court properly granted those parts of defendants' motion with respect to the causes of action for intentional infliction of economic harm, conversion, and tortious interference with contractual relations because they are barred by the statute of limitations. Even assuming, arguendo, that the tort of intentional infliction of economic harm is recognized in New York, we note that it would have a three-year statute of limitations (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 93 n 1), and there is also a three-year statute of limitations for the torts of conversion (*see* CPLR 214 [3]; *DiMatteo v Cosentino*, 71 AD3d 1430, 1431) and tortious interference with contractual relations (*see* CPLR 214 [4]; *Niagara Mohawk Power Corp. v Freed*, 288 AD2d 818, 818-819). Those causes of action accrued in 2007 and are therefore time-barred.

Finally, we further agree with defendants that the court properly granted those parts of their motion with respect to the remaining causes of action for failure to state a cause of action (*see* CPLR 3211 [a] [7]). The fraud cause of action failed to plead detrimental reliance with the requisite particularity (*see Gelmac Quality Feeds, Inc. v Ronning*, 23 AD3d 1019, 1020; *see generally* CPLR 3016 [b]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559). The Judiciary Law § 487 cause of action must also be pleaded with particularity (*see Briarpatch Ltd., L.P. v Frankfurt Garbus Klein & Selz, P.C.*, 13 AD3d 296, 297, *lv denied* 4 NY3d 707), and plaintiffs failed to do so here (*see Savitt v Greenberg Traurig, LLP*, 126 AD3d 506, 507; *Schiller v Bender, Burrows & Rosenthal, LLP*, 116 AD3d 756, 758-759).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

589

CA 15-01712

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

CHESTER W. PASTUSZYNSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LISA F. LOFASO AND CINTAS CORPORATION,
DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (BRADLEY D. MARBLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered July 9, 2015. The order denied the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint, as amplified by the bill of particulars, with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: In this action to recover damages for injuries arising from an automobile accident, defendants appeal from an order denying their motion for summary judgment dismissing the complaint. The complaint, as amplified by the bill of particulars, sought recovery under three categories of serious injury, i.e., the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories (*see* Insurance Law § 5102 [d]). We agree with defendants that Supreme Court erred in denying the motion with respect to the 90/180-day category, and we therefore modify the order accordingly.

We conclude with respect to the permanent consequential limitation of use and significant limitation of use categories that, although defendants met their initial burden, plaintiff raised triable issues of fact with respect to those two categories. Plaintiff submitted, inter alia, affirmations from both his treating physician and a neurological expert that provided "objective proof of spasm in his [lumbar] spine . . . and proof showing quantitative restrictions in the range of motion in his . . . lumbar spine" (*Siemucha v Garrison*, 111 AD3d 1398, 1399). In addition, plaintiff raised an

issue of fact whether there was a gap in his treatment by submitting the affirmation of his treating physician stating that the physician continuously treated plaintiff from the date of the accident until the present date.

With respect to the 90/180-day category, however, defendants met their initial burden by submitting excerpts of plaintiff's deposition testimony in which plaintiff admitted that he did not miss any full days of work after the accident. "In response, plaintiff failed to raise an issue of fact whether he was unable to perform substantially all of the material acts that constituted his usual and customary daily activities" (*Robinson v Polasky*, 32 AD3d 1215, 1216; *see Parkhill v Cleary*, 305 AD2d 1088, 1089-1090).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

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

609

CA 16-00209

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF CASINO FREE TYRE BY ITS PRESIDENT, JAMES DAWLEY, III, DESIREE DAWLEY, JAMES DAWLEY, III, LYNN BARBUTO, ROBERT BARBUTO, JONATHAN MORELLI, JANE MORELLI, ASTRID NEARPASS, JAMES NEARPASS, LAURA WORDEN, TODD WORDEN AND DAGMAR NEARPASS, PETITIONERS-APPELLANTS,

V ORDER

TOWN BOARD OF TOWN OF TYRE, TOWN OF TYRE, DAVID PAGE, AS CODE ENFORCEMENT OFFICER OF TOWN OF TYRE, LAGO RESORT & CASINO, LLC, WILPAC HOLDINGS, LLC, WILMOT GAMING, LLC, WILPAC FUNDING, LLC, THOMAS C. WILMOT, SR., M. BRENT STEVENS AND WILMORITE, INC., RESPONDENTS-RESPONDENTS.

WILLIAMS & CONNOLLY LLP, WASHINGTON, D.C. (DANIEL F. KATZ, OF THE WASHINGTON, D.C. AND MISSOURI BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND MACKENZIE HUGHES LLP, SYRACUSE, FOR PETITIONERS-APPELLANTS.

SIVE PAGET & RIESEL, P.C., NEW YORK CITY (MARK A. CHERTOK OF COUNSEL), AND BOND, SCHOENECK & KING, PLLC, SYRACUSE, FOR RESPONDENTS-RESPONDENTS TOWN BOARD OF TOWN OF TYRE, TOWN OF TYRE, AND DAVID PAGE, AS CODE ENFORCEMENT OFFICER OF TOWN OF TYRE.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), HARRIS BEACH PLLC, PITTSFORD, AND KIRKLAND & ELLIS LLP, LOS ANGELES, CALIFORNIA, FOR RESPONDENTS-RESPONDENTS LAGO RESORT & CASINO, LLC, WILPAC HOLDINGS, LLC, WILMOT GAMING, LLC, WILPAC FUNDING, LLC, THOMAS C. WILMOT, SR., M. BRENT STEVENS AND WILMORITE, INC.,

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Appeal from a judgment (denominated order and judgment) of the Supreme Court, Seneca County (W. Patrick Falvey, A.J.), entered February 1, 2016 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court

MOTION NO. (935/87) KA 14-01601. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD LYON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND TROUTMAN, JJ. (Filed June 10, 2016.)

MOTION NO. (1576/90) KA 90-01576. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HARRY AYRHART, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND SCUDDER, JJ. (Filed June 10, 2016.)

MOTION NO. (649/91) KA 02-00858. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM J. BARNES, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed June 10, 2016.)

MOTION NO. (1518/91) KA 04-00648. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BARRY ARKIM, ALSO KNOWN AS ED MASON, DEFENDANT-APPELLANT. -- Motions for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed June 10, 2016.)

MOTION NO. (1713/04) KA 02-00981. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALVIN FULTON, JR., ALSO KNOWN AS SHAIK S., ALSO KNOWN AS SHAIKH S. ABDMUQTADIR, DEFENDANT-APPELLANT. -- Motion for reconsideration

denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND SCUDDER, JJ. (Filed June 10, 2016.)

MOTION NO. (467/05) KA 02-00776. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY A. RIMMEN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed June 10, 2016.)

MOTION NO. (712/08) KA 06-00530. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER M. DIAZ, DEFENDANT-APPELLANT. -- Motion for reconsideration denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed June 10, 2016.)

MOTION NO. (136/10) KA 08-01696. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LONDARR WARD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed June 10, 2016.)

MOTION NO. (632/12) KA 10-01368. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BERNARD THOMAS, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, CARNI, AND SCUDDER, JJ. (Filed June 10, 2016.)

MOTION NO. (18/16) CA 15-01144. -- LISA L. SLOCUM, PLAINTIFF-APPELLANT, V

PROGRESSIVE NORTHWESTERN INSURANCE COMPANY, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed June 10, 2016.)

MOTION NO. (40/16) CA 15-00499. -- IN THE MATTER OF WILLIAM E. HAMILTON, PETITIONER-APPELLANT, V MARY ALLEY, JAMES FROIO, AND BOARD OF EDUCATION OF JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT, RESPONDENTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND SCUDDER, JJ. (Filed June 10, 2016.)

MOTION NO. (71/16) KA 14-00338. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SEANDELL KING, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed June 10, 2016.)

MOTION NO. (183/16) CA 15-00500. -- RUSSELL BAKER, PLAINTIFF-APPELLANT, V LOFINK MOTOR CO., INC., DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed June 10, 2016.)

MOTION NO. (240/16) CA 14-01773. -- WENDOVER FINANCIAL SERVICES, PLAINTIFF-APPELLANT, V JO-ANN RIDGEWAY, AS EXECUTRIX AND BENEFICIARY UNDER

THE LAST WILL AND TESTAMENT OF AMELIA DONVITO, ALSO KNOWN AS AMELIA C. DONVITO, DECEASED, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ. (Filed June 10, 2016.)

MOTION NO. (277/16) CA 15-00759. -- SHARON JORDAN-PARKER AND CLARK PARKER, PLAINTIFFS-APPELLANTS, V CITY OF BUFFALO, ET AL., DEFENDANTS, AND DESTRO & BROTHERS CONCRETE COMPANY, INC., DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ. (Filed June 10, 2016.)

MOTION NO. (278/16) CA 15-00760. -- SHARON JORDAN-PARKER AND CLARK PARKER, PLAINTIFFS-APPELLANTS, V CITY OF BUFFALO, ET AL., DEFENDANTS, AND DIDONATO ASSOCIATES, P.E., P.C., DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ. (Filed June 10, 2016.)

MOTION NO. (279/16) CA 15-00761. -- SHARON JORDAN-PARKER AND CLARK PARKER, PLAINTIFFS-APPELLANTS, V CITY OF BUFFALO, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 3.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ. (Filed June 10, 2016.)

KA 14-00588. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LAVEEDA L. COLLINS, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon her guilty plea of aggravated unlicensed operation of a motor vehicle in the first degree ([AUO] Vehicle and Traffic Law § 511 [3] [a] [i]), and driving while intoxicated ([DWI] § 1192 [3]). County Court imposed a six-month term of imprisonment on the AUO count together with a $500 fine, and a concurrent six-month term on the DWI count together with a $500 fine and a one-year conditional discharge for purposes of the ignition interlock device requirement (*see* Vehicle and Traffic Law § 1193 [1] [b] [ii]). Defendant's assigned appellate counsel has moved to be relieved of the assignment on the ground that there are no nonfrivolous issues for appeal (*see People v Crawford*, 71 AD2d 38). Upon our review of the record, we conclude that a nonfrivolous issue exists as to whether the court erroneously imposed a more severe sentence than that bargained for if defendant was not successful on interim probation, without affording defendant the opportunity to withdraw her plea (*see People v Lafferty*, 60 AD3d 1318, 1318-1319; *see generally People v Carr*, 127 AD3d 1503, 1504). We therefore relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from a Judgment of the Monroe County

Court, Vincent M. Dinolfo, J. - Aggravated Unlicensed Operation of a Motor Vehicle, 1st Degree). PRESENT: WHALEN, P.J., LINDLEY, NEMOYER, AND SCUDDER, JJ. (Filed June 10, 2016.)

KAH 14-01823. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. TERRELL TAYLOR, PETITIONER-APPELLANT, V S. DOLCE, SUPERINTENDENT OF ORLEANS CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38). (Appeal from a Judgment [denominated order] of Supreme Court, Orleans County, James P. Punch, A.J. - Habeas Corpus). PRESENT: WHALEN, P.J., LINDLEY, NEMOYER, AND SCUDDER, JJ. (Filed June 10, 2016.)