SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 24, 2017

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

711/15
CA 14-01919
PRESENT: WHALEN, P.J., CENTRA, CARNI, AND SCUDDER, JJ.

IN THE MATTER OF JAMES R. DIEGELMAN AND
ANDREA M. DIEGELMAN, CLAIMANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND CITY OF BUFFALO BOARD OF
EDUCATION, RESPONDENTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF
COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (John P. Lane, J.H.O.), entered January 16, 2014. The order granted the application of claimants for leave to serve a late notice of claim. The order was reversed by order of this Court entered June 12, 2015 in a memorandum decision (129 AD3d 1527), and claimants on December 15, 2015 were granted leave to appeal to the Court of Appeals from the order of this Court (26 NY3d 913), and the Court of Appeals on November 21, 2016 reversed the order and remitted the case to this Court for consideration of issues raised but not determined on the appeal to this Court (28 NY3d 231).

Now, upon remittitur from the Court of Appeals and having considered the issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondents appeal from an order that granted claimants' application for leave to serve a late notice of claim. We previously held that the application should have been denied as patently without merit on the ground that the claim was barred by General Municipal Law § 207-c, but the Court of Appeals concluded that the claim was not so barred (*Matter of Diegelman v City of Buffalo*, 28 NY3d 231, *revg* 129 AD3d 1527). The Court therefore reversed our order and remitted the matter to this Court "for consideration of issues raised but not determined on the appeal" (*id.* at 241). We now conclude that Supreme Court did not abuse its discretion in granting claimants' application.

The proposed notice of claim states that the claim is for personal injuries sustained by James R. Diegelman (claimant) during his employment as a police officer by respondent City of Buffalo. Claimants allege that claimant suffers from metastatic malignant mesothelioma as the result of his exposure to asbestos at several locations owned by respondents. Claimants submitted evidence that their application was made within one year and 90 days after the claim accrued (*see* General Municipal Law § 50-e [1] [a]; [5]; § 50-i), i.e., upon claimant's diagnosis (*see* CPLR 214-c [2]; *Matter of New York County DES Litig.*, 89 NY2d 506, 508-509). In determining whether to grant claimants' application, the court was required to consider "all relevant facts and circumstances," including the "nonexhaustive list of factors" in section 50-e (5) (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539; *see Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460-461). "[T]he presence or absence of any one of the numerous relevant factors the court must consider is not determinative" (*Salvaggio v Western Regional Off-Track Betting Corp.*, 203 AD2d 938, 938-939). The three main factors are whether the claimants have shown a reasonable excuse for the delay, whether respondents had actual knowledge of the facts surrounding the claim within 90 days of its accrual "or within a reasonable time thereafter," and whether the delay would cause substantial prejudice to the municipality (§ 50-e [5]; *see Dalton v Akron Cent. Schs.*, 107 AD3d 1517, 1518, *affd* 22 NY3d 1000).

Here, even assuming, arguendo, that claimants failed to provide a reasonable excuse for their delay, we conclude that the remaining factors support the court's exercise of discretion in granting their application. Although respondents did not obtain knowledge of the facts underlying the claim until approximately nine months after the expiration of the 90-day period, we conclude under the circumstances of this case that "this was a reasonable time, particularly in light of the fact that respondent[s] do[ ] not contend 'that there has been any subsequent change in the condition of the [premises] which might hinder the investigation or defense of this action' " (*Matter of Edwards v Town of Delaware*, 115 AD2d 205, 206). Moreover, claimants made a sufficient showing that the late notice will not substantially prejudice respondents, and respondents failed to "respond with a particularized evidentiary showing that [they] will be substantially prejudiced if the late notice is allowed" (*Newcomb*, 28 NY3d at 467). We therefore conclude that the court "properly exercised its broad discretion in granting [claimants'] application pursuant to General Municipal Law § 50-e (5)" (*McBee v County of Onondaga*, 34 AD3d 1360, 1360).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

1002
KA 13-01957
PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC HARRIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered October 11, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). We agree with defendant that the waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the 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 Hassett*, 119 AD3d 1443, 1443-1444, *lv denied* 24 NY3d 961 [internal quotation marks omitted]). " '[A]lthough the record establishes that defendant executed a written waiver of the right to appeal, there was no colloquy between [the c]ourt and defendant regarding the waiver of the right to appeal to ensure that' defendant was aware that it encompassed his challenge to the severity of the sentence" (*People v Avellino*, 119 AD3d 1449, 1449-1450). We nevertheless reject defendant's contention that the sentence is unduly harsh and severe.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

1038
CA 15-02019
PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF NICOLAS GRANTO, RICHARD FLECK,
KEVIN HENDERSON AND GEORGE MCDONELL,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (SEAN J. MACKENZIE OF COUNSEL), FOR PETITIONERS-APPELLANTS.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (CHRISTOPHER M. MAZUR OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Frank Caruso, J.), entered March 2, 2015 pursuant to 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 affirmed without costs.

Memorandum: Petitioners, members of the Niagara Falls Police Department (NFPD), commenced this CPLR article 78 proceeding seeking designation as police detectives pursuant to Civil Service Law § 58 (4) (c) (ii). In appeal No. 1, petitioners appeal from a judgment granting respondent's motion to dismiss the petition on the ground that the proceeding was not timely commenced. In appeal No. 2, petitioners Nicolas Granto, Kevin Henderson and George McDonell (renewal petitioners) appeal from an order denying their motion seeking leave to renew their opposition to the relief granted in the judgment in appeal No. 1.

We reject petitioners' contention in appeal No. 1 that Supreme Court erred in granting the motion and dismissing the petition as untimely. It is well settled that where, as here, the proceeding is in the nature of mandamus to compel, it "must be commenced within four months after refusal by respondent, upon demand of petitioner, to perform its duty" (*Matter of Densmore v Altmar-Parish-Williamstown Cent. Sch. Dist.*, 265 AD2d 838, 839, *lv denied* 94 NY2d 758; *see* CPLR 217 [1]; *Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1182). " '[A] petitioner[, however,] may not delay in making a demand in order to indefinitely postpone the time within which to institute the

proceeding. The petitioner must make his or her demand within a reasonable time after the right to make it occurs, or after the petitioner knows or should know of the facts which give him or her a clear right to relief, or else, the petitioner's claim can be barred by the doctrine of laches' " (*Speis*, 114 AD3d at 1182). "The term laches, as used in connection with the requirement of the making of a prompt demand in mandamus proceedings, refers solely to the unexcused lapse of time" and "does not refer to the equitable doctrine of laches" (*Matter of Devens v Gokey*, 12 AD2d 135, 137, *affd* 10 NY2d 898). Inasmuch as "[t]he problem . . . is one of the [s]tatute of [l]imitations[,] . . . it is immaterial whether or not the delay cause[s] any prejudice to the respondent" (*id.; see Matter of Norton v City of Hornell*, 115 AD3d 1232, 1233, *lv denied* 23 NY3d 907; *Matter of Thomas v Stone*, 284 AD2d 627, 628, *appeal dismissed* 96 NY2d 935, *lv denied* 97 NY2d 608, *cert denied* 536 US 960; *Matter of Curtis v Board of Educ. of Lafayette Cent. Sch. Dist.*, 107 AD2d 445, 448; *see also Matter of Sheerin v New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 NY2d 488, 495-496). Thus, to the extent that we held in *Matter of Degnan v Rahn* (2 AD3d 1301, 1302) that a respondent is required to make a showing of prejudice to establish that a proceeding in the nature of mandamus to compel is barred by the doctrine of laches, that case is no longer to be followed.

"[T]he four-month limitations period of CPLR article 78 proceedings has been 'treat[ed] . . . as a measure of permissible delay in the making of the demand' " (*Norton*, 115 AD3d at 1233). Here, petitioners asserted that they became aware that they could be designated detectives under Civil Service Law § 58 (4) (c) (ii) when Supreme Court granted such relief to similarly-situated members of the NFPD in September 2012 (*see Matter of Sykes v City of Niagara Falls*, 112 AD3d 1302, 1302). Petitioners' demand, therefore, should have been made no later than January 2013, but petitioners did not make their demand to be designated as detectives until March 2014, which was well beyond four months after they knew or should have known of the facts that provided them a clear right to relief (*see Densmore*, 265 AD2d at 839). Contrary to petitioners' contention in appeal No. 1 that they had a reasonable excuse for the delay in making the demand, there was nothing about the pendency of the *Sykes* proceeding that should have led petitioners to conclude that their own proceeding did not have merit. In addition, the self-serving affidavit submitted by petitioners in opposition to the motion, in which they claimed that they had feared retaliation if they demanded designation as detectives, is based solely upon conclusory and speculative allegations, and thus does not substantiate their assertion that they had a reasonable excuse for the delay. We therefore conclude that "it was [well] within the court's discretion to determine that petitioner[s] unreasonably delayed in making the demand" (*Densmore*, 265 AD2d at 839; *see Norton*, 115 AD3d at 1233).

Contrary to renewal petitioners' contention in appeal No. 2, we conclude that the court properly denied their motion seeking leave to renew. " 'A motion for leave to renew must be based upon new facts that were unavailable at the time of the original motion' and that would change the prior determination" (*Foxworth v Jenkins*, 60 AD3d

1306, 1307; *see* CPLR 2221 [e] [2]). "Although a court has discretion to grant renewal, 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 [internal quotation marks omitted]). Here, the affidavits of renewal petitioners and their attorney did not present new facts, and renewal petitioners failed to provide a reasonable justification for the failure to produce the additional evidence in opposing the laches argument that formed the basis for respondent's motion to dismiss (*see Garland v RLI Ins. Co.*, 79 AD3d 1576, 1577, *lv dismissed* 17 NY3d 774, 18 NY3d 877; *see also Wolfe v Wayne-Dalton Corp.*, 133 AD3d 1281, 1284).

All concur except CURRAN, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent in appeal No. 1. The majority and I agree that this proceeding is in the nature of mandamus. Such a proceeding "must be commenced within four months after the refusal by respondent, upon the demand of petitioner[s], to perform its duty" (*Matter of Densmore v Altmar-Parish-Williamstown Cent. Sch. Dist.*, 265 AD2d 838, 839, *lv denied* 94 NY2d 758). "[T]he demand must be made within a reasonable time after the right to make the demand occurs" (*Matter of Devens v Gokey*, 12 AD2d 135, 136, *affd* 10 NY2d 898). "[A] demand should be made no more than four months after the right to make the demand arises" (*Densmore*, 265 AD2d at 839). Nonetheless, "[t]he sole test [for courts to consider] is . . . whether, under the circumstances of the case, the [petitioners'] delay in making the demand was unreasonably protracted" (*Matter of Perry v Blair*, 49 AD2d 309, 315; *see Matter of Central Sch. Dist. No. 2 v New York State Teachers' Retirement Sys.*, 27 AD2d 265, 268, *affd* 23 NY2d 213).

The parties agree that the right to make the demand arose when the Roving Anti-Crime Unit was disbanded on January 2, 2013. At a minimum, the reasonable period of time in which to make the demand was four months later, i.e., May 2, 2013. Petitioners did not make their demand until 10 months later in March of 2014. In my view, however, this 10-month delay in making the demand was not so unreasonable as to deprive petitioners of their day in court.

The majority relies upon cases where either no excuse was offered for a delay or where the court determined that the excuse was so meritless as to be rejected as a matter of law (*see Matter of Norton v City of Hornell*, 115 AD3d 1232, 1233, *lv denied* 23 NY3d 907; *see also Devens*, 12 AD2d at 136). Here, petitioners have offered a viable excuse for the delay and, thus, in my view, we have no need to reach the ill-stated language in *Matter of Degnan v Rahn* (2 AD3d 1301, 1302). Rather, the majority has apparently determined that the excuse offered by petitioners here is meritless as a matter of law. I disagree with that determination.

Petitioners delayed their demand because they were awaiting this Court's decision in *Matter of Sykes v City of Niagara Falls* (112 AD3d

1302), a virtually identical situation to the present matter—including a lengthier delay in making a demand—and one involving the same police department. This Court has previously accepted such an excuse as meritorious (*see Matter of Uphoff v Roberts*, 244 App Div 596, 597), and I fail to appreciate any distinction between *Uphoff* and the case before us here.

Petitioners also assert that they feared retaliation from respondent if they brought suit before this Court decided *Sykes* based on their understanding of retaliatory actions having been undertaken against the petitioners in *Sykes*. Contrary to the majority, on this motion to dismiss, I am unwilling to weigh the credibility of the affidavit submitted by petitioners. The affidavit offers facts supporting petitioners' explanation for awaiting our decision in *Sykes* and, in my view, the only way to disregard it is to disbelieve it, a function I maintain is inappropriate on this motion.

I am concerned that the majority's decision seeks to draw a hard and fast line rather than following long-established precedent requiring that we apply a facts-and-circumstances test to determine whether the excuse for delay is reasonable (*see People ex rel. Gas Light Co. of Syracuse v Common Council of City of Syracuse*, 78 NY 56, 63; *People ex rel. McDonald v Lantry*, 48 App Div 131, 132; *Matter of McDonald*, 34 App Div 512, 514-515). Based on the above precedent, we also are permitted, in a case where a petitioner offers an excuse for a delay, to consider prejudice to the respondent or other persons (*see Gas Light Co. of Syracuse*, 78 NY at 63; *McDonald*, 34 App Div at 514). While I agree that an unexplained delay should not be excused based solely on a lack of prejudice, I also submit that an explained delay warrants at least some consideration of prejudice.

In this case, there is no evidence in the record that petitioners' designation and compensation as detectives will cause prejudice in displacing anyone who has occupied the position in the interim (*see Austin v Board of Higher Educ. of City of N.Y.*, 5 NY2d 430, 441; *Matter of Williams v Pyrke*, 233 App Div 345, 346, citing *People ex rel. Young v Collis*, 6 App Div 467, 469). Therefore, there also is no issue of the respondent suffering prejudice in being required to compensate multiple employees for the same positions. In my view, the above facts, together with the excuse offered by petitioners and respondent's conceded absence of prejudice, render it appropriate to conclude that the petitioners' delay was not unreasonable.

For these reasons, I would reverse the judgment, deny respondent's motion to dismiss, reinstate the petition, and grant respondent time to serve and file an answer, to be followed by further proceedings in Supreme Court.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

1039
CA 15-02020
PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF NICOLAS GRANTO,
KEVIN HENDERSON, GEORGE MCDONELL,
PETITIONERS-APPELLANTS,
AND RICHARD FLECK, PETITIONER,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (SEAN J. MACKENZIE OF COUNSEL), FOR PETITIONERS-APPELLANTS.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (CHRISTOPHER M. MAZUR OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered November 30, 2015. The order denied the motion of petitioners for leave to renew their oppostion to respondent's motion to dismiss the petition.

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

Same memorandum as in *Matter of Granto v City of Niagara Falls* ([appeal No. 1] ___ AD3d ___ [Mar. 24, 2017]).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

1142
KA 14-00127

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALAN D. NEAL, DEFENDANT-APPELLANT.

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

ALAN D. NEAL, DEFENDANT-APPELLANT PRO SE.

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 January 10, 2013. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of driving while intoxicated as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]), defendant contends in his main brief that his plea was not knowing, intelligent, and voluntary because County Court failed to advise him of the amount of the fine to be imposed before he pleaded guilty. Although that contention survives defendant's waiver of the right to appeal, defendant failed to move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve his contention for our review (*see People v Watkins*, 77 AD3d 1403, 1403, *lv denied* 15 NY3d 956; *People v Baker*, 49 AD3d 1293, 1293, *lv denied* 10 NY3d 932). Contrary to defendant's further contention, the court advised him at the time of the plea that it could impose a fine in addition to a term of incarceration, and thus preservation was required (*see generally People v Murray*, 15 NY3d 725, 726-727).

As the People correctly concede, however, the court erred in imposing a $1,500 fine. Vehicle and Traffic Law § 1193 (1) (c) (ii) provides that a person convicted of driving while intoxicated as a class D felony "shall be punished by a fine of not less than two

thousand dollars nor more than ten thousand dollars or by a period of imprisonment as provided in the penal law, or by both such fine and imprisonment." The court therefore had the authority to impose a fine and a sentence of imprisonment, but was required to impose a minimum fine of $2,000 if it chose to impose any fine. We cannot allow the $1,500 illegal fine to stand (*see generally People v VanValkinburgh*, 90 AD3d 1553, 1554) and, as a matter of discretion in the interest of justice, we conclude that no fine should be imposed. We therefore modify the judgment by vacating the fine.

With respect to the jurisdictional challenges to the felony complaint and his arraignment thereon in the pro se supplemental brief, "[t]he felony complaint was superseded by the indictment to which defendant pleaded guilty, and he therefore may not challenge the felony complaint" (*People v Anderson*, 90 AD3d 1475, 1477, *lv denied* 18 NY3d 991; *see People v Mitchell*, 132 AD3d 1413, 1416, *lv denied* 27 NY3d 1072). Defendant's valid waiver of the right to appeal encompasses his challenges in his pro se supplemental brief to the court's suppression rulings (*see People v Kemp*, 94 NY2d 831, 833). Furthermore, the remaining contentions in defendant's pro se supplemental brief do not " 'implicate the voluntariness of the plea and thus [they are] also encompassed by his valid waiver of the right to appeal' " (*People v Russell*, 128 AD3d 1383, 1384, *lv denied* 25 NY3d 1207).

All concur except NEMOYER and SCUDDER, JJ., who dissent in part and vote to modify in accordance with the following memorandum: We respectfully dissent in part. Vehicle and Traffic Law § 1193 (1) (c) (ii) provides that a person convicted of driving while intoxicated as a class D felony "shall be punished by a fine of not less than two thousand dollars nor more than ten thousand dollars or by a period of imprisonment as provided in the penal law, or by both such fine and imprisonment."

Here, we agree with the majority that County Court erred in imposing a fine of $1,500, $500 less than the minimum prescribed by the statute, and that we cannot allow the illegal fine to stand. We depart from the majority's reasoning, however, with regard to the appropriate remedy for the illegal sentence. Rather than concluding "as a matter of discretion in the interest of justice" that no fine should be imposed in this case, we believe that the fine should be vacated and that the matter should be remitted to Monroe County Court for resentencing (*see People v Smith*, 309 AD2d 1282, 1282).

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

1147
KA 14-00974
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAJERON WILLIAMS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (LINDA M. CAMPBELL 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 (Victoria M. Argento, J.), rendered April 3, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), and imposing sentence. We agree with defendant that County Court erred in failing to determine whether he should be afforded youthful offender status (*see People v Rudolph*, 21 NY3d 497, 501). Defendant was convicted of an armed felony offense, and the court therefore was required "to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3) . . . [and] make such a determination on the record" (*People v Middlebrooks*, 25 NY3d 516, 527). If "the court determines that one or more of the CPL 720.10 (3) factors are present, and the defendant is therefore an eligible youth, the court then 'must determine whether . . . the eligible youth is a youthful offender' " (*id.* at 528). Because the court failed to do so here, we hold the case, reserve decision, and remit the matter to County Court to make and state for the record "a determination of whether defendant is a youthful offender" (*Rudolph*, 21 NY3d at 503).

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

1199
CA 16-00511
PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHAUTAUQUA COUNTY, CITY OF DUNKIRK, VILLAGE OF
BROCTON, VILLAGE OF WESTFIELD, BROCTON CENTRAL
SCHOOL DISTRICT, DUNKIRK CITY SCHOOL DISTRICT,
FREDONIA CENTRAL SCHOOL DISTRICT, RIPLEY CENTRAL
SCHOOL DISTRICT, AND WESTFIELD CENTRAL SCHOOL
DISTRICT, RESPONDENTS-DEFENDANTS-RESPONDENTS.

INGRAM YUZEK GAINEN CARROLL & BERTOLOTTI, LLP, NEW YORK CITY (JOHN G.
NICOLICH OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (MICHAEL B. RISMAN OF COUNSEL), AND STEPHEN
M. ABDELLA, COUNTY ATTORNEY, MAYVILLE, FOR RESPONDENTS-DEFENDANTS-
RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Chautauqua County (Paul B. Wojtaszek, J.), entered October 2, 2015 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment dismissed the petition.

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

Memorandum: Petitioner-plaintiff (petitioner) is a telecommunications company with fiber optic installations located in Chautauqua County and elsewhere throughout the State. In January 2014, petitioner filed applications pursuant to RPTL 556 seeking refunds from several tax-assessing entities located in Chautauqua County (hereafter, respondents) of taxes paid on fiber optic installations for the years 2010, 2011, and 2012. In August 2014 and February 2015, the Chautauqua County Real Property Tax Service Director issued reports to respondents recommending the denial of those applications.

In December 2014, petitioner commenced this hybrid CPLR article 78 proceeding and declaratory judgment action, seeking a declaration that its fiber optic installations are not taxable real property within the meaning of RPTL 102 (12), and mandamus to compel respondents to approve the refund applications and to refund taxes paid in 2010, 2011, and 2012. Over the next several months,

respondents adopted resolutions denying the refund applications on several grounds, including that petitioner's fiber optic installations are taxable real property under RPTL 102 (12) (f) and (i), and petitioner made its tax payments for those years voluntarily and without protest. Thereafter, respondents answered the petition-complaint (petition) and asserted various defenses and objections in point of law, including the aforesaid grounds upon which the applications were denied.

Supreme Court concluded that petitioner's fiber optic installations are taxable real property inasmuch as they constitute "equipment for the distribution of . . . light" under RPTL 102 (12) (f), and dismissed the petition by a judgment, from which petitioner now appeals.

As a preliminary matter, we note that this is properly only a CPLR article 78 proceeding inasmuch as the relief sought by petitioner, i.e., review of respondents' administrative determinations that the subject property constitutes taxable real property, is available under CPLR article 78 without the necessity of a declaration (*see Matter of Zen Ctr. of Syracuse, Inc. v Gamage*, 94 AD3d 1490, 1490; *see also Greystone Mgt. Corp. v Conciliation & Appeals Bd. of City of N.Y.*, 62 NY2d 763, 765; *Matter of Potter v Town Bd. of Town of Aurora*, 60 AD3d 1333, 1334, *appeal dismissed* 12 NY3d 882, *lv denied* 13 NY3d 707; *Matter of Citizens Against Sprawl-Mart v City of Niagara Falls*, 35 AD3d 1190, 1191, *lv dismissed in part and denied in part* 9 NY3d 858).

We agree with petitioner that its fiber optic installations are not taxable under RPTL 102 (12) (f). Under RPTL 102 (12) (f), the definition of real property includes "[b]oilers, ventilating apparatus, elevators, plumbing, heating, lighting and power generating apparatus, shafting other than counter-shafting and equipment for the distribution of heat, light, power, gases and liquids." The issue turns on whether petitioner's fiber optic cables are "equipment for the distribution of . . . light," and particularly upon the definition of the word *distribution*. There is no dispute about what fiber optic cables are or how they work—they transmit light to a receiver that decodes the light into electronic signals, which are then sent to a television, computer, or other such device. The parties disagree whether that process constitutes the "distribution . . . of light" within the meaning of the statute.

" 'It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature' " (*Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 583; *see Gawron v Town of Cheektowaga*, 117 AD3d 1410, 1412). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski*, 91 NY2d at 583; *see Gawron*, 117 AD3d at 1412). Where the interpretation of the statute turns on the definition of words not defined therein, "we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary

definitions as useful guideposts in determining the meaning of a word or phrase" (*Yaniveth R. v LTD Realty Co.*, 27 NY3d 186, 192 [internal quotation marks omitted]; *see De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 537-538). Also pertinent are the "meanings of adjacent words" (*Matter of Kese Indus. v Roslyn Torah Found.*, 15 NY3d 485, 491), and the "circumstances surrounding the statute's passage" (*Consedine v Portville Cent. Sch. Dist.*, 12 NY3d 286, 290; *see Matter of Albany Law Sch. v New York State Off. of Mental Retardation & Dev. Disabilities*, 19 NY3d 106, 122). Furthermore, a tax statute must be narrowly construed and "any doubts concerning its scope and application are to be resolved in favor of the taxpayer" (*Debevoise & Plimpton v New York State Dept. of Taxation & Fin.*, 80 NY2d 657, 661; *see Matter of RCN N.Y. Communications, LLC v Tax Commn. of the City of N.Y.*, 95 AD3d 456, 457, *lv denied* 20 NY3d 855).

The word *distribution* means "a spreading out or scattering over an area or throughout a space" or "delivery or conveyance (as of newspapers or goods) to the members of a group" (Webster's Third New International Dictionary [2002]). Examples include "the distribution of the oil throughout the engine parts" and "the distribution of telephone directories to customers" (*id.*). In other words, distribution implies an "apportioning of something" more or less evenly, or as a due or right, to an "appropriate person or place" (*id.*; *see Matter of Level 3 Communications, LLC v Clinton County*, 144 AD3d 115, 118-119). Given the context in which the word *distribution* appears in RPTL 102 (12) (f), that definition makes sense. Undoubtedly, the kinds of equipment enumerated in the statute, such as boilers, plumbing, and lighting apparatus, distribute heat, liquids, and light to consumers. By contrast, although "the fiber optic cables at issue undeniably *transmit* light signals from one end of the network to the other, such transmission does not result in the 'distribution' of light, but rather data" (*Level 3 Communications, LLC*, 144 AD3d at 118). Thus, we cannot conclude that petitioner's fiber optic installations distribute light " 'without resorting to an artificial or forced construction' " (*Feher Rubbish Removal, Inc. v New York State Dept. of Labor, Bur. of Pub. Works*, 28 AD3d 1, 4, *lv denied* 6 NY3d 711).

We nonetheless reject petitioner's contention that the court erred in dismissing the petition for mandamus to compel respondents' approval of petitioner's refund applications. In a CPLR article 78 proceeding for mandamus to compel, the petitioner must establish "a clear legal right to the relief requested" (*Matter of Dietz v Bd. of Educ. of Rochester City School Dist.*, 98 AD3d 1251, 1252 [internal quotation marks omitted]). Under the common law rule, " 'it is incumbent upon the taxpayer to establish appropriate legal protest prior to or at the time of payment as a prerequisite to recovery' " of taxes paid under a mistake of law (*Level 3 Communications, LLC*, 144 AD3d at 120-121; *see Video Aid Corp. v Town of Wallkill*, 85 NY2d 663, 667; *cf. Matteawan On Main, Inc. v City of Beacon*, 109 AD3d 590, 591). Without express protest, "moneys remitted as taxes or fees are applied to authorized public expenditures, and financial provision is not made for refunds" (*Video Aid Corp.*, 85 NY2d at 667; *see 10 Lafayette Sq.*

Holdings v City of Buffalo, 108 Misc 2d 960, 961). Critically, petitioner filed its refund applications pursuant to RPTL 556, which "does not provide an affirmative right to recover taxes without protest" (*Matter of Level 3 Communications, LLC v Essex County*, 129 AD3d 1255, 1257 n 1, *lv denied* 26 NY3d 907, *rearg denied* 26 NY3d 1126; *cf. City of Rochester v Chiarella*, 98 AD2d 8, 9, *affd* 63 NY2d 857), and there is no dispute that petitioner made its tax payments voluntarily and without protest. We thus conclude that the court properly dismissed the petition.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

1249
KA 15-01402
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

CLIFFORD BROWN, 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 (Dennis M. Kehoe, J.), dated April 27, 2015. 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 reversed on the law without costs and the matter is remitted to Wayne County Court for further proceedings in accordance with the following memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing points for his criminal history based upon a prior juvenile delinquency adjudication. We agree.

In August 2005, when he was just over 13½ years old, defendant was adjudicated a juvenile delinquent in New York for conduct against a 10-year-old female that, if committed by an adult, would constitute the crime of sexual abuse in the first degree (Penal Law § 130.65). In June 2012, defendant was convicted in South Carolina, upon his plea of guilty, of committing or attempting a lewd act upon a child under the age of 16 (SC Code Ann former § 16-15-140) as a result of defendant's sexual conduct with a six-year-old male in March 2008. Following the preparation of a risk assessment instrument by the Board of Examiners of Sex Offenders (Board), the court conducted a hearing during which defense counsel argued, among other things, that defendant should not have been assessed 30 points under risk factor 9, for a prior sex crime adjudication as a juvenile delinquent, and 10 points under risk factor 10, for a prior sex crime that occurred less than three years before the instant South Carolina offense. Specifically, defense counsel relied on *People v Campbell* (98 AD3d 5, 12-13, *lv denied* 20 NY3d 853), and argued that the Family Court Act prohibited consideration of a juvenile delinquency adjudication in a SORA determination. The court determined that it was constrained by

our decision in *People v Catchings* (56 AD3d 1181, 1182, *lv denied* 12 NY3d 701), and rejected defendant's challenge to the assessments under risk factors 9 and 10.

The risk assessment guidelines issued by the Board provide that a juvenile delinquency adjudication is considered a crime for purposes of assessing points under the criminal history section of the risk assessment instrument (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [Guidelines], at 6 [2006]). Family Court Act § 381.2 (1) provides, however, that neither the fact that a person was before Family Court for a juvenile delinquency hearing, nor any confession, admission or statement made by such a person is admissible as evidence against him or her in any other court. Section 380.1 (1) further provides that "[n]o adjudication under this article may be denominated a conviction and no person adjudicated a juvenile delinquent shall be denominated a criminal by reason of such adjudication." Given this conflict between the Guidelines and the plain language of the Family Court Act, we agree with the Second Department's holding in *Campbell* and conclude that the Board "exceeded its authority by adopting that portion of the Guidelines which includes juvenile delinquency adjudications in its definition of crimes for the purpose of determining a sex offender's criminal history" (98 AD3d at 12; *see People v Shaffer*, 129 AD3d 54, 55; *see generally Green v Montgomery*, 95 NY2d 693, 697). We note that the conflict between the Guidelines and the Family Court Act was not before us in *Catchings* (56 AD3d at 1182) and, to the extent that our decision in that case suggests that a juvenile delinquency adjudication may be considered a crime for purposes of assessing points in a SORA determination, it should not be followed. We therefore conclude that the court erred in considering defendant's juvenile delinquency adjudication in assessing a total of 40 points under risk factors 9 and 10.

To the extent that defendant also challenges the court's assessment of 10 points under risk factor 8 for being 20 years old or younger at the time of his first sex crime, defense counsel correctly conceded during the SORA hearing that those points should be assessed because defendant was indisputably under 20 years old when he committed the sex crime in South Carolina (*see* Guidelines at 13).

Removing the improperly assessed points under risk factors 9 and 10 renders defendant a presumptive level one risk. Under the circumstances of this case, however, we remit the matter to County Court for further proceedings to determine whether an upward departure from defendant's presumptive risk level is warranted (*see People v Updyke*, 133 AD3d 1063, 1064; *People v Leach*, 106 AD3d 1387, 1388; *People v Felice*, 100 AD3d 609, 610).

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

1258
KA 09-00310
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

WILLIAM MORRISON, DEFENDANT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, FOR DEFENDANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (TIM WU OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered April 18, 2007. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, sexual abuse in the first degree and endangering the welfare of a vulnerable elderly person in the second degree.

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

Memorandum: On a prior appeal, we affirmed the judgment convicting defendant upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]), sexual abuse in the first degree (§ 130.65 [1]), and endangering the welfare of a vulnerable elderly person in the second degree (former § 260.32 [4]) (*People v Morrison*, 90 AD3d 1554, *lv denied* 19 NY3d 1028, *reconsideration denied* 20 NY3d 934). We subsequently granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel had failed to raise an issue that may have merit, i.e., whether County Court erred in failing to comply with CPL 310.30 in its handling of jury notes (*People v Morrison*, 128 AD3d 1424), and we vacated our prior order. We now consider the appeal de novo.

We agree with defendant that the court violated a core requirement of CPL 310.30 in failing to advise counsel on the record of the contents of a substantive jury note, and thereby committed reversible error (*see People v Mack*, 27 NY3d 534, 538; *People v Silva*, 24 NY3d 294, 299-300, *rearg denied* 24 NY3d 1216; *People v O'Rama*, 78 NY2d 270, 277-278). The record establishes that a jury note marked as court exhibit 8 stated that "[w]e have made decision on the Third Count we are having hard time with 1 and 2 just giving you are [sic] status." Soon thereafter, a jury note marked as court exhibit 9 stated that "[w]e have arrived on decision on 2 and 3, but we have a

lot of work to do on #1. I don[']t see it being quick. Not sure what to do. We ars [sic] starting to make way."

It is well settled that, "when the trial court fails to provide counsel with meaningful notice of a substantive jury note, a mode of proceedings error has occurred and reversal is required" (*Mack*, 27 NY3d at 538). Here, the record establishes that the court brought the jury into the courtroom but did not read court exhibits 8 and 9 into the record, contrary to the procedure it employed with the previous notes sent by the jury. The court then instructed the jury to continue working to try to reach a unanimous verdict. We agree with the People that CPL 310.30 did not apply to court exhibit 8 inasmuch as the jury was not requesting "further information or instruction" (*People v Collins*, 99 NY2d 14, 17), but we agree with defendant that court exhibit 9 was a substantive jury note requiring notice to defense counsel (*see People v Kisoon*, 8 NY3d 129, 135; *People v Victor*, 139 AD3d 1102, 1108-1109, *lv denied* 28 NY3d 1076). Thus, defense counsel was "deprived . . . of the opportunity to accurately analyze the jury's deliberations and frame intelligent suggestions for the court's response" (*Kisoon*, 8 NY3d at 135).

We reject the People's contention, and disagree with our dissenting colleague, that the jury's inquiry was merely ministerial (*cf. Mack*, 27 NY3d at 537 n 1). Our dissenting colleague concludes that the jury's statement, "[n]ot sure what to do," was a ministerial inquiry concerning the logistics of the jury's deliberations, i.e., the jury was asking whether it should continue deliberating that evening considering the late hour. We agree that the note could be interpreted that way, but we conclude that it also could be interpreted as it was interpreted by the court, i.e., the jury was having difficulty reaching a unanimous verdict and was making a substantive inquiry for guidance concerning further deliberations. In response to the note, the court issued an *Allen*-type charge. Quite simply, even if we consider all the surrounding circumstances, the jury note was ambiguous, and we must resolve that ambiguity in defendant's favor (*see People v Johnson*, 64 NY2d 617, 618 n 2; *People v O'Donnell*, 2 AD2d 971, 971; *see also People v Thompson*, 26 NY3d 678, 687-688).

We also reject the People's contention that "special circumstances," i.e., the presence of media in the courtroom, justified the departure from the *O'Rama* procedures (*O'Rama*, 78 NY2d at 278). There are no special circumstances that would excuse a court from failing to give notice to defense counsel of the contents of a substantive jury note (*see generally Mack*, 27 NY3d at 538). Finally, contrary to the People's contention, "[w]here a trial transcript does not show compliance with *O'Rama*'s procedure as required by law, we cannot assume that the omission was remedied at an off-the-record conference that the transcript does not refer to" (*People v Walston*, 23 NY3d 986, 990; *see People v Owens*, 144 AD3d 1510, 1510-1511). The presumption of regularity cannot be applied when the alleged error is that the court failed to apprise defense counsel of the contents of a jury note, and the record "must indicate compliance with adequate

procedures under *O'Rama*" (*Silva*, 24 NY3d at 300). We therefore reverse the judgment and grant a new trial on counts one through three of the indictment. In light of our determination, there is no need to address defendant's remaining contentions.

All concur except PERADOTTO, J., who dissents and votes to affirm in accordance with the following memorandum: I respectfully dissent. In my view, the *O'Rama* procedure was not implicated because the jury note marked as court exhibit 9 was ministerial in nature, and defendant was therefore required to preserve his challenge to County Court's handling of that jury note. There is no basis to exercise this Court's discretion in the interest of justice to address defendant's unpreserved contention. I would thus affirm the judgment of conviction.

Criminal Procedure Law § 310.30 provides that a deliberating jury "may request the court for further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case. Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper." The statute thus "imposes two responsibilities on trial courts upon receipt of a substantive note from a deliberating jury: the court must provide counsel with meaningful notice of the content of the note, and the court must provide a meaningful response to the jury" (*People v Mack*, 27 NY3d 534, 536, *rearg denied* 28 NY3d 944; *see People v Nealon*, 26 NY3d 152, 155-156; *People v O'Rama*, 78 NY2d 270, 276-277). The statute, however, "does not require notice to defendant in every instance of communication from the jury to the court" (*People v Lykes*, 81 NY2d 767, 769). Rather, "[t]he *O'Rama* procedure is implicated whenever the court receives 'a *substantive* written jury communication,' " but that procedure "is not implicated when the jury's request is ministerial in nature and therefore requires only a ministerial response" (*Nealon*, 26 NY3d at 161; *see People v Mays*, 20 NY3d 969, 971; *People v Ochoa*, 14 NY3d 180, 188).

An inquiry is substantive, and thus triggers the court's obligations under *O'Rama*, "when a deliberating jury requests further instruction or clarification on the law, trial evidence, or any other matter relevant to its consideration of the case" (*People v Rivera*, 23 NY3d 827, 831; *see People v Collins*, 99 NY2d 14, 17). An announcement by the jury that it is deadlocked—which is effectively a request that it be relieved of the duty to resolve the trial issues, thereby requiring further instruction by the court—is also a substantive inquiry (*see e.g. People v Kisoon*, 8 NY3d 129, 132; *O'Rama*, 78 NY2d at 275, 275 n 2; *People v Lockley*, 84 AD3d 836, 838, *lv denied* 17 NY3d 807; *see generally* CPL 310.60).

In contrast, an inquiry is ministerial if it is "wholly unrelated to the substantive legal or factual issues of the trial" (*People v Harris*, 76 NY2d 810, 812; *see People v Hameed*, 88 NY2d 232, 241, *cert*

denied 519 US 1065; *People v Gruyair*, 75 AD3d 401, 402-403, *lv denied* 15 NY3d 852). Inquiries concerning " 'the logistics of the deliberative process,' " such as questions about scheduling and requests for breaks (*People v Bonaparte*, 78 NY2d 26, 30; *see Mack*, 27 NY3d at 537 n 1; *see generally People v Brito*, 135 AD3d 627, 627, *lv denied* 27 NY3d 1066; *People v Backus*, 184 AD2d 231, 231, *lv denied* 80 NY2d 926), are " 'not the kind of substantive [requests] that implicate[] *O'Rama*' " (*People v Wallace*, 27 NY3d 1037, 1039, quoting *Mays*, 20 NY3d at 971; *see Gruyair*, 75 AD3d at 403; *People v McDowell*, 15 AD3d 840, 840, *lv denied* 5 NY3d 791).

There are two jury notes at issue in this case. The note marked as court exhibit 8 stated: "We have made decision on the Third Count we are having hard time with 1 and 2 just giving you are [sic] status." The jury note marked court exhibit 9 stated: "We have arrived on decision on 2 and 3, but we have a lot of work to do on #1. I don['']t see it being quick. Not sure what to do. We ars [sic] starting to make way." Preliminarily, I agree with the People and the majority that court exhibit 8 did not constitute an inquiry at all inasmuch as it was merely a status update, i.e., it did not request any "further information or instruction" (*Collins*, 99 NY2d at 17). Contrary to the majority's determination, however, even assuming, arguendo, that court exhibit 9 constituted an inquiry, I conclude that it was ministerial in nature because, viewing the text of the note in the context of all the surrounding circumstances (*see People v Taylor*, 26 NY3d 217, 225-226; *People v Mitchell*, 46 AD3d 480, 480, *lv denied* 10 NY3d 842), it unambiguously concerned only the logistics of the deliberative process.

Here, at 4:00 p.m. on the first day of deliberations, i.e., the day prior to date of the notes at issue on appeal, the court informed the jury that the building usually closed at 4:30 p.m. and provided the jury with the choice of deliberating until 4:45 p.m. or breaking for the night and continuing the next morning. The court then asked the jury to send out a note at 4:30 p.m. advising whether it would reach a verdict in the remaining time or whether it wished to break for the night. The jury subsequently sent out a note indicating that it would not be able to reach a verdict that evening and requesting to come back in the morning. The court read that note into the record and instructed the jury that it would break until the following morning. The jury continued deliberations the following day beginning at 9:00 a.m., and the jury sent out various notes throughout the day.

The jury notes at issue here were received and addressed by the court at 4:52 p.m. Court exhibit 8 gave a status update, and court exhibit 9 followed up by indicating that the jury had reached a decision on two of the three counts and was starting to make way with respect to the top count, i.e., rape in the first degree (Penal Law § 130.35 [1]), although it did not expect resolution of that count to be quick. In the presence of defendant, defense counsel and the prosecutor, the court responded by declining to read the notes on the record as it had done with previous notes sent by the jury. Instead, after noting its appreciation for the hard work that the jury had put

in throughout the proceedings, the court provided an *Allen*-type instruction expressing hope that the jury would eventually reach a unanimous verdict. The court continued by mentioning that the jury had been deliberating all day, and that the court would adjourn until the morning if the jurors thought that breaking for the evening would be helpful as opposed to continuing for another hour. The court further discussed that the weather report was calling for poor conditions overnight, and requested that the jurors discuss their options. The jury promptly responded with a note marked as court exhibit 10 indicating that it did not believe that it would be able to come to a unanimous decision in the next hour and preferred to come back in the morning at 10:00 a.m. when the weather would be clear.

Contrary to the majority's conclusion, considering the full text of court exhibit 9 and all of the surrounding circumstances, "the only reasonable interpretation" (*Mitchell*, 46 AD3d at 480) of the jury's statement that it was "[n]ot sure what to do" is that the inquiry concerned the logistics of the jury's deliberations. The clause was immediately preceded by a reference to the amount of work to be done on the top count and immediately followed by the jury's indication that it was beginning to make progress. Consistent with the late hour and the court's practice of giving the jury a choice of whether to break for the evening or continue deliberating based on the status of the jury's deliberations, the record establishes that the jury raised a question of scheduling when it indicated that it was "[n]ot sure what to do." The jury was asking whether to continue deliberating or break for the evening given that it had not yet come to a decision on the top count and anticipated needing additional time to reach a verdict even though it was starting to make progress. The jury note did not request the court's assistance on the ground that the jury was hopelessly deadlocked, and thus the majority's reliance on *Kisoon* is misplaced (*cf.* 8 NY3d at 132; *O'Rama*, 78 NY2d at 275, 275 n 2). Nor did the jury otherwise indicate that it was at an impasse or a standstill (*cf. People v Cook*, 85 NY2d 928, 930; *People v Dame*, 144 AD3d 1625, 1625). There is thus no basis in the record to support the majority's interpretation that "the jury was having difficulty reaching a unanimous verdict and was making a substantive inquiry for guidance concerning further deliberations." To the contrary, the note conveyed that the jury was making progress, but had much work to do with regard to the top count and, therefore, felt it necessary to express its uncertainty whether it should continue deliberating or break for the evening. The inquiry was ministerial inasmuch as it concerned " 'the logistics of the deliberative process' " (*Bonaparte*, 78 NY2d at 30), and was " 'wholly unrelated to the [remaining] substantive legal [and] factual issue[] of the trial,' " (*Hameed*, 88 NY2d at 241), i.e., whether defendant had engaged in sexual intercourse with the victim by forcible compulsion (*see* Penal Law § 130.35 [1]). The jury's inquiry "bore no substantial relationship to . . . defendant['s] opportunity to defend against the charges" (*Hameed*, 88 NY2d at 241).

The majority's reliance on *People v Victor* (139 AD3d 1102, 1108-1109, *lv denied* 28 NY3d 1076) is misplaced. In that case, the jury sent out a note stating that " 'we have reach[ed] agreement on 9 of

the 10 charges # 8G 4NG' " (*id.* at 1108). Shortly thereafter, the jury sent another note stating, "Ready" (*id.*). When discussing the first jury note with counsel, however, the court indicated only that the jury had reached agreement on nine out of the ten charges and excluded mention of the clause at the end of the note (*see id.*). The Third Department concluded that the court committed a mode of proceedings error on the ground that the court failed to meet its "affirmative obligation to read [the first jury note] verbatim so that the parties had the opportunity to accurately analyze the jury's question and frame intelligent suggestions for the court's response" (*id.* at 1109). In support of its implicit determination that the note was substantive and triggered the court's *O'Rama* obligations, the Third Department cited *People v Silva* (24 NY3d 294, 299, *rearg denied* 24 NY3d 1216) and *Kisoon* (8 NY3d at 134), which involve jury notes indicating deadlock, requesting instruction on the law, and making other substantive inquiries. Significantly, as counsel discussed in *Victor*, the jury note in that case raised the prospect that the jury was attempting to render a partial verdict upon being deadlocked on the last count (*see* 139 AD3d at 1108-1109; *see generally* CPL 310.70)—apparently, in my view, by a vote of eight guilty (G) and four not guilty (NG). As discussed in detail above, that is simply not true in the case before us. Although the jury here provided a further status update to the court on its progress with respect to two of the counts, it also affirmatively indicated that it was moving forward with its deliberations on the top count. Thus, both the text of court exhibit 9 and the particular surrounding circumstances here are distinguishable from those in *Victor* and, contrary to the majority, I am not convinced that the implicit determination of a substantive inquiry in that case serves as persuasive authority to be applied to the facts of this case.

To the extent that the court provided a more robust response to the jury note than was required, I agree with the People that the court could not transform a ministerial inquiry regarding the logistics of a productive, continuing deliberation into a substantive deadlock announcement by merely exercising caution and reiterating the jury's deliberative obligations. Nor is the court's prudence indicative of an ambiguity. The text and surrounding circumstances establish that the inquiry itself was ministerial and thus the court's failure to follow the *O'Rama* procedure at that point, as it had done with the jury's prior substantive notes, was not a mode of proceedings error.

Finally, I have examined defendant's remaining contentions and conclude that none requires modification or reversal of the judgment.

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

1281
CA 16-01141
PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

IN THE MATTER OF MICHAEL PILARZ,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KEVIN HELFER, COMMISSIONER, DIVISION OF
PARKING ENFORCEMENT FOR CITY OF BUFFALO,
RESPONDENT-DEFENDANT-RESPONDENT.

THE O'BRIEN FIRM, P.C., BUFFALO (JOHN P. FORD OF COUNSEL), FOR
PETITIONER-PLAINTIFF-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (JOHN J. HANNIBAL, IV,
OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 3, 2016 in a CPLR article 78 proceeding and declaratory judgment action. The order and judgment granted the motion of respondent-defendant to dismiss the petition.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting judgment in favor of respondent-defendant as follows:

> It is ADJUDGED and DECLARED that section 307-8 (D) of the Code of the City of Buffalo is not facially unconstitutional,

and as modified the order and judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking vacatur of his guilty plea to a traffic summons, a return of fines paid, and a declaration that either section 307-8 (D) of the Code of the City of Buffalo (Code) or the policies of the City of Buffalo Division of Parking Enforcement (City) are unconstitutional. The essence of petitioner's claim is that after his vehicle was towed by the City and placed in storage following an alleged abandoned vehicle parking violation, he was unlawfully required to either (1) plead "guilty" and pay all fines and towing and storage charges in order to have his vehicle immediately returned or (2) plead "not guilty" and await a hearing, thus suffering the deprivation of his vehicle until the hearing was held. Supreme Court granted respondent's motion to dismiss the proceeding on the grounds that the

petition is time-barred and, in any event, without merit.

We note at the outset that a CPLR article 78 proceeding is not the proper vehicle for that part of petitioner's challenge to the facial unconstitutionality of the Code, and we thus convert the article 78 proceeding to a hybrid article 78 proceeding/declaratory judgment action (*see* CPLR 103 [c]; *92-07 Rest. v New York State Liq. Auth.*, 80 AD2d 603, 604).

If petitioner-plaintiff (petitioner) were challenging only whether section 307-8 (D) of the Code was applied in an unconstitutional manner, we would agree with the court that the petition is time-barred inasmuch as "[a]n article 78 proceeding must be commenced within four months after the administrative determination to be reviewed becomes 'final and binding upon the petitioner' " (*Matter of Yarbough v Franco*, 95 NY2d 342, 346, quoting CPLR 217 [1]). Here, petitioner's action accrued on February 4, 2015, when he executed his plea (*see Matter of Nedd v Koehler*, 159 AD2d 344, 345), because it was at that point that he was "aggrieved" by his payment of the towing and storage fees and the parking ticket fine. He subsequently commenced this article 78 proceeding on July 13, 2015, more than four months later (*see Yarbough*, 95 NY2d at 346).

However, petitioner also contends that section 307-8 (D) of the Code is facially unconstitutional. Where the substance of a petitioner's claim falls within the purview of the Federal Civil Rights Act, the applicable statute of limitations for such a cause of action is three years, and thus petitioner's converted proceeding is not barred by the statute of limitations (*see Owens v Okure*, 488 US 235, 237-239, 251; *see also* CPLR 214 [5]; *Freeland v Erie County*, 122 AD3d 1348, 1351; *Matter of Doorley v DeMarco*, 106 AD3d 27, 33).

Ultimately, however, regardless whether the matter is an article 78 proceeding challenging the constitutionality of the Code as applied or a hybrid article 78 proceeding/declaratory judgment action challenging the facial validity of the Code, we conclude that the court properly concluded that the petition is without merit. On appeal, petitioner does not dispute that he received adequate notice and challenges only the sufficiency of the hearing procedure itself. Contrary to petitioner's contention, the record indicates that he could have received a hearing the same day that he sought the return of his vehicle and that, if a hearing officer was unavailable, the hearing would occur within a day or two. Alternatively, petitioner could have scheduled a hearing for a later date.

Despite having notice and an opportunity to be heard, petitioner placed greater value on the expeditious return of his vehicle (*see Horn v City of Chicago*, 860 F2d 700, 704-705; *see also Herrada v City of Detroit*, 275 F3d 553, 556-557). In effect, petitioner's perceived Hobson's choice was created by his own desire for convenience, and "[a] procedural due process challenge in a case of this sort leads to illogical results because an individual could create a procedural due process violation by essentially turning down an opportunity for a hearing" (*Wertz v Village of W. Milgrove*, 2009 WL 1183155, *5).

Therefore, inasmuch as the ticket “explicitly specified how to challenge the citation[] should [petitioner] choose to do so,” but petitioner instead “chose to pay . . . rather than request [a] hearing[]” (*Zilba v City of Port Clinton, Ohio*, 924 F Supp 2d 867, 874), we conclude that petitioner voluntarily chose to relinquish his right to a hearing by pleading guilty and paying the fines and cannot now claim that he was deprived of the due process that was once afforded to him (*see Weinrauch v Park City*, 751 F2d 357, 360). Consequently, petitioner is also not entitled to attorney fees (*see Matter of Walker v New York City*, 262 AD2d 151, 152, *lv denied* 94 NY2d 753).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

1305
CA 16-00751
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

MICHAEL J. STACHOWSKI, AS GUARDIAN OF THE PROPERTY OF TAQUILO CASTELLANOS, AN INFANT, ROGELIO CASTELLANOS, JR., INDIVIDUALLY, AND AS PARENT AND NATURAL GUARDIAN OF TAQUILO CASTELLANOS, AN INFANT, AND TAQUILO CASTELLANOS, AN INFANT, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

UNITED FRONTIER MUTUAL INSURANCE CO., DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ADAM R. DURST OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ARTHUR A. HERDZIK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS MICHAEL J. STACHOWSKI, AS GUARDIAN OF THE PROPERTY OF TAQUILO CASTELLANOS, AN INFANT, AND TAQUILO CASTELLANOS, AN INFANT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 1, 2016. The judgment, among other things, denied the motion of defendant for summary judgment and granted the cross motion of plaintiffs Michael J. Stachowski, as guardian of the property of Taquilo Castellanos, and Taquilo Castellanos, for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the cross motion of plaintiffs Michael J. Stachowski, as guardian of the property of Taquilo Castellanos, and Taquilo Castellanos and vacating the declaration, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration that defendant is obligated to defend and indemnify them in the underlying personal injury action arising out of a dog bite. Defendant disclaimed liability under the homeowner's policy issued to plaintiff Taquilo Castellanos (Taquilo) based upon the exclusion for canine-related injuries "caused by any dog . . . owned, harbored, or in ***your*** care . . . when such injury or damage is caused by . . . [a]ny dog that has not had inoculations as required by law." Defendant appeals from a judgment that, inter alia, denied its motion for summary judgment and granted the cross motion of Taquilo and plaintiff Michael J. Stachowski, as guardian of the property of

Taquilo (Stachowski) for summary judgment declaring that defendant is obligated to defend and indemnify Taquilo and Stachowski in the underlying action.

Pursuant to Insurance Law § 3420 (d) (2), defendant was required to provide written notice of its disclaimer "as soon as [was] reasonably possible." Defendant had the burden of establishing the reasonableness of its approximately 12-week delay in providing the notice of disclaimer (*see Nuzzo v Griffin Tech.*, 222 AD2d 184, 189, *lv dismissed* 89 NY2d 981, *lv denied* 91 NY2d 802) and, here, it sought to justify the delay based upon its need for an investigation into issues bearing on its coverage decision (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 69).

"Normally the question whether a notice of disclaimer of liability or denial of coverage has been sent 'as soon as is reasonably possible' is a question of fact which depends on all the facts and circumstances, especially the length of and the reason for the delay . . . It is only in the exceptional case that it may be decided as a matter of law" (*Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1030, *rearg denied* 47 NY2d 951). This is not such an exceptional case. We thus conclude that, while Supreme Court properly denied defendant's motion, it erred in granting the cross motion of Taquilo and Stachowski. Issues of fact remain whether the "delay in disclaiming was reasonably related to [defendant's] performance of a prompt, diligent, thorough, and necessary investigation" into whether the dog had the inoculations required by law, i.e., a rabies vaccination (*Matter of Country-Wide Ins. Co. v Ramirez*, 104 AD3d 850, 851; *see Admiral Ins. Co. v State Farm Fire & Cas. Co.*, 86 AD3d 486, 490). We therefore modify the judgment accordingly.

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

1309
CA 16-00475
PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, AND SCUDDER, JJ.

JEFFREY J. MCKAY AND SANDRA MCKAY,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

JARED WEEDEN, C.T. GATES CONSTRUCTION, INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS,
NOLAN CONSTRUCTION, LLC, NOLAN DRYWALL, LLC,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS-RESPONDENTS.

LAW OFFICES OF JOHN WALLACE, ROCHESTER (JOHN WALKER OF COUNSEL), FOR
DEFENDANT-RESPONDENT-APPELLANT JARED WEEDEN.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW A. LENHARD OF
COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT C.T. GATES CONSTRUCTION,
INC.

GOLDBERG SEGALLA LLP, ROCHESTER (NICHOLAS J. PONTZER OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal and cross appeals from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 4, 2016. The order, among other things, denied the motion of plaintiffs for summary judgment, and granted in part and denied in part the cross motion of defendant Jared Weeden and the motion of defendant C.T. Gates Construction, Inc. for summary judgment.

It is hereby ORDERED that said cross appeal by defendant Jared Weeden from the order insofar as it granted that part of his cross motion seeking dismissal of the Labor Law claims against him is unanimously dismissed, and the order is modified on the law by vacating the sua sponte dismissal of the complaint against defendants Nolan Construction, LLC, and Nolan Drywall, LLC; denying the cross motion of those defendants and reinstating the Labor Law §§ 200 and 240 (1) claims, the common-law negligence cause of action, and the cross claim of defendant C.T. Gates Construction, Inc., against them; denying that part of the motion of defendant C.T. Gates Construction, Inc., with respect to the Labor Law § 240 (1) claim and reinstating that claim against it; granting those parts of plaintiffs' motion seeking partial summary judgment on the issues of liability on the

Labor Law § 240 (1) claim and the violation of 12 NYCRR 23-1.7 (b) (1); granting that part of plaintiffs' motion seeking dismissal of the counterclaims of defendants Nolan Construction, LLC, Nolan Drywall, LLC, and C.T. Gates Construction, Inc., for contractual indemnification; and granting the cross motion of defendant Jared Weeden in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries allegedly sustained by Jeffrey J. McKay (plaintiff) when, while hanging a piece of drywall, he stepped into an unguarded stairwell opening and fell to the concrete basement floor below. Plaintiff was hired by defendants Nolan Construction, LLC, and Nolan Drywall, LLC (collectively, Nolan) to finish drywall in a single-family home owned by defendant Jared Weeden. Weeden contracted with defendant C.T. Gates Construction, Inc. (Gates), to construct the home, and Gates subcontracted with Nolan to complete the drywall work. It is undisputed that railings around the opening in the floor had been removed by someone other than plaintiff. Because the drywall work had been delegated to Nolan by Gates, Nolan "obtain[ed] the concomitant authority to supervise and control that work[,] and [Nolan therefore became] a statutory 'agent' of [Gates]" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318). Furthermore, plaintiff was injured while engaged in an activity delegated to Nolan (*see Burns v Lecesse Constr. Servs., LLC*, 130 AD3d 1429, 1432). We thus conclude that Supreme Court erred in sua sponte dismissing the complaint against Nolan on the ground that Nolan is not a statutory agent for purposes of liability pursuant to Labor Law §§ 200, 240 (1), and 241 (6), and we therefore modify the order accordingly.

We agree with plaintiffs that the court erred in denying that part of their motion seeking partial summary judgment on liability on their Labor Law § 240 (1) claim and in granting, instead, those parts of the motion of Gates and cross motion of Nolan seeking dismissal of that claim against them. We therefore further modify the order by denying those parts of the motion and cross motion, reinstating that claim, and granting that part of plaintiffs' motion. As a preliminary matter, we note that the court relied on our decision in *Riley v Stickl Constr. Co.* (242 AD2d 936) for its determination that a fall from the first floor through an unguarded opening to the basement is not a fall from an elevated worksite within the meaning of section 240 (1). To the extent that *Riley* stands for the proposition that a worker falling from the first floor to the basement is not protected by section 240 (1), that decision is no longer to be followed. Instead, we conclude that, because there was a "difference between the elevation level of the required work and a lower level" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514), and "[b]ecause plaintiff fell through an opening in the floor, [plaintiffs are] entitled to judgment on liability under Labor Law § 240 (1)" (*Russell v Baker Rd. Dev. Inc.*, 278 AD2d 790, 790, *lv dismissed* 96 NY2d 824; *see King v Malone Home Bldrs., Inc.*, 137 AD3d 1646, 1649; *Manns v Norstar Bldg. Corp.*, 12 AD3d 1022, 1023).

We further conclude that the court erred in denying that part of plaintiffs' motion seeking summary judgment on the limited issue whether 12 NYCRR 23-1.7 (b) (1) was violated, and we therefore further modify the order accordingly. That regulation, which is sufficiently specific to support a cause of action under Labor Law § 241 (6) (*see Pitts v Bell Constructors, Inc.*, 81 AD3d 1475, 1476), requires protection from hazardous openings. It is undisputed that the protective railings and the plywood cover had been removed from the stairwell opening and that plaintiff fell through the opening to the floor below. Thus, "it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury. If proven, the general contractor [and the statutory agent are] vicariously liable without regard to . . . fault" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350). With respect to Nolan, we note that "[a] subcontractor . . . will be liable as an agent of the general contractor for injuries sustained in those areas and activities within the scope of the work delegated to it" (*Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 12 AD3d 1059, 1060).

That part of Weeden's cross appeal relating to the Labor Law claims is dismissed inasmuch as he is not aggrieved by that part of the court's order dismissing those claims against him (*see Burns*, 130 AD3d at 1432). We conclude, however, that the court erred in denying that part of Weeden's cross motion seeking to dismiss the common-law negligence cause of action and cross claims against him. Weeden established that plaintiff's injury occurred as a result of the manner and method of the work, that he did not exercise any supervisory control over the work and, thus, that no liability attaches to him (*see Hargrave v LeChase Constr. Servs.*, 115 AD3d 1270, 1271-1272). No party raised an issue of fact sufficient to defeat the cross motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore further modify the order by granting Weeden's cross motion in its entirety.

We reject the contention of Gates on its cross appeal that the court erred in denying that part of its cross motion seeking to dismiss the Labor Law § 200 claim and common-law negligence cause of action against it. "Section 200 of the Labor Law is a codification of the common-law duty imposed upon [a] . . . general contractor to provide construction site workers with a safe place to work. An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury' " (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877). Because there are issues of fact whether Gates's employees removed and/or failed to replace the railings and plywood cover, Gates failed to establish that it satisfied its duty to provide a safe place to work as required by section 200. Even assuming, arguendo, that Gates established that it did not supervise or control plaintiff's work, we conclude that, "[i]nasmuch as plaintiff[s] allege[] that the accident occurred as the result of a dangerous condition on the premises, any issue whether [Gates] supervised or controlled plaintiff's work is irrelevant . . . [Gates], as the part[y] seeking summary judgment dismissing those claims, [was] required to establish as a matter of law that [it] did not exercise

any supervisory control over the general conditions of the premises or that [it] neither created nor had actual or constructive notice of the dangerous condition on the premises" (*Burns*, 130 AD3d at 1434 [internal quotation marks omitted]). Here, Gates failed to establish as a matter of law that it did not create the dangerous condition or that it lacked actual or constructive notice of it.

We reject Gates's further contention that the court erred in denying that part of its cross motion seeking summary judgment on its cross claim against Nolan for common-law indemnification. "[A] party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 376, 377-378). Inasmuch as there are issues of fact with respect to whether Gates complied with its duty pursuant to section 200 and whether it was negligent, summary judgment on the cross claim against Nolan was properly denied (*see Krajnik v Forbes Homes, Inc.*, 120 AD3d 902, 904-905). We nevertheless agree with Gates that the court erred in granting those parts of Nolan's cross motion seeking dismissal of the Labor Law § 200 claim and the common-law negligence cause of action against Nolan, and we therefore further modify the order accordingly. We note that Gates has standing to raise this issue because it asserted a cross claim against Nolan for contribution and common-law indemnification based upon Nolan's alleged culpable conduct (*see Scoville v Town of Amherst*, 277 AD2d 1038, 1039). We conclude that Nolan failed to establish as a matter of law that it did not have the authority to supervise and control plaintiff's work and, thus, it failed to establish that liability cannot be imposed on it under section 200 (*see Finocchi v Live Nation Inc.*, 141 AD3d 1092, 1093-1094). We further conclude that Nolan failed to establish that it lacked actual or constructive notice of the dangerous condition and, thus, that it cannot be held liable for common-law negligence (*see Burns*, 130 AD3d at 1434).

Finally, we agree with plaintiffs that the court erred in denying that part of their motion seeking dismissal of the counterclaims of Gates and Nolan for contractual indemnification, and we therefore further modify the order accordingly. It is undisputed that on September 5, 2007, plaintiff signed a document appearing on letterhead for Nolan Construction, LLC entitled "Indemnification Statement." The indemnification statement provides, inter alia, that he, as a subcontractor, would pay and indemnify the "owner and contractor" against any loss and will hold each of them harmless and pay any "liability or damage . . . , which the owner and general contractor incurred because of injury to . . . any person . . . as a consequence of the performance of the work." Plaintiff, and a representative of Nolan, also signed on the same day a "Sub-Contract Agreement," which provides in relevant part that the agreement "is intended to memorialize certain of the terms and conditions concerning payment and completion of work in connection with certain sub-contract jobs . . . In the event that the [subcontrator] employs any workers, he shall . . . indemnify and hold [Nolan] harmless for any liabilities or claims which may be made by such personnel against [Nolan], or any liabilities or claims which may be made by third parties based on any

acts or omissions of [subcontractor] or such personnel." It is axiomatic that, "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed . . . The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Hooper v AGS Computers*, 74 NY2d 487, 491-492). Indeed, "the language of an indemnity agreement 'should not be extended to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract' " (*Jeanetti v Casler Masonry, Inc.*, 133 AD3d 1339, 1340, quoting *Niagara Frontier Transp. Auth. v Tri-Delta Constr. Corp.*, 107 AD2d 450, 453, *affd* 65 NY2d 1038). We conclude that it is not "clearly implied from the language and purpose of the agreement" that plaintiff agreed to indemnify Gates and Nolan for, inter alia, damages awarded for injuries he sustained as a result of their respective failure to comply with Labor Law §§ 200, 240 (1), and 241 (6), or their negligence (*Hooper*, 74 NY2d at 491-492). We further conclude that damages awarded to plaintiff for injuries he sustained as a result of the culpable conduct of those defendants are not " 'of such character that it is reasonable to infer that they were intended to be covered under the contract' " (*Jeanetti*, 133 AD3d at 1340).

Entered: March 24, 2017 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 12-01359

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUSLAN KONOVALCHUK, DEFENDANT-APPELLANT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUSLAN KONOVALCHUK, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 23, 2012. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (three counts) 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 a jury verdict of three counts of robbery in the second degree (Penal Law § 160.10 [2] [b]) and one count of robbery in the third degree (§ 160.05). Defendant contends that Supreme Court, in sentencing him, improperly penalized him for exercising his right to a jury trial. We reject that contention. " '[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial' " (*People v Chappelle*, 14 AD3d 728, 729, *lv denied* 5 NY3d 786; *see People v Murphy*, 68 AD3d 1730, 1731, *lv denied* 14 NY3d 843). Indeed, " '[g]iven 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). We conclude that "the record shows no retaliation or vindictiveness against the defendant for electing to proceed to trial" (*People v Shaw*, 124 AD2d 686, 686, *lv denied* 69 NY2d 750; *see People v Brown*, 67 AD3d 1427, 1427-1428, *lv denied* 14 NY3d 839). The sentence is not unduly harsh or severe.

We reject the contention of defendant in his pro se supplemental

brief that he was deprived of his right to counsel when the court summarily denied his request for new counsel without conducting any inquiry or giving him an opportunity to state the grounds for the motion. A defendant may be entitled to new assigned counsel "upon showing 'good cause for a substitution,' such as a conflict of interest or other irreconcilable conflict with counsel" (*People v Sides*, 75 NY2d 822, 824). In determining whether good cause exists to substitute counsel, the court should consider "the timing of the defendant's request, its effect on the progress of the case and whether present counsel will likely provide the defendant with meaningful assistance" (*People v Linares*, 2 NY3d 507, 510). Where a defendant makes a "seemingly serious request[]" for new assigned counsel, the court is obligated to "make some minimal inquiry" (*Sides*, 75 NY2d at 824-825; *see People v Porto*, 16 NY3d 93, 99-100). Here, despite the court's initial interruption of defendant while he was stating the reasons for his request for new counsel, defendant thereafter made additional statements, and we conclude that the record establishes that defendant was able to set forth his contention that he was requesting new counsel because his counsel was ineffective. Inasmuch as those stated grounds were wholly without merit, there was no reason for the court to conduct any further inquiry. Defendant made no "specific factual allegations that would indicate a serious conflict with counsel" (*Porto*, 16 NY3d at 100-101) and, indeed, it appeared that the motion was merely a delaying tactic (*see People v Woods*, 110 AD3d 748, 748, *lv denied* 23 NY3d 969).

Contrary to defendant's further contention in his pro se supplemental brief, viewing the evidence in light of the elements of the crime of robbery in the second degree (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those robbery counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although a different verdict would not have been unreasonable, it cannot be said that the jurors failed to give the evidence the weight it should be accorded (*see People v Ettleman*, 109 AD3d 1126, 1128, *lv denied* 22 NY3d 1198).

We reject defendant's remaining contention in his pro se supplemental brief that he received ineffective assistance of counsel. With respect to counsel's failure to object to the court's statement to the prospective jurors at the start of jury selection that defendant was in custody, the record shows that the court immediately followed that statement with an instruction that the prospective jurors were not to hold it against defendant that he was in custody, and the prospective jurors agreed that they would not. In light of that essentially sua sponte curative instruction, we conclude that any objection by defense counsel would have been redundant. With respect to counsel's failure to move to reopen the probable cause hearing after hearing certain testimony at trial, we conclude that such a motion would have been without merit because the trial testimony would not have changed the probable cause determination. It is well settled that "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3

NY3d 702; *see People v Simmons*, 133 AD3d 1275, 1278, *lv denied* 27 NY3d 1006).

Lastly, defendant contends that counsel was ineffective in failing to seek a ruling from the court on that part of defendant's omnibus motion seeking dismissal of the indictment alleging that the grand jury proceedings were defective on the ground that the prosecutor failed to notify the grand jury of defendant's request pursuant to CPL 190.50 (6) to call certain witnesses (*see generally People v Hill*, 5 NY3d 772, 773; *People v Rigby*, 105 AD3d 1383, 1383-1384, *lv denied* 21 NY3d 1019). Defendant failed, however, to provide a sufficient record to enable this Court to review his contention (*see People v Hawkins*, 113 AD3d 1123, 1125, *lv denied* 22 NY3d 1156).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

4
KA 15-01692
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFFORD GRAHAM, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 18, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and as a matter of discretion in the interest of justice and the indictment is dismissed without prejudice to the People to re-present any appropriate charges under counts one and eight of the indictment to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and endangering the welfare of a child (§ 260.10 [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). Because defendant did not renew his motion for a trial order of dismissal after presenting evidence, he failed to preserve for our review his contention that the verdict is not supported by legally sufficient evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention is without merit (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that reversal is required because Supreme Court erred in denying his request for a jury instruction on the defense of temporary innocent possession of the handgun. In order for a defendant to be entitled to such an instruction, "there must be proof in the record showing a legal excuse for having the weapon in [one's] possession as well as facts tending to establish that, once possession [was] obtained, the weapon [was

not] used in a dangerous manner" (*People v Williams*, 50 NY2d 1043, 1045; *see People v Banks*, 76 NY2d 799, 801). Here, there were such facts. Defendant testified that he briefly struggled with a man who threatened him with a gun in front of his wife's residence and, in the struggle, the gun fell to the ground. According to defendant's testimony, after the assailant fled the scene, defendant picked up the gun from the street and immediately handed it to his wife, who then brought it into the home and hid it in the bedroom. The police later discovered the gun, hidden in a women's purse in a bedroom closet, during a search of the home after being dispatched to that location to investigate a domestic violence report. That testimony was not "utterly at odds with [any] claim of innocent possession" (*People v Robinson*, 63 AD3d 1634, 1635, *lv denied* 13 NY3d 799 [internal quotation marks omitted]), and we thus conclude that there were sufficient facts for the jury to conclude that defendant's possession of the gun was temporary and lawful (*see People v Hayes*, 55 AD2d 812, 812; *People v Singleteary*, 54 AD2d 1088, 1088; *see also People v Holes*, 118 AD3d 1466, 1467-1468).

Defendant further contends that reversal is also required on the ground that the integrity of the grand jury proceeding was impaired because the prosecutor failed to instruct the grand jury concerning the defense of temporary innocent possession of a weapon. Although defendant failed to preserve that contention for our review inasmuch as he did not move to dismiss the indictment on that specific ground (*see* CPL 470.05 [2]; *People v Beyor*, 272 AD2d 929, 930, *lv denied* 95 NY2d 832), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We agree with defendant that the integrity of the grand jury proceeding was impaired, and we thus dismiss the two counts of the indictment of which defendant was convicted, without prejudice to the People to re-present any appropriate charges under those counts to another grand jury (*see People v Connolly*, 63 AD3d 1703, 1704-1705). The prosecutor is required to instruct the grand jury on the law with respect to matters before it (*see* CPL 190.25 [6]). If the prosecutor fails to instruct the grand jury on a defense that would eliminate a needless or unfounded prosecution, the proceeding is defective, mandating dismissal of the indictment (*see* CPL 210.35 [5]; *People v Valles*, 62 NY2d 36, 38-39). Under the circumstances of this case, an instruction on the defense of temporary and lawful possession was warranted, and the prosecutor's failure to provide that instruction impaired the integrity of the grand jury proceeding (*see* CPL 210.35 [5]; *People v Grant*, 113 AD3d 875, 876).

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

23
CA 16-01251
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

CHARLES R. FOTHERINGHAM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RIVERSOURCE LIFE INSURANCE CO. OF NEW YORK,
FORMERLY KNOWN AS IDS LIFE INSURANCE OF NEW YORK,
AND AMERIPRISE FINANCIAL SERVICES, INC., FORMERLY
KNOWN AS AMERICAN EXPRESS FINANCIAL ADVISORS, INC.,
DEFENDANTS-RESPONDENTS.

JAMES I. MYERS, PLLC, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (JOANNA J. CHEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered January 25, 2016. The order granted defendants' cross motion to dismiss the complaint.

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

Memorandum: In 1997, plaintiff and his now-deceased wife consulted with an agent and registered representative of defendants Ameriprise Financial Services, Inc., formerly known as American Express Financial Advisors, Inc. (Ameriprise), and Riversource Life Insurance Co. of New York, formerly known as IDS Life Insurance of New York (Riversource), to discuss their investment planning. The agent advised plaintiff and his wife to purchase a variable universal life insurance policy from Riversource (Policy). From 1997 until 2014, the premiums and cost for the Policy rose to the point that the monthly premiums were over $4,000. In 2014, plaintiff terminated the policy, at which time his investment accounts were worth half of the original amount invested with Ameriprise. Plaintiff commenced this action asserting causes of action for, inter alia, fraud, negligence and breach of fiduciary duty. In his complaint, plaintiff alleged that defendants' agent and representative made false and misleading representations about the Policy, made unsuitable recommendations concerning the Policy and violated defendants' duty of care in recommending that plaintiff purchase the Policy.

Fifteen years before this action was commenced, a class action was commenced in Federal District Court in Minnesota based on the

Policy. That action was settled, and the September 18, 2000 Stipulation of Settlement (Settlement), which was incorporated into the May 15, 2001 "Final Order and Judgment Approving Class Action Settlement and Dismissing Complaint" (Judgment), contained a broad waiver and release provision.

Before answering the complaint herein, defendants moved to enforce the Settlement and Judgment in the United States District Court for the District of Minnesota, contending that plaintiff should be enjoined from proceeding with the New York State litigation. Defendants also moved, in Supreme Court, to dismiss the complaint, contending, inter alia, that plaintiff's claims were barred by the express terms of the class action Settlement and Judgment and, alternatively, they sought a stay pending the outcome of the federal enforcement action. Supreme Court granted the alternative relief sought, and stayed the state action. Ultimately, in ruling on defendants' motion "for an order to enforce the settlement and bar the New York action" (enforcement order), the District Court found that plaintiff had received adequate notice of the class action lawsuit and Settlement and that his claims rested on conduct that had occurred during the class period. The District Court further found that plaintiff's claims were, "at the very least, . . . 'based upon, related to, or connected with, directly or indirectly, in whole or in part' the misrepresentations made [during the Class Period]" and that they "did not independently arise out of any circumstances that first occurred after the close of the Class Period." As a result, the District Court granted defendants' motion to enforce the Settlement and enjoin plaintiff's state court action. Plaintiff did not take an appeal from that order or move to reargue in the District Court.

Plaintiff then moved, in Supreme Court, to lift the stay and for leave to amend the complaint, contending that the enforcement order, "if enforced[,] would deny [plaintiff's] due process rights to pursue his remedies in his state of residence." Defendants cross-moved to dismiss the complaint on the ground that plaintiff's claims were barred by the Settlement and Judgment in the class action lawsuit. Supreme Court granted defendants' cross motion, finding that the waiver and release provisions of the class action Settlement and Judgment encompassed all of plaintiff's claims in this matter. We now affirm.

Contrary to plaintiff's contention, the District Court had jurisdiction over plaintiff. Plaintiff was a class member in the class action by virtue of the fact that he was afforded the requisite notice and neither opted out nor sought to be excluded from the Settlement (*see Phillips Petroleum Co. v Shutts*, 472 US 797, 811-812; *Matter of American Express Fin. Advisors Sec. Litig.*, 672 F3d 113, 129), and plaintiff does not allege that the named parties did not adequately represent the absent class (*see generally Phillips Petroleum Co.*, 472 US at 808). Moreover, the Settlement and Judgment in the class action gave the District Court continued jurisdiction over class members as well as "all matters relating to the . . . enforcement and interpretation of the Settlement Agreement and . . . Judgment," including "resol[ution of] any disputes, claims or causes

of action that, in whole or in part, are related to or arise out of the Settlement . . . [and] Judgment (including . . . whether claims or causes of action allegedly related to this case are or are not barred by this . . . Judgment)."

Plaintiff contends that the enforcement order violates the Anti-Injunction Act (28 USC § 2283). We reject that contention. The District Court's enforcement order is necessary "to protect or effectuate" the District Court's class action Judgment (*id.*), and the relitigation exception of the Anti-Injunction Act authorizes the enforcement order in this case because plaintiff's claims were " 'presented to and decided by the federal court' " (*Smith v Bayer Corp.*, 564 US 299, 306). Here, "preclusion is clear beyond peradventure" (*id.* at 307).

Plaintiff further contends that the enforcement order violates the All Writs Act (28 USC § 1651 [a]). We again reject that contention and conclude that the District Court was authorized to issue "all writs necessary or appropriate in aid of [its] respective jurisdiction[]" (*id.*; *see American Express Fin. Advisors Sec. Litig.*, 672 F3d at 141 n 20; *Thompson v Edward D. Jones & Co.*, 992 F2d 187, 189).

Inasmuch as this Court must "give full faith and credit to [the] federal court [enforcement order]" (*Matter of Frontier Ins. Co.*, 27 AD3d 274, 275, *lv denied* 7 NY3d 713; *see Stoll v Gottlieb*, 305 US 165, 170-171, *reh denied* 305 US 675; *Garvin v Garvin*, 302 NY 96, 103), from which no appeal was taken, we conclude that Supreme Court properly granted defendants' cross motion to dismiss the complaint.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

41
CA 16-01215
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

TIMOTHY TAGGART, PLAINTIFF-RESPONDENT,

V — MEMORANDUM AND ORDER

MARGARET FANDEL AND JOHN FANDEL,
DEFENDANTS-APPELLANTS.

BURGIO, KITA, CURVIN & BANKER, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (ANDREW L. BOUGHRUM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered March 21, 2016. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: In this action to recover damages for personal injuries allegedly arising from exposure to lead paint, defendants appeal from an order that, inter alia, granted in part their motion for summary judgment by dismissing certain claims, but denied the motion with respect to three claims, i.e., the premises liability claim arising from allegations that defendants had actual or constructive notice of deteriorating lead paint on the premises, the claim for failure to warn of a hazardous condition, and the claim for failure to inspect the premises to discover deteriorating lead paint. We agree with defendants that Supreme Court erred in denying those parts of the motion, and we therefore reverse the order insofar as appealed from and grant the motion in its entirety.

The law is well settled. With respect to the premises liability claim, "[i]n order for a landlord to be held liable for a lead paint condition, it must be established that the landlord had actual or constructive notice of the hazardous condition and a reasonable opportunity to remedy it, but failed to do so" (*Spain v Holl*, 115 AD3d 1368, 1369; *see generally Chapman v Silber*, 97 NY2d 9, 19-20). A plaintiff can establish that the landlord had constructive notice of a hazardous lead paint condition by showing that the landlord: "(1) retained a right of entry to the premises and assumed a duty to make

repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment" (*Chapman*, 97 NY2d at 15). Therefore, insofar as relevant here, in order "to meet their burden on their motion[] for summary judgment with respect to the premises liability [claim], defendants were required to establish that they 'had no actual or constructive notice of the hazardous lead paint condition prior to an inspection conducted by the [Monroe] County Department of Health [MCDH]' " (*Kimball v Normandeau*, 132 AD3d 1340, 1341; *see Stokely v Wright*, 111 AD3d 1382, 1382)

We agree with defendants that they met their initial burden of establishing that they did not have actual or constructive notice of a hazardous lead paint condition on the premises prior to an inspection conducted by the MCDH (*see Spain*, 115 AD3d at 1369; *Stokely*, 111 AD3d at 1382-1383; *cf. Watson v Priore*, 104 AD3d 1304, 1305-1306, *lv dismissed in part and denied in part* 21 NY3d 1052). Defendants submitted affidavits and deposition testimony establishing that they were not aware of any peeling or chipping paint on the premises prior to the inspection conducted by the MCDH. Defendants also established that neither plaintiff nor the relatives with whom plaintiff resided at the premises ever complained to either defendant of any peeling or chipping paint on the premises. Contrary to plaintiff's contention, he failed to raise an issue of fact whether defendants were aware of chipping and peeling paint on the premises (*see Kimball*, 132 AD3d at 1341; *cf. Davis v Brzostowski*, 133 AD3d 1371, 1372), or whether defendants retained the requisite right of entry to the apartment to sustain a claim for constructive notice (*see Sanders v Patrick*, 94 AD3d 1514, 1515, *lv denied* 19 NY3d 814). Furthermore, "[w]ithout evidence legally sufficient to permit a jury to rationally infer that the defendant had constructive notice of a dangerous condition, the defendant cannot be held liable for failure to warn or to remedy the defect" (*Maguire v Southland Corp.*, 245 AD2d 347, 348; *see generally Ramos v Baker*, 91 AD3d 930, 932). Consequently, absent evidence raising a triable issue of fact whether defendants had actual or constructive notice of a dangerous condition on the premises, the court erred in denying that part of the motion seeking dismissal of the failure to warn claim.

Contrary to plaintiff's further contention, Real Property Law § 235-b does not raise a presumption that defendants had notice of the dangerous condition. "That section provides that, when entering into a lease agreement, the landlord warrants that the premises are habitable; it does not constitute 'controlling legislation' warranting a determination that defendant had notice of the dangerous condition" (*Sykes v Roth*, 101 AD3d 1673, 1674; quoting *Chapman*, 97 NY2d at 15).

We also agree with defendants that the claim alleging failure to inspect the apartment for lead paint must be dismissed. "The Court of Appeals in *Chapman* (97 NY2d at 21) expressly decline[d] to impose a new duty on landlords to test for the existence of lead in leased properties based solely upon the general knowledge of the dangers of

lead-based paints in older homes" (*Sanders*, 94 AD3d at 1516 [internal quotation marks omitted]), and plaintiff here has proposed no other viable basis for the imposition of such a duty.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

55
KA 15-00778
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY J. PETT, DEFENDANT-APPELLANT.

DANIEL M. GRIEBEL, TONAWANDA, FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE 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 Herkimer County Court (Daniel R. King, A.J.), dated April 12, 2015. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of robbery in the second degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, and the matter is remitted to Herkimer County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order of County Court (King, A.J.) denying his CPL article 440 motion to vacate a judgment convicting him, upon his plea of guilty, of robbery in the second degree. Defendant contends that County Court (Kirk, J.) violated his due process rights by accepting his guilty plea without conducting a competency hearing. We agree.

We note at the outset that Judge King did not reach the merits of defendant's motion because he determined that the issue had been decided in a prior CPL article 440 motion (*see* CPL 440.10 [3] [b]) and that, in any event, it could have been raised therein (*see* CPL 440.10 [3] [c]). We conclude that the precise issue raised herein was not raised in a prior motion and, although a court may refuse to consider the issue because it could have been raised in the prior motion but was not, we exercise our discretion to reach the merits (*see People v Hamilton*, 115 AD3d 12, 21).

Upon defense counsel's motion for a CPL article 730 examination based on defendant's lengthy psychiatric history, defendant was examined by two psychiatrists. One psychiatrist found defendant competent to stand trial, but the other found him incompetent to stand trial. Although CPL 730.30 (4) explicitly requires a hearing when the examining psychiatrists report conflicting findings on the issue of

competency, no hearing was held. Instead, Judge Kirk accepted defendant's guilty plea to a reduced charge of robbery in the second degree. During the plea colloquy, defense counsel purported to "withdraw" her request for a competency hearing. Defendant was subsequently sentenced in accordance with the terms of the plea agreement.

"Article 730 of the Criminal Procedure Law sets out the procedures courts of this State must follow in order to prevent the criminal trial of [an incompetent] defendant" (*People v Tortorici*, 92 NY2d 757, 759, *cert denied* 528 US 834). The CPL expressly provides that, "[w]hen the examination reports submitted to the court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person, . . . the court *must* conduct a hearing to determine the issue of capacity" (CPL 730.30 [4] [emphasis added]; *see People v Meurer*, 184 AD2d 1067, 1068, *lv dismissed* 80 NY2d 835, *lv denied* 80 NY2d 907). "That section is mandatory and not discretionary" (*People v McCabe*, 87 AD2d 852, 852), and a plea of guilty cannot be accepted unless the requisite hearing is held and the defendant is found competent (*see People v Armlin*, 37 NY2d 167, 172). Thus, we conclude that Judge Kirk erred in failing to conduct a competency hearing before accepting defendant's plea of guilty (*see e.g. Meurer*, 184 AD2d at 1067-1068; *People v O'Reilly*, 125 AD2d 979, 980; *McCabe*, 87 AD2d at 852-853).

A reconstruction hearing generally is the proper remedy for the violation of CPL article 730, but "we are unable to determine on the record before us whether a meaningful reconstruction hearing is feasible" (*People v Greene*, 38 AD3d 1338, 1339, *lv dismissed* 11 NY3d 788). Under the circumstances of this case, we reverse the order denying defendant's motion, rather than holding the case and reserving decision as in *Greene*. As in *Greene*, however, we "remit the matter to County Court for a hearing . . . to determine whether sufficient evidence may be developed to reconstruct defendant's mental capacity at the time of [the plea] and, if so, to determine whether defendant was competent" (*id.*). If, on remittal, it is feasible to conduct a reconstruction hearing concerning defendant's competency at the time of the plea in 2008, and if the People meet their burden at the reconstruction hearing of establishing defendant's competency at the time of the plea by a preponderance of the evidence (*see generally People v Mendez*, 1 NY3d 15, 19-20), then defendant's instant motion should be denied. If, however, the People fail to meet their burden of establishing defendant's competency at the time of the plea, or if it is not feasible to conduct a reconstruction hearing, then defendant's instant motion should be granted, the judgment and guilty plea should be vacated and further proceedings on the indictment should be conducted (*see e.g. People v Galea*, 54 AD3d 686, 688, *lv denied* 11 NY3d 854; *People v Hasenflue*, 48 AD3d 888, 889-891, *lv denied* 11 NY3d 789).

In view of our determination, we do not address defendant's

remaining contentions.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

58

CAF 15-02170

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

IN THE MATTER OF JAMES P., JR., ALSO KNOWN AS JUSTUS H.

MEMORANDUM AND ORDER

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

TIFFANY H., RESPONDENT-APPELLANT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

ANTHONY P. BELLETIER, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered December 10, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Memorandum: In this permanent neglect proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child. Initially, we note that "where, as here, a parent admits to permanent neglect, there is no need for [petitioner] to put forth evidence establishing—nor is it necessary for the court to determine—that [petitioner] had exercised diligent efforts to strengthen the parental relationship" (*Matter of Aidan D.*, 58 AD3d 906, 908; *see Matter of Eleydie R. [Maria R.]*, 77 AD3d 1423, 1424).

Contrary to the mother's contention, Family Court did not abuse its discretion in limiting the evidence concerning whether the subject child's foster parents were qualified to adopt him. The court permitted certain questioning concerning the suitability of the foster parents to adopt the subject child, and there is clear and convincing evidence supporting its determination that it was in the child's best interests to terminate the mother's parental rights and free him for adoption. Consequently, the court did not abuse its discretion in limiting any further evidence regarding the foster parents at the

hearing. Indeed, "it must be emphasized that termination of parental rights does not hinge upon a comparison of the relative benefits offered a child by his [biological] family to those offered by the foster family" (*Matter of Leon RR*, 48 NY2d 117, 124). In any event, "the ultimate purpose of the dispositional inquiry was not to determine whether the [child was] in the best possible foster placement—a determination statutorily entrusted to petitioner—but to decide whether [his] best interests required termination of the mother's parental rights" (*Matter of Michael JJ. [Gerald JJ.]*, 101 AD3d 1288, 1293, *lv denied* 20 NY3d 860). Here, "[g]iven the evidence that the [child's] progress in the foster home was satisfactory, and the lack of any evidence that the mother was capable of offering [him] a safe home, the court's determination to commit the [child's] guardianship and custody to petitioner was in [his] best interests" (*id.*).

Contrary to the mother's further contention, the court did not abuse its discretion in declining to grant a suspended judgment. It is well settled that a suspended judgment "is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311; *see* Family Ct Act § 633). The record establishes that the mother made "only minimal progress in addressing the issues that resulted in the [child's] removal from her custody, which was not sufficient to warrant any further prolongation of the [child's] unsettled familial status" (*Matter of Alexus R.L. [Ashley K.]*, 140 AD3d 1699, 1700 [internal quotation marks omitted]).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

64
CA 16-00907
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

AUBURN CUSTOM MILLWORK, INC.,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

SCHMIDT & SCHMIDT, INC.,
DEFENDANT-APPELLANT-RESPONDENT.

FOX & KOWALEWSKI, LLP, CLIFTON PARK (LAURENCE I. FOX OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Matthew A. Rosenbaum, J.), entered February 25, 2016. The order, among other things, denied in part plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's motion in its entirety and vacating the award of damages, and as modified the order is affirmed without costs.

Memorandum: Defendant, a general contractor, entered into a contract with the Town of Charlton (Town) in August 2006 for the construction of a town hall building. The architect hired by the Town prepared detailed specifications for the project. Plaintiff, a manufacturer of architectural millwork, submitted a quote to defendant for the fabrication and delivery of custom millwork for the project. Defendant's president, Walter Schmidt, issued an initial purchase order agreeing to the quoted price and setting forth certain conditions, including the requirement that plaintiff forward "submittals" of its product data and shop drawings. Upon the request of plaintiff's owner and president, Christopher J. Colella, Schmidt subsequently issued a revised purchase order that removed a condition of the agreement that had purported to make the purchase order itself pending architect approval of the submittals, and replaced that condition with a different requirement. Plaintiff produced and delivered certain millwork, and then sent a first invoice to defendant in June 2007, which defendant paid. Plaintiff also produced and shipped custom millwork identified in a second invoice, which was issued in August 2007. In the meantime, apparently as a result of

contentious relations between defendant and the Town and its architect, including difficulties in obtaining approved submittals, the Town terminated defendant's contract for cause in September 2007. Defendant's surety was called upon to facilitate completion of the project pursuant to defendant's public improvement performance bond. Thereafter, plaintiff's then-manager of accounts payable and receivable followed up with Schmidt by email in early October 2007 about the second invoice being unpaid and the fact that plaintiff had other completed material stored at its facility ready for the project. Schmidt replied the following day, requesting that plaintiff forward an itemized bill reflecting materials delivered and costs incurred to date for review by the bonding company. Plaintiff subsequently sent defendant a third invoice in October 2007. The remaining millwork identified in the third invoice was stored at plaintiff's offices pending defendant's request that it be shipped to the project.

Plaintiff subsequently commenced this action for breach of contract, unjust enrichment and an account stated, seeking to recover the amount of the unpaid second and third invoices plus interest and attorneys' fees. Supreme Court, among other things, granted that part of plaintiff's motion for summary judgment on the breach of contract cause of action and awarded plaintiff damages, denied that part of plaintiff's motion seeking summary judgment on the account stated cause of action, and denied defendant's cross motion for summary judgment dismissing the complaint. Defendant appeals, and plaintiff cross-appeals.

On its appeal, defendant contends that the court erred in granting plaintiff's motion in part inasmuch as there are triable issues of fact with respect to the breach of contract cause of action. We agree. "It is well settled that the elements of a breach of contract cause of action are 'the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages' " (*Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376, *lv denied* 22 NY3d 864). It is undisputed that the revised purchase order constituted the contract between the parties. The parties dispute, however, whether the revised purchase order required that plaintiff comply with the procedure for obtaining architect approval of its submittals as set forth in the specifications and, if so, whether plaintiff performed its contractual obligations.

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569). "Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous" (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278; *see Greenfield*, 98 NY2d at 569). "The proper inquiry in determining whether a contract is ambiguous is whether the agreement on its face is reasonably susceptible of more than one interpretation[,] . . . [and a] party seeking summary judgment has the burden of establishing that the construction it favors is the only construction which can

fairly be placed thereon" (*Kibler v Gillard Constr., Inc.*, 53 AD3d 1040, 1042 [internal quotation marks omitted]).

Here, plaintiff failed to meet that burden. In relevant part, the initial purchase order issued by defendant following plaintiff's quote required as the first condition that "Submittals . . . include (6) copies" of "Product Data" and "Shop Drawings"; specified in the second condition that the purchase order would be "pending architect approved submittals"; and requested in the sixth condition that submittals be forwarded at plaintiff's first opportunity. Plaintiff thereafter requested a change to the language on the ground that the purchase order itself could not be made contingent on the architect's approval of submittals because the parties would be under a binding agreement once plaintiff started shop drawings. In response, defendant issued the revised purchase order that retained the other conditions, but replaced the challenged language in the second condition with the requirement that "[a]ll work . . . comply with drawings and specifications." Thus, on its face, the revised purchase order contemplated that plaintiff, as part of its contractual obligations, would be required to forward submittals; however, it did not provide any definite or precise language regarding the nature of the submittal procedure or the requirements thereof.

Plaintiff contends that the only fair construction of the contract is that it merely required that plaintiff's work product comply with the specifications, but did not require plaintiff's compliance with the administrative procedures contained therein, i.e., formal architect approval. We conclude, however, that the contract terms are ambiguous because there is a reasonable basis for a difference of opinion whether the revised purchase order, which required that plaintiff make submittals that included its shop drawings, also required that plaintiff comply with the requirements for obtaining architect approval of that work as set forth more fully in the specifications referenced in the second condition of the revised purchase order (*see generally Greenfield*, 98 NY2d at 570-571). We further conclude that the contractual terms, coupled with the extrinsic evidence of the parties' intent—which included Colella's deposition testimony indicating plaintiff's possession of the specifications and understanding of their requirements, Colella's assurance to Schmidt that plaintiff would go through the submittal procedure to obtain architect approval, and the parties' discussion of plaintiff's compliance with the submittal procedure during performance of the contract—establish that the revised purchase order required that plaintiff obtain approved shop drawings from the architect in accordance with the specifications.

Plaintiff nonetheless contends that the architect approval requirement of the submittal procedure contained in the specifications of the prime contract between defendant and the Town cannot be incorporated into the revised purchase order, and thus cannot be binding upon it. We reject that contention. " '[A] reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified' " (*Hayward Baker, Inc. v C.O. Falter Constr. Corp.*, 104 AD3d 1253,

1254). Thus, "[u]nder New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244). Contrary to plaintiff's contention, we conclude that the architect approval provisions of the specifications related to the scope, quality, character and manner of plaintiff's millwork inasmuch as compliance with those provisions was the method by which the parties ensured that the quality and character of the work met the requirements of the project.

Having established that the revised purchase order required that plaintiff obtain architect approval through the submittal procedure, defendant contends that summary judgment on the breach of contract cause of action is inappropriate because there is a triable issue of fact whether plaintiff fulfilled its contractual obligations. We agree. Plaintiff's own submissions, which included both Colella's affidavit indicating that plaintiff had produced "approved" millwork and Schmidt's deposition testimony to the contrary, raised triable issues of fact regarding whether it had performed in compliance with the contract (*see Micro-Link, LLC v Town of Amherst*, 109 AD3d 1130, 1131; *Andrews, Pusateri, Brandt, Shoemaker & Roberson, P.C. v County of Niagara*, 91 AD3d 1287, 1287-1288; *Schenectady Air Sys. v Campito Plumbing & Heating*, 84 AD2d 863, 864). Even assuming, arguendo, that plaintiff met its initial burden, we conclude that defendant raised a triable issue of fact in opposition to plaintiff's motion by submitting Schmidt's affidavit and his email exchange with one of plaintiff's representatives. Those submissions indicated, among other things, that plaintiff had failed to obtain submittals with the requisite architect approval and that, consequently, the architect had refused to recommend payment and the Town refused to pay defendant for the material furnished by plaintiff (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Nonetheless, relying primarily upon defendant's submissions in opposition, plaintiff contends, in essence, that the record establishes that defendant waived the contractual requirement that the millwork be approved pursuant to the specifications because plaintiff had obtained verbal approval from the project architect to which defendant failed to object. We reject that contention. Although "[c]ontractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned," and "[s]uch abandonment 'may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage,' " a waiver " 'should not be lightly presumed' and must be based on 'a clear manifestation of intent' to relinquish a contractual protection" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104). "Generally, the existence of an intent to forgo such a right is a question of fact" (*id.*).

Here, we conclude that the submissions—including Schmidt's deposition testimony regarding the apprehensions he expressed to

plaintiff about proceeding without architect approval, the email exchange with plaintiff’s representative regarding plaintiff’s failure to obtain such approvals, and Schmidt’s affidavit regarding his hope that plaintiff would comply despite defendant’s payment of the first invoice and his admonishment to plaintiff that the architect would not authorize payment for materials that it was treating as nonconforming and unacceptable for the project—do not demonstrate, as a matter of law, that defendant and its architect intended to waive the formal, written architect approval requirement of the contract (*see G. De Vincentis & Son Constr. v City of Oneonta*, 304 AD2d 1006, 1008-1009; *Engineered Air, Div. of Thermal Components v LeCesse Bros. Contr.*, 149 AD2d 951, 951; *cf. McFadyen Consulting Group, Inc. v Puritan’s Pride, Inc.*, 87 AD3d 620, 621-622). We similarly conclude that, contrary to plaintiff’s contention, it failed to eliminate all triable issues of fact with respect to defendant’s alleged liability pursuant to provisions of the Uniform Commercial Code (*see generally Hooper Handling v Jonmark Corp.*, 267 AD2d 1075, 1075-1076).

Although plaintiff submitted evidence that defendant sought and may have recovered some portion of the value of plaintiff’s millwork in defendant’s separate lawsuit against the Town, the record evidence in that regard does not entitle plaintiff to summary judgment as a matter of law on the breach of contract cause of action. We note that there was a postverdict lump sum settlement in that lawsuit; thus, the evidence submitted by plaintiff indicating that the jury awarded defendant the sum of the first and second invoices provides only limited proof that defendant is in possession of funds rightfully belonging to plaintiff and such proof, in any event, would be relevant to the unjust enrichment cause of action that was not the subject of the motions below and is not addressed on appeal (*see generally Hayward Baker, Inc.*, 104 AD3d at 1255). In addition, to the extent that the evidence from defendant’s lawsuit against the Town supports the proposition that defendant considered plaintiff’s millwork compliant, that evidence merely raises an issue of fact in view of the conflicting evidence in the record (*see generally Zuckerman*, 49 NY2d at 562). We thus conclude that the court erred in granting that part of plaintiff’s motion for summary judgment on the breach of contract cause of action and awarding plaintiff damages, and we modify the order accordingly.

On its cross appeal, plaintiff contends that the court erred in denying that part of its motion for summary judgment on the account stated cause of action. We reject that contention. “ ‘An account stated represents an agreement between the parties reflecting an amount due on a prior transaction . . . An essential element of an account stated is an agreement with respect to the amount of the balance due’ ” (*Seneca Pipe & Paving Co., Inc. v South Seneca Cent. Sch. Dist.*, 83 AD3d 1540, 1541; *see Micro-Link, LLC*, 109 AD3d at 1131). “[W]hile the mere silence and failure to object to an account stated cannot be construed as an agreement to the correctness of the account, the factual situation attending the particular transactions may be such that, in the absence of an objection made within a reasonable time, an implied account stated may be found” (*Interman

Indus. Prods. v R. S. M. Electron Power, 37 NY2d 151, 154; *see Schwerzmann & Wise, P.C. v Town of Hounsfield* [appeal No. 2], 126 AD3d 1483, 1484). " 'Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible' " (*Schwerzmann & Wise, P.C.*, 126 AD3d at 1484).

Here, we conclude that plaintiff met its initial burden by establishing that it contracted with defendant to provide millwork for the project, that the relevant invoices were sent to and received by defendant, and that defendant neither paid the second and third invoices nor objected to them (*see Chianis & Anderson Architects, PLLC v Courterback Dev. Co., LLC*, 140 AD3d 1286, 1288, *lv denied in part and dismissed in part* 28 NY3d 1021). However, viewing the evidence in the light most favorable to defendant as the nonmoving party (*see generally Esposito v Wright*, 28 AD3d 1142, 1143), we conclude that defendant's submissions are sufficient to raise an issue of fact. In particular, Schmidt's affidavit raises an issue of fact whether there was a dispute between the parties regarding plaintiff's compliance with the contract that would preclude payment of the balance owed under the second and third invoices, i.e., a dispute over the amounts due (*see generally Chianis & Anderson Architects, PLLC*, 140 AD3d at 1288-1289; *Micro-Link, LLC*, 109 AD3d at 1131; *Construction & Mar. Equip. Co. v Crimmins Contr. Co.*, 195 AD2d 535, 535). While bald, self-serving assertions of oral objections are insufficient to raise an issue of fact (*see Darby & Darby v VSI Intl.*, 95 NY2d 308, 315), Schmidt's affidavit was corroborated, at least in part, by contemporaneous documentation in the form of the email exchange in which he expressed to plaintiff's representative that plaintiff had not obtained approved submittals for any work that it had been providing (*see generally Chianis & Anderson Architects, PLLC*, 140 AD3d at 1289). Moreover, while Schmidt may not have specifically recalled objecting to or approving the second and third invoices, we conclude that acquiescence to the account on those invoices cannot be implied from that silence given the plausible explanation that no payment would be made on fabricated millwork that lacked shop drawings approved by the architect, and that fact was or should have been evident to plaintiff (*see id.*). We thus conclude that the record does not establish that the only rational inference to be drawn from defendant's retention of the second and third invoices was its agreement to pay them (*see generally Schwerzmann & Wise, P.C.*, 126 AD3d at 1484-1485).

In light of our determination, we do not address plaintiff's remaining contention on its cross appeal.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

66
CA 16-01200
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND CURRAN, JJ.

IN THE MATTER OF CITIZEN REVIEW BOARD OF THE
CITY OF SYRACUSE, PETITIONER-PLAINTIFF-RESPONDENT,

V   OPINION AND ORDER

SYRACUSE POLICE DEPARTMENT, FRANK L. FOWLER,
AS CHIEF OF POLICE AND CITY OF SYRACUSE,
RESPONDENTS-DEFENDANTS-APPELLANTS.

ROBERT P. STAMEY, CORPORATION COUNSEL, SYRACUSE (JOHN A. SICKINGER OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (HARRISON V. WILLIAMS, JR., OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Spencer J. Ludington, A.J.), entered April 29, 2016 in a CPLR article 78 proceeding and declaratory judgment action. The order denied the motion of respondents-defendants to dismiss the petition/complaint.

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

Opinion by CURRAN, J.:

Respondents-defendants (respondents) appeal from an order denying their motion to dismiss this hybrid CPLR article 78 proceeding and declaratory judgment action on the grounds of lack of capacity and standing. We conclude that the order should be affirmed.

I. Background

In 2011, the Common Council of the City of Syracuse (Common Council) amended Local Law 11 of 1993 (ordinance), which had previously established petitioner-plaintiff, Citizen Review Board of the City of Syracuse (CRB). The purpose of the ordinance was "[t]o establish an open citizen-controlled process for reviewing grievances involving members of the Syracuse Police Department and provide a non-exclusive alternative to civil litigation." The ordinance further states that, "[i]n order to insure public accountability over the powers exercised by members of the Syracuse Police Department while preserving the integrity of the agency that employs them, citizen complaints regarding members of the Syracuse Police Department shall

be heard and reviewed fairly and impartially by the review board."

The CRB consists of 11 members, who "shall be residents of the City of Syracuse and should aspire to reflect the City's diverse community with respect to age, disability, ethnicity, gender, geography, language, race, religion and sexual orientation," and is independent of the Syracuse Police Department. The ordinance provides that the CRB "shall hear, investigate and review complaints and recommend action regarding police misconduct," and also may make recommendations with respect to changes in police policies and procedures.

Pursuant to the ordinance, "[w]ithin 60 days of the receipt of a complaint, the CRB shall complete its investigation, determine whether there is reasonable cause to proceed to a hearing, conduct a hearing, and issue its findings and recommendations to the Chief [of Police] and the Corporation Counsel." The ordinance further provides that, "[w]ithin thirty (30) days of the receipt of a recommendation from a hearing panel, the Chief of Police shall advise the [CRB] in writing as to what type of actions or sanctions were imposed, and the reasons if none were imposed." The CRB administrator also must regularly publish reports that document, among other things, the total number and type of complaints, the number of cases involving recommendation for sanctions, the number of cases where sanctions were imposed, the number of cases reviewed by the full CRB, the length of time each case was pending before the CRB, and the number of complainants who filed a notice of claim against the City of Syracuse while their complaints were being considered by the CRB.

In furtherance of the CRB's duties, the ordinance provides that the CRB, "by majority vote of its members, may authorize the issuance of a subpoena" and that "[CRB] subpoenas are enforceable pursuant to relevant provisions of Article 23 of the [CPLR]." The CRB also is authorized, in the event of a conflict with the Corporation Counsel, to seek and retain independent legal counsel.

On October 28, 2015, in response to four CRB findings sent to the Chief of Police, the Chief of Police notified the CRB administrator via a letter that, because he "did not receive findings from the [CRB] within the sixty (60) days allotted by Local Law 11, Section 7, Sub 3a," the Syracuse Police Department "was forced to proceed without recommendations from the [CRB]" in those four matters. The Chief of Police also refused to "advise the board in writing as to what type of actions or sanctions were imposed, and the reasons if none were imposed," as required by the ordinance.

On February 5, 2016, the CRB commenced this hybrid CPLR article 78 proceeding/declaratory judgment action seeking, inter alia, a judgment directing the Chief of Police to comply with the ordinance by advising the CRB in writing as to what type of sanctions or actions were imposed against the officers and the reasons if none were imposed.

On March 9, 2016, respondents moved to dismiss the

petition/complaint (petition) pursuant to CPLR 3211 and 7804 (f), arguing, among other things, that the CRB lacked capacity and standing to institute the proceeding/action. Supreme Court granted that part of the motion in which respondents contended that the City of Syracuse was not a proper party to the CRB's request for declaratory relief, and otherwise denied the motion, and respondents appeal.

The matters raised in this appeal are issues of first impression in this Department, and we conclude that the CRB has both the capacity and standing to institute this proceeding/action for the relief sought in the petition in furtherance of its independent duties under the ordinance (*see Matter of Green v Safir*, 174 Misc 2d 400, 405-406, *affd* 255 AD2d 107, *lv denied* 93 NY2d 882).

II. The CRB's Legal Capacity to Sue

We first address respondents' contention that the CRB lacks legal capacity to sue. As the Court of Appeals noted in *Community Bd. 7 of Borough of Manhattan v Schaffer* (84 NY2d 148, 155-156), "[g]overnmental entities created by legislative enactment present . . . capacity problems. Being artificial creatures of statute, such entities have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate." However, "[a]n express grant of authority is not always necessary . . . Rather, capacity may be inferred as a necessary implication from the powers and responsibilities of a governmental entity" (*Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.*, 5 NY3d 36, 42), "provided, of course, that 'there is no clear legislative intent negating review' " (*Community Bd. 7 of Borough of Manhattan*, 84 NY2d at 156; *see Matter of New York State Bd. of Examiners of Sex Offenders v Ransom*, 249 AD2d 891, 891).

Here, pursuant to the plain language of the ordinance, the CRB is entitled to the response from the Chief of Police required by section seven (3) (g) of the ordinance in furtherance of its independent duties thereunder (*see Green*, 255 AD2d at 107-108). Like the Public Advocate in *Green*, the CRB is charged in the ordinance with determining the effectiveness of the police department's responses to civilian complaints and ascertaining whether the police department's "failure to prosecute and/or impose discipline against misbehaving officers is indicative of systemic problems in the response to complaints" (*Green*, 174 Misc 2d at 402). Thus, in light of the CRB's mandate and obligation to handle grievances filed by citizens against police officers, it is squarely within the CRB's "zone of interest" to take action to obtain compliance with the ordinance. Further, pursuant to the ordinance, the CRB has both subpoena power, including the authority to enforce those subpoenas in court, and the power to retain independent counsel. Such factors, together with a lack of legislative intent that negates review, provide a clear indication of an implied power to sue (*see Saratoga Lake Protection & Improvement Dist. v Department of Pub. Works of City of Saratoga Springs,* 11 Misc 3d 780, 782-785, *mod on other grounds* 46 AD3d 979, *lv denied* 10 NY3d 706; *cf. Community Bd. 7 of Borough of Manhattan*, 84 NY2d at 157-158).

Moreover, without the required response letters from the Chief of Police, the CRB cannot publicly report the number of cases where sanctions were imposed as required by the ordinance, thereby depriving the CRB and the public of the ability to assess the disciplinary practices of the Chief of Police as intended by the ordinance (*see generally Community Bd. 7 of Borough of Manhattan*, 84 NY2d at 156; *Matter of City of New York v City Civ. Serv. Commn.,* 60 NY2d 436, 444-445, *rearg denied* 61 NY2d 759).

III. The CRB’s Standing

We turn next to the issue of standing. It is well settled that

> “[s]tanding is an element of the larger question of justiciability . . . The various tests that have been devised to determine standing are designed to ensure that the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast[] the dispute in a form traditionally capable of judicial resolution . . . Often informed by considerations of public policy . . . , the standing analysis is, at its foundation, aimed at advancing the judiciary’s self-imposed policy of restraint, which precludes the issuance of advisory opinions” (*Community Bd. 7 of Borough of Manhattan*, 84 NY2d at 154-155 [internal quotation marks omitted]).

Thus, in order to establish standing, the CRB “must show injury in fact, meaning that [the CRB] will actually be harmed by the challenged . . . action. As the term itself implies, the injury must be more than conjectural. Second, the injury [the CRB] asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted” (*Matter of Graziano v County of Albany*, 3 NY3d 475, 479 [internal quotation marks omitted]).

Here, the CRB’s enabling legislation provides that it was formed to “establish an open citizen-controlled process for reviewing grievances involving members of the Syracuse Police Department” and that “citizen complaints regarding members of the Syracuse Police Department shall be heard and reviewed fairly and impartially by the review board.” Further, the CRB is required by the ordinance to report and publish the number of cases in which sanctions were imposed. Inasmuch as the CRB cannot perform its legislative mandate without the Chief of Police’s compliance with the corresponding legislative mandate that he “advise the [CRB] in writing as to what type of actions or sanctions were imposed, and the reasons if none were imposed,” we conclude that the CRB has sustained a sufficiently particularized injury that falls squarely within the zone of interests set forth in the ordinance (*see Saratoga Lake Protection & Improvement Dist.*, 46 AD3d at 981-982).

IV. Conclusion

Accordingly, we conclude that the CRB has both the capacity and standing to institute this proceeding/action seeking, inter alia, to compel the Chief of Police to comply with the legislative mandate at issue, and the order therefore should be affirmed.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

69

KA 16-01106

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DIJON BROWN, DEFENDANT-APPELLANT.

JEREMY D. SCHWARTZ, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered July 2, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and unlawful possession of marihuana (§ 221.05). The charges arose from the seizure of evidence following the stop of the vehicle in which defendant was a passenger. At a suppression hearing, police officers testified that they stopped the vehicle after observing its driver violate Vehicle and Traffic Law § 1144-a (a), which requires every operator of a motor vehicle to "exercise due care to avoid colliding with" a stopped emergency vehicle that is "displaying" its emergency lights.

We reject defendant's contention that County Court erred in reopening the suppression hearing to receive additional testimony to clarify which lights on the police vehicle were illuminated when it was passed by the vehicle in which defendant was riding. Where, as here, the court has not yet rendered its decision on the suppression motion, it is within the court's discretion to reopen the hearing to receive such evidence (*see People v Binion*, 100 AD3d 1514, 1516, *lv denied* 21 NY3d 911; *People v Ramirez*, 44 AD3d 442, 443, *lv denied* 9 NY3d 1008). We note in any event that defendant was not prejudiced by the additional testimony inasmuch as the initial testimony of the officers was sufficient to establish that the overhead emergency lights on the police vehicle were activated. We further conclude that the evidence at the suppression hearing supports the court's determination that the officers acquired "probable cause to believe

that a traffic violation ha[d] occurred," thereby justifying the stop of the vehicle (*Whren v United States*, 517 US 806, 810; *see People v Robinson*, 97 NY2d 341, 349).

Finally, we conclude that defendant's challenge to the constitutionality of Vehicle and Traffic Law § 1144-a is not properly before us because defendant failed to give the requisite notice to the Attorney General (*see* Executive Law § 71 [3]; *People v Hibbert*, 114 AD3d 1134, 1134, *lv denied* 23 NY3d 963; *People v Davis*, 68 AD3d 1653, 1654, *lv denied* 14 NY3d 839).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

70

KA 14-01695

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN VICKERS, ALSO KNOWN AS SEAN M. VICKERS, ALSO KNOWN AS SEAN MICHAEL VICKERS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 11, 2014. The judgment convicted defendant, upon a jury verdict, of sodomy in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and the amended indictment is dismissed without prejudice to the People to re-present any appropriate charges to another grand jury.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial of sodomy in the first degree (Penal Law former § 130.50 [4]). In appeal No. 2, defendant appeals from a judgment convicting him following the same jury trial of sodomy in the first degree (former § 130.50 [4]), two counts of criminal sexual act in the first degree (§ 130.50 [4]), and sexual abuse in the first degree (§ 130.65 [3]).

The convictions arise from two indictments based upon allegations that defendant sexually assaulted or abused five underage victims. The first indictment, which is the subject of appeal No. 1, charged defendant with course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]). The second indictment, which is the subject of appeal No. 2, charged defendant with, inter alia, course of sexual conduct against a child in the first degree (§ 130.75 [1] [b]) (count one); two counts of predatory sexual assault against a child on the ground that he committed a course of sexual conduct against a child in the first degree (§§ 130.75 [1] [b]; 130.96) (counts two and six); and sexual abuse in the first degree (§ 130.65 [3]) (count 10).

Before trial, County Court granted the People's motion to consolidate the indictments and denied defendant's cross motion to sever count one from the second indictment. After the close of proof, the court granted the People's motion to amend the indictments so that the two counts of course of sexual conduct against a child in the first degree, as charged in the first indictment and count one of the second indictment, were replaced with two counts of sodomy in the first degree (Penal Law former § 130.50 [4]), and the two counts of predatory sexual assault against a child, as charged in counts two and six of the second indictment, were replaced with two counts of criminal sexual act in the first degree (§ 130.50 [4]).

Viewing the evidence in light of the elements of the crimes in appeal Nos. 1 and 2 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 court erred in granting the People's motion to consolidate the indictments. The offenses charged therein were the "same or similar in law" (CPL 200.20 [2] [c]), and defendant failed to demonstrate prejudice resulting from the consolidation (*see People v Davey*, 134 AD3d 1448, 1451; *People v Molyneaux*, 49 AD3d 1220, 1221, *lv denied* 10 NY3d 937). Contrary to defendant's further contention, the court did not abuse its discretion in denying his motion to sever count one from the second indictment, inasmuch as defendant failed to demonstrate the requisite good cause for a discretionary severance under CPL 200.20 (3) (*see People v Keegan*, 133 AD3d 1313, 1314, *lv denied* 27 NY3d 1152; *see generally People v McKinnon*, 15 AD3d 842, 843, *lv denied* 4 NY3d 888).

Defendant contends that he was denied effective assistance of counsel based on his attorney's prior representation of two prosecution witnesses. We reject that contention. The court was apprised of the potential conflict of interest and thus had a duty to "inquire[] of defendant to ascertain, on the record, whether he had an awareness of the potential risks involved in his continued representation by the attorney and had knowingly chosen to continue such representation" (*People v Lombardo*, 61 NY2d 97, 102; *see People v McCutcheon*, 109 AD3d 1086, 1087, *lv denied* 22 NY3d 1042). Although the court erred in failing to conduct such an inquiry, we nonetheless conclude that defendant was not denied effective assistance of counsel inasmuch as he failed to demonstrate that "the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation" (*People v Ortiz*, 76 NY2d 652, 657 [internal quotation marks omitted]; *see McCutcheon*, 109 AD3d at 1087). Contrary to defendant's further contention that he was denied effective assistance of counsel based on his attorney's constitutionally inadequate performance, we conclude that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

We agree with defendant, however, that the court erred in granting the People's motion to amend the indictments at the close of

proof. The fact that defendant consented to the amendments is of no moment because he has " 'a fundamental and nonwaivable right to be tried only on the crimes charged' " (*People v Graves*, 136 AD3d 1347, 1348, *lv denied* 27 NY3d 1069; *see People v Powell*, 153 AD2d 54, 58, *lv denied* 75 NY2d 969). "An indictment may not be amended in any respect which changes the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed it" (CPL 200.70 [2]; *see People v Grega*, 72 NY2d 489, 495-496). Unlike the crimes charged in the amended indictments, the crimes of course of sexual conduct against a child in the first degree and predatory sexual assault against a child based upon allegations that defendant committed a course of sexual conduct against a child in the first degree as charged in the initial indictments do not criminalize a specific act, and thus do not require jury unanimity with respect to a specific act (*see People v Calloway*, 176 Misc 2d 161, 165-166; *see generally People v Pabon*, 28 NY3d 147, 154). For that reason, we conclude that the amendments of the indictments "resulted in an impermissible substantive change in the indictment[s] by adding new counts that changed the theory of the prosecution" (*People v Green*, 250 AD2d 143, 145, *lv denied* 93 NY2d 873; *see generally People v Baker*, 123 AD3d 1378, 1380-1381). We therefore reverse the judgments insofar as they convicted defendant on those counts, and dismiss those counts of the amended indictments without prejudice to the People to re-present any appropriate charges under those counts to another grand jury.

In light of our determination, we address defendant's challenge to the severity of the sentence only insofar as it concerns count 10 of the amended indictment in appeal No. 2 and conclude that the sentence with respect to that count is not unduly harsh and severe.

Entered: March 24, 2017

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 14-01696

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

SEAN VICKERS, ALSO KNOWN AS SEAN M. VICKERS, ALSO
KNOWN AS SEAN MICHAEL VICKERS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 11, 2014. The judgment convicted defendant, upon a jury verdict, of sodomy in the first degree, criminal sexual act in the first degree (two counts) and sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of sodomy in the first degree and two counts of criminal sexual act in the first degree and dismissing counts one, two and six of the amended indictment without prejudice to the People to re-present any appropriate charges under those counts to another grand jury, and as modified the judgment is affirmed.

Same memorandum as in *People v Vickers* ([appeal No. 1] ___ AD3d ___ [Mar. 24, 2017]).

Entered: March 24, 2017   Frances E. Cafarell
Clerk of the Court

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

75
KA 14-00845
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM HIBBARD, DEFENDANT-APPELLANT.

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

WILLIAM HIBBARD, 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 (Michael L. D'Amico, J.), rendered March 20, 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 affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20). Preliminarily, we note that defendant's waiver of the right to appeal is not valid. The perfunctory inquiry made by County Court during the colloquy was not sufficient "to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Beaver*, 128 AD3d 1493, 1494 [internal quotation marks omitted]). Moreover, although the record includes a signed written waiver of the right to appeal, there was no "attempt by the court to ascertain on the record an acknowledgment from defendant that he had, in fact, signed the waiver or that, if he had, he was aware of its contents" and understood them (*People v Callahan*, 80 NY2d 273, 283; *see People v Bradshaw*, 18 NY3d 257, 265-267; *cf. People v Bryant*, 28 NY3d 1094, 1095-1096).

Defendant's challenge in his main brief to the factual sufficiency of the plea allocution is not preserved for our review (*see People v Lugg*, 108 AD3d 1074, 1075; *see generally People v Lopez*, 71 NY2d 662, 665) and is lacking in merit in any event. No factual basis for the plea is required where, as here, "a defendant enters a negotiated plea to a lesser crime than the one charged" (*People v Johnson*, 23 NY3d 973, 975; *see People v Gibson*, 140 AD3d 1786, 1787, *lv denied* 28 NY3d 1072).

Defendant's contention in his pro se supplemental brief that the court erred in accepting the guilty plea notwithstanding defendant's mental health history is likewise not preserved for our review (*see generally People v Mobley*, 118 AD3d 1336, 1337, *lv denied* 24 NY3d 1121). In any event, the court properly accepted the guilty plea after conducting an appropriate inquiry into defendant's history of mental health problems. A "history of prior mental illness or treatment does not itself call into question defendant's competence" (*People v Taylor*, 13 AD3d 1168, 1169, *lv denied* 4 NY3d 836), and nothing on the record before us establishes that defendant was so lacking in "orientation or cognition that he lacked the capacity to plead guilty" (*People v Alexander*, 97 NY2d 482, 486). To the contrary, the record establishes that defendant had a rational understanding of the nature and effect of his plea (*see generally People v Young*, 66 AD3d 1445, 1446, *lv denied* 13 NY3d 912; *People v Lear*, 19 AD3d 1002, 1002, *lv denied* 5 NY3d 807).

Finally, contrary to defendant's contention in his main brief, we conclude that the sentence is not unduly harsh or severe.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

76

KA 15-00040

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DASHAWN A. BUTLER, ALSO KNOWN AS DASHAWN BUTLER,
ALSO KNOWN AS DASHAWN ALLEN BUTLER,
DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 22, 2014. The judgment convicted defendant, upon a jury verdict, of criminal use of a firearm in the second degree, criminal possession of a weapon in the fourth degree and attempted assault in the first 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 by reversing that part convicting defendant of criminal use of a firearm in the second degree and dismissing count one of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal use of a firearm in the second degree (Penal Law § 265.08 [2]), criminal possession of a weapon in the fourth degree (§ 265.01 [1]), and attempted assault in the first degree (§§ 110.00, 120.10 [1]), arising from an incident in which defendant pointed a gun at the victim and fired several rounds. Contrary to defendant’s contention, we conclude that the conviction of criminal possession of a weapon in the fourth degree is supported by legally sufficient evidence that the firearm was operable, and the conviction of attempted assault in the first degree is supported by legally sufficient evidence that the firearm was both operable and loaded with live ammunition (*see generally People v Shaffer*, 66 NY2d 663, 664). Despite the lack of forensic evidence, “the People supplied the necessary proof through circumstantial evidence, i.e., eyewitness testimony and surrounding circumstances” (*People v Spears*, 125 AD3d 1401, 1402, *lv denied* 25 NY3d 1172 [internal quotation marks omitted]). Furthermore, 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 he was denied his right to confront one of the witnesses against him when County Court received in evidence that witness's grand jury testimony. A defendant may not assert his or her constitutional right of confrontation to prevent the admission of grand jury testimony when " 'it has been shown that the defendant procured the witness's unavailability through violence, threats, or chicanery' " (*People v Smart*, 23 NY3d 213, 220; *see People v Vernon*, 136 AD3d 1276, 1278, *lv denied* 27 NY3d 1076). At a *Sirois* hearing, a police detective testified that the witness told him that defendant had threatened to harm her if she said anything about the shooting. The detective convinced the witness to come to the courthouse on the day of trial but, upon her arrival, she refused to testify because defendant had confronted her during the prior weekend and said that he wanted to "beat the shit out of her" for testifying before the grand jury. In addition, a man who identified himself as defendant's cousin told her that "she had snitched" and threatened to kill her. Based on the foregoing, we conclude that the court properly determined that the People established by the requisite clear and convincing evidence that the witness was unavailable to testify due to defendant's misconduct (*see People v Geraci*, 85 NY2d 359, 370; *People v Miller*, 61 AD3d 1429, 1429, *lv denied* 12 NY3d 927).

We reject defendant's further contention that the court erred in denying his motion to dismiss the indictment pursuant to CPL 30.30. "[T]he period of delay resulting from the absence or unavailability of the defendant" is not chargeable to the People, and "[a] defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence" (CPL 30.30 [4] [c] [i]). " 'The police are not required to search for a defendant indefinitely, but they must exhaust all reasonable investigative leads as to his or her whereabouts' " (*People v Williams*, 137 AD3d 1709, 1710). At the hearing on defendant's motion, a police sergeant testified that, during the 57-day period before defendant was apprehended, the police conducted street investigations, held regular briefings, shared intelligence, monitored social media accounts that the police believed to contain information about defendant, and surveilled residences where defendant may have been staying. In light of those efforts to locate defendant, we conclude that the court properly excluded that time from the speedy trial calculation (*see People v Hawkins*, 130 AD3d 1298, 1300-1301, *lv denied* 26 NY3d 968).

Defendant contends that the grand jury proceedings were defective because the prosecutor failed to disclose evidence favorable to the defense prior to the grand jury proceeding or present that evidence to the grand jury. We reject that contention inasmuch as the allegedly favorable evidence was not "entirely exculpatory" (*People v Gibson*, 260 AD2d 399, 399, *lv denied* 93 NY2d 924), and the failure to disclose that evidence or present it to the grand jury "did not result in a needless or unfounded prosecution" (*People v Smith*, 289 AD2d 1056, 1057, *lv denied* 98 NY2d 641 [internal quotation marks omitted]).

Defendant's challenge to the court's *Sandoval* ruling is not preserved for our review inasmuch as defendant did not object to the court's ultimate ruling (*see People v Davey*, 134 AD3d 1448, 1450). In any event, the record establishes that the court "weighed appropriate concerns and limited both the number of convictions and the scope of permissible cross-examination" (*id.* at 1451 [internal quotation marks omitted]), and thus we conclude that the court's ruling does not constitute an abuse of discretion.

We agree with defendant, however, that the use or display of the firearm while committing the class C felony of attempted assault in the first degree cannot serve as the predicate for his conviction of criminal use of a firearm in the second degree inasmuch as the use or display of that same firearm satisfied an element of attempted assault in the first degree (*see People v Brown*, 67 NY2d 555, 560-561, *cert denied* 479 US 1093; *People v Wegman*, 2 AD3d 1333, 1335, *lv denied* 2 NY3d 747). Although defendant failed to preserve that contention for our review (*see People v Simpson*, 292 AD2d 852, 853, *lv denied* 98 NY2d 655), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we modify the judgment by reversing that part convicting him of criminal use of a firearm in the second degree and dismissing that count of the indictment. We reject defendant's further contention that the count charging criminal possession of a weapon in the fourth degree is an inclusory concurrent count of attempted assault in the first degree (*see People v Solomon*, 96 AD3d 1396, 1397; *see generally People v Miller*, 168 AD2d 642, 642, *lv denied* 78 NY2d 956).

Finally, the sentence is not unduly harsh and severe.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

80
CAF 15-01417
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF SKYE N., STARR N., BRITTANI N.,
AND MITCHELL N.
-- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

CARL N., SR., RESPONDENT-APPELLANT.

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

KATE NOWADLY, 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 (Sharon M. LoVallo, J.), entered August 11, 2015 in a proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b. The order, among other things, transferred guardianship and custody of the subject children to petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject children on the ground of permanent neglect and transferred guardianship and custody of the children to petitioner. Petitioner commenced the underlying proceeding alleging that the father derivatively neglected the subject children when he repeatedly sexually abused his then 14-year-old stepdaughter, who is not a subject of this proceeding. The father subsequently pleaded guilty to, inter alia, rape in the first degree and course of sexual conduct against a child in the second degree relating to his conduct with his stepdaughter.

Contrary to the father's contention, petitioner demonstrated by the requisite clear and convincing evidence that it made diligent efforts to encourage and strengthen the parent-child relationship by "developing an appropriate service plan tailored to the situation, regularly updating the [father] on the children's progress and continually reminding [him] to comply with the requirements of the service plan" (*Matter of Deime Zechariah Luke M. [Sharon Tiffany M.]*,

112 AD3d 535, 536, *lv denied* 22 NY3d 863; *see Matter of Davianna L. [David R.]*, 128 AD3d 1365, 1365, *lv denied* 25 NY3d 914; *Matter of Jaylysia S.-W.*, 28 AD3d 1228, 1228-1229). The father contends that he planned for the children's return by planning to participate in sex offender treatment, but could not do so because such a program was not offered at the facility where he was incarcerated. We reject that contention, inasmuch as "petitioner was not required to provide 'services and other assistance . . . so that problems preventing the discharge of the child[ren] from care [could] be resolved or ameliorated' " (*Jaylysia S.-W.*, 28 AD3d at 1229, quoting Social Services Law § 384-b [7] [f] [3]; *see Matter of Amanda C.*, 281 AD2d 714, 716, *lv denied* 96 NY2d 714).

Contrary to the father's further contention, petitioner established that, despite its diligent efforts to reunite the father with the children, the father failed to plan for the children's future "by neither acknowledging nor meaningfully addressing the conditions that led to the children's removal in the first instance, namely, the underlying sexual abuse of another older daughter" (*Matter of Iasha Tameeka McL. [Herbert McL.]*, 135 AD3d 601, 601; *see Matter of Emerald L.C. [David C.]*, 101 AD3d 1679, 1680), and by failing to "provide any 'realistic and feasible' alternative to having the children remain in foster care until [his] release from prison" (*Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1594, *lv dismissed* 21 NY3d 975; *see Davianna L.*, 128 AD3d at 1365).

Although the father requested a suspended judgment at the dispositional hearing and thus preserved for our review his contention that Family Court erred in failing to grant that relief, we reject that contention inasmuch as the record of the dispositional hearing establishes that "any progress that [the father] made 'was not sufficient to warrant any further prolongation of the child[ren's] unsettled familial status' " (*Matter of Jose R.*, 32 AD3d 1284, 1285, *lv denied* 7 NY3d 718; *see Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386, *lv denied* 25 NY3d 910).

Finally, to the extent that the father contends that the court improperly admitted in evidence records containing hearsay statements, we conclude that any such error is harmless " 'because the result reached herein would have been the same even had such [statements] been excluded,' " and " '[t]here is no indication that the court considered, credited, or relied upon inadmissible hearsay in reaching its determination' " (*Kyla E.*, 126 AD3d at 1386).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

83
CA 16-00571
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

NANCY J. BRADY AND PATRICK J. BRADY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TIMOTHY J. CONTANGELO, DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (JENNIFER J. PHILLIPS OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF FRANCIS M. LETRO, BUFFALO (CAREY C. BEYER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered December 29, 2015. The order denied the motion of defendant to dismiss the complaint and 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 second and third causes of action, and as modified the order is affirmed without costs in accordance with the following memorandum: Plaintiffs commenced this action seeking to recover damages for injuries allegedly sustained by Nancy J. Brady (plaintiff) when defendant or the leashes attached to his two dogs knocked her over during a walk in a park. Defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (7) and sought summary judgment dismissing the complaint, and he contends on appeal that Supreme Court erred in denying that part of his motion seeking summary judgment dismissing the complaint.

We conclude that the court properly denied that part of defendant’s motion with respect to the first cause of action, alleging that defendant was negligent in running into plaintiff. When human bodies collide, a defendant may be liable under common-law negligence principles for failing to control his or her speed or movement in the vicinity of another (*see generally Moore v Hoffman*, 114 AD3d 1265, 1266). Although both dogs and humans allegedly were involved in this collision, it is well settled that “ ‘there may be more than one proximate cause of an injury’ ” (*Mazella v Beals*, 27 NY3d 694, 706; *see Honer v McComb*, 126 AD3d 1555, 1556). Here, defendant failed to meet his burden of establishing as a matter of law that he was free of negligence in controlling his own body (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

We agree with defendant, however, that the court erred in denying that part of his motion with respect to the second cause of action, based upon his alleged negligent handling of dogs, and we therefore modify the order accordingly. As plaintiff correctly concedes, "a cause of action for ordinary negligence does not lie against the owner of a dog that causes injury" (*Antinore v Ivison*, 133 AD3d 1329, 1329; *see Doerr v Goldsmith*, 25 NY3d 1114, 1116).

We also agree with defendant that the court erred in denying his motion with respect to the third cause of action alleging strict liability based upon the dogs' vicious propensities, and thus we further modify the order accordingly. It is well established that "an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities – albeit only when such proclivity results in the injury giving rise to the lawsuit" (*Collier v Zambito*, 1 NY3d 444, 447; *see Ioveno v Schwartz*, 139 AD3d 1012, 1012, *lv denied* 28 NY3d 905; *Dickinson v Uschold*, 11 AD3d 1036, 1037). In contrast, "normal canine behavior" such as "barking and running around" does not amount to vicious propensities (*Collier*, 1 NY3d at 447; *see Bloom v Van Lenten*, 106 AD3d 1319, 1321). We conclude that defendant met his initial burden of establishing that he lacked knowledge of any vicious propensity on the part of either dog that gave rise to the injury and, in opposition, plaintiff failed to raise an issue of fact. Although defendant testified that one dog used to jump on people when he was younger and had been hostile with his veterinarian, there is no evidence that defendant's dogs jumped on plaintiff, made contact with her body, or otherwise acted hostilely toward her. To the contrary, plaintiff testified that the dogs ran toward her and caused a collision between plaintiff and defendant that knocked plaintiff to the ground. In our view, such an act constitutes normal canine behavior, and thus plaintiff failed to present evidence of a known, vicious propensity that "result[ed] in the injury giving rise to the lawsuit" (*Collier*, 1 NY3d at 447; *see Bloom*, 106 AD3d at 1321).

Entered: March 24, 2017

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 15-01824
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DIONTE CARROLL, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN GILSENAN, OF THE PENNSYLVANIA AND MICHIGAN BARS, ADMITTED PRO HAC VICE, 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 February 27, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We agree with defendant that the waiver of the right to appeal is invalid because " 'the minimal inquiry made by County Court was insufficient to establish that the 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 Jones*, 107 AD3d 1589, 1589, *lv denied* 21 NY3d 1075). Contrary to the People's contention, the written waiver of the right to appeal, which was not signed until sentencing, does not serve to validate the otherwise inadequate oral waiver where, as here, "there is no indication that [the court] obtained a knowing and voluntary waiver of that right at the time of the plea" (*People v Sims*, 129 AD3d 1509, 1510, *lv denied* 26 NY3d 935; *see People v Lawson* [appeal No. 7], 124 AD3d 1249, 1250). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

99

KA 12-01592

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered June 21, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree, and criminally using drug paraphernalia in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the fine imposed on count one of the indictment from $10,000 to $5,000, by vacating the fines imposed on counts two through four of the indictment, by reducing the mandatory surcharge from $600 to $300, by reducing the crime victim assistance fee from $50 to $25, and by vacating the “additional $50 DNA” fee, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]), and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]). Police investigators executing a search warrant at defendant’s residence seized two small bags of cocaine, 39 rocks of crack cocaine, a razor, a scale, and glassine envelopes. While defendant was on the ground being handcuffed, he repeatedly stated, “it’s for my personal use.” The investigators, however, found $160 in small bills on defendant’s person and recovered no crack pipes or other indicia of personal drug use from inside his residence.

Defendant contends that County Court abused its discretion in failing to preclude the testimony of an undercover officer as a sanction for the People’s destruction of *Rosario* material, i.e., audio recordings of two failed drug purchases. We reject that contention. It is well settled that “nonwillful, negligent loss or destruction of

Rosario material does not mandate a sanction unless the defendant establishes prejudice" (*People v Martinez*, 22 NY3d 551, 567; *see People v Lee*, 116 AD3d 493, 496, *lv denied* 23 NY3d 1064). If prejudice is shown, as it was here, the proper sanction for eliminating that prejudice is left to the sound discretion of the trial court, which may consider the degree of prosecutorial fault (*see Martinez*, 22 NY3d at 567; *People v Olson*, 126 AD3d 1139, 1141, *lv denied* 25 NY3d 1169). Under the circumstances of this case, where there was testimony that the audio recordings were destroyed as part of a routine police practice, we conclude that the court did not abuse its discretion in refusing to preclude the undercover officer's testimony and instead imposing the lesser sanction of an adverse inference charge (*see Olson*, 126 AD3d at 1141; *see generally People v Durant*, 26 NY3d 341, 347). Defendant further contends that the adverse inference charge was erroneous as given, but he failed to preserve his contention for our review (*see People v Castillo*, 34 AD3d 221, 222, *lv denied* 8 NY3d 879), 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]).

To the extent that defendant contends that the court erred under *People v Molineux* (168 NY 264) in allowing the undercover officer's testimony, we reject his contention inasmuch as the evidence was probative of his intent to sell (*see People v Ray*, 63 AD3d 1705, 1706, *lv denied* 13 NY3d 838). To the extent that defendant contends that the audio recordings were *Brady* material, we reject his contention because he failed to demonstrate a reasonable possibility that the audio recordings would have changed the outcome of the proceedings (*see People v Gayden* [appeal No. 2], 111 AD3d 1388, 1389).

Contrary to defendant's further contention, we conclude that the court properly refused to charge the lesser included offense of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03). The physical evidence recovered from defendant's residence bore all the hallmarks of the drug trade. Thus, there was no reasonable view of the evidence from which the jury could have concluded that defendant was guilty of simple possession but not the more serious charges (*see People v Townsend*, 138 AD3d 1506, 1507; *People v Bond*, 239 AD2d 785, 786, *lv denied* 90 NY2d 891).

Defendant contends that he was denied effective assistance of counsel because counsel moved to suppress, rather than to preclude, statements not contained in the CPL 710.30 notice. We reject that contention. "[I]t is well settled that disagreement over trial strategy is not a basis for a determination of ineffective assistance of counsel" (*People v Jarvis*, 113 AD3d 1058, 1059, *affd* 25 NY3d 968 [internal quotation marks omitted]), and we cannot say that counsel's decision to proceed with a motion to suppress deprived defendant of effective assistance of counsel (*see People v Borthwick*, 51 AD3d 1211, 1215-1216, *lv denied* 11 NY3d 734). Viewing the evidence, the law, and the circumstances of this particular case in totality at the time of the representation, we conclude that defense counsel provided defendant with meaningful representation (*see generally People v*

Baldi, 54 NY2d 137, 147).

We agree with defendant that the court abused its discretion in ruling that the People could impeach him using his prior drug-related convictions and their underlying facts. In determining whether the People may impeach a defendant using prior criminal acts, a court must balance the probative value of the evidence on the issue of credibility against the risk of undue prejudice, as measured by the potential impact of the evidence and the possibility that its introduction would deter defendant from testifying in his or her defense (*see People v Sandoval*, 34 NY2d 371, 376-377). Certain factors should be considered, such as the prior conviction's temporal proximity, the degree to which the prior conviction bears upon the defendant's truthfulness, and the extent to which the prior conviction may be taken as evidence of the defendant's propensity to commit the crime charged (*see id.*). It is well recognized that " 'in the prosecution of drug charges, interrogation as to prior narcotics convictions . . . may present a special risk of impermissible prejudice because of the widely accepted belief that persons previously convicted of narcotics offenses are likely to be habitual offenders' " (*People v Smith*, 18 NY3d 588, 593-594, quoting *Sandoval*, 34 NY2d at 377-378). Here, the record reveals that the court considered only the temporal proximity of the prior convictions and defendant's willingness to place his interests above those of society in general (*see People v Williams*, 56 NY2d 236, 239-240; *People v Arnold*, 298 AD2d 895, 896, *lv denied* 99 NY2d 580). There is no indication that the court considered the special risk that defendant's prior drug-related convictions might be taken by the jury as evidence of his propensity to commit the crime charged. Nevertheless, we conclude that the error is harmless in light of the overwhelming evidence of defendant's guilt and the lack of any significant probability that the jury would have acquitted him had it not been for the error (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

We further agree with defendant that the court made multiple errors in imposing fines and assessing fees and surcharges, and we modify the judgment accordingly. The court erred in imposing a fine in excess of $5,000 upon defendant's conviction of count one of the indictment, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). In imposing a fine under Penal Law § 80.00 (1) (c) (iii), the court was required to consider "the profit gained by defendant's conduct, whether the amount of the fine is disproportionate to the conduct in which defendant engaged, its impact on any victims, and defendant's economic circumstances, including the defendant's ability to pay, the effect of the fine upon his or her immediate family or any other persons to whom the defendant owes an obligation of support" (§ 80.00 [1] [c]). There is no indication in the record that the court considered those factors, and so we reduce the fine imposed on count one to the $5,000 statutory maximum for felony convictions (*see* § 80.00 [1] [a]). Furthermore, we conclude that the fines are illegal to the extent that the court imposed a fine on both a conviction of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree that "arose from a single act" (*People v Regatuso*,

140 AD3d 1750, 1751; *see* § 80.15), and we therefore vacate the fine imposed under count two of the indictment. The fine imposed with respect to count two must be vacated for another reason, along with the fines for counts three and four. More particularly, the court erred in imposing unauthorized "concurrent" fines upon defendant's conviction with respect to those counts. The statute does not authorize concurrent fines (*see* § 80.00 *et seq.*). In other words, if the sentencing court imposes multiple fines, those fines necessarily aggregate. Here, however, the court imposed "concurrent" fines and ordered that such fines were "not an additional amount" to the fine imposed on count one. We thus conclude that the fines imposed on counts two, three, and four were not authorized by the statute, and we therefore vacate them. In addition, the court erroneously assessed multiple mandatory surcharges, crime victim assistance fees, and DNA databank fees on crimes committed through a single act (*see* § 60.35 [2]; *People v Anderson*, 254 AD2d 701, 702, *lv denied* 92 NY2d 980). Otherwise, defendant's sentence is not unduly harsh and severe.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

103
CA 16-00579
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF JAMES K. GLOGOWSKI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ORLEANS, ORLEANS COUNTY
DEPARTMENT OF HEALTH, PAUL A. PETTIT AND
DAVID G. WHITCROFT, RESPONDENTS-RESPONDENTS.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, ALBANY (BENJAMIN F. NEIDL OF COUNSEL), FOR PETITIONER-APPELLANT.

WEBSTER SZANYI, LLP, BUFFALO (TOM LEWANDOWSKI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered December 16, 2015 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is reinstated, the determination is annulled and the matter is remitted to Supreme Court, Orleans County, for further proceedings on the petition.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to compel respondents to approve design proposals and plans for, inter alia, a septic system. We conclude that Supreme Court erred in dismissing the petition.

Petitioner is licensed as a professional land surveyor in New York. His license contains an exemption pursuant to Education Law § 7208 (n), which allows him to design, inter alia, "sanitary sewerage facilities of a minor nature in connection with subdivisions and the extension and inspection thereof, but not including . . . commercial buildings." In January 2015, petitioner was retained by a local farmer to design a septic system for a four-bedroom, one-and-one-half bath farmhouse, which was to be used as temporary housing for up to 12 migrant farm workers. Petitioner thereafter submitted his design to respondents (hereinafter, County) for approval. In February 2015, petitioner received a letter from the County that it would accept septic system designs from him only for residential projects, and that the farmhouse had been determined to be commercial. The County

therefore concluded that the septic system design must be the work product of a licensed professional engineer. The County also sent a letter to the farmer who retained petitioner and informed him that the proposed septic system design was not approved because it was not prepared by an engineer.

Petitioner commenced this proceeding, alleging that the categorical denial of his proposed design was an error of law, and that the determination that the farmhouse at issue was commercial was arbitrary and capricious. We agree with petitioner that the County's determination that he is categorically prevented from designing the septic system is based on a flawed interpretation of law, and thus it is invalid (*see New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 205).

We note that we afford the County no deference in interpreting Education Law § 7208 (n). The interpretation of the statute does not involve technical aspects within the specialized knowledge of the County, and thus the meaning of the statute is for the courts to determine (*see Matter of Killian [General Motors Corp., Delco Chassis Div.–Sweeney]*, 89 NY2d 748, 752).

To interpret Education Law § 7208 (n), we must first determine the scope of practice of a land surveyor generally. The definition of the practice of land surveying is set forth in the Education Law as follows: "The practice of the profession of land surveying is defined as practicing that branch of the engineering profession and applied mathematics which includes the measuring and plotting of the dimensions and areas of any portion of the earth, including all naturally placed and man- or machine-made structures and objects thereon, the lengths and directions of boundary lines, the contour of the surface and the application of rules and regulations in accordance with local requirements incidental to subdivisions for the correct determination, description, conveying and recording thereof or for the establishment or reestablishment thereof" (§ 7203).

Thus, as a general rule, a land surveyor is limited to the measuring and plotting of real property and its boundaries, structures thereon, etc., and may not design or evaluate "utilities, structures, buildings, machines, equipment, processes, works, or projects," such practice being the privilege of engineers and, to a limited extent, architects (*see generally* Education Law §§ 7201, 7301).

In 1972, the Legislature authorized an exception to the limited scope of a land surveyor's practice. That exception is set forth in Education Law § 7208 (n), which provides, in relevant part, that: "[Article 145 of the Education Law] shall not be construed to affect or prevent . . . [t]he design by a land surveyor of roads, drainage, water supply or sanitary sewerage facilities of a minor nature in connection with subdivisions and the extension and inspection thereof, but not including sewage disposal or treatment plants, lift stations, pumping stations, commercial buildings or bridges."

The Education Department also issued a regulation defining the

term “minor nature” to include “the design of . . . sewage disposal systems . . . for individual lots” (8 NYCRR § 68.12 [b] [1]).

Petitioner correctly contends that, according to a plain reading of the statute and regulation, the design he submitted to the County is “of a minor nature” inasmuch as it is a sewage disposal system for an individual lot. The County’s contention that the design is not “of a minor nature” because it is of a “commercial building” is legally and factually incorrect. We conclude that the County failed to interpret the statute properly inasmuch as the language appearing after “but not including” is a proviso limiting the exception for designs “of a minor nature” and is not an independent basis for determining that petitioner is disqualified from submitting the design in question (*see* McKinney’s Cons Laws of NY, Book 1, Statutes § 212, Comment; *see also Friedman v Connecticut Gen. Life Ins. Co.*, 9 NY3d 105, 114). The County also erred in concluding that the design was of a “commercial building” inasmuch as the design was solely for a septic system, not any sort of a building. We therefore reverse the judgment, reinstate the petition, annul the County’s determination that the submitted design is not “of a minor nature,” and remit the matter to Supreme Court for further proceedings on the petition.

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

107
CA 16-00874
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF ELIZABETH G. QUATTRONE,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIE 2-CHAUTAUQUA-CATTARAUGUS BOARD OF
COOPERATIVE EDUCATIONAL SERVICES,
RESPONDENT-DEFENDANT-RESPONDENT.

JASON L. SCHMIDT, FREDONIA, FOR PETITIONER-PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JOSEPH S. BROWN OF COUNSEL), FOR
RESPONDENT-DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Chautauqua County (Paul B. Wojtaszek, J.), entered September 11, 2015. The judgment, inter alia, granted the motion of respondent-defendant for leave to reargue and, upon reargument, granted the motion of respondent-defendant for summary judgment and dismissed the petition-complaint.

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

Memorandum: In 2003, petitioner-plaintiff (petitioner) was notified by respondent-defendant (respondent) that her tenured position as a teacher of gifted and talented elementary school students had been abolished, and petitioner's name thereafter was placed on a preferred eligible list for reappointment to a similar position in accordance with Education Law § 3013 (3) (a). In 2007, petitioner learned that respondent had created a position as a teacher in a universal prekindergarten (UPK) program in one of respondent's component school districts. Despite declining respondent's offers of that position in December 2007 and June 2008, petitioner subsequently brought this hybrid plenary action and CPLR article 78 proceeding. In her petition-complaint (petition), petitioner alleges, on various theories, that respondent violated her recall rights under the Education Law and seeks reappointment to the UPK teacher position, with back pay and benefits and restored pension credit, retroactive to 2005, when respondent allegedly established that position. Upon granting respondent's motion for leave to reargue, Supreme Court dismissed the petition in its entirety based on the doctrine of primary jurisdiction, concluding that the issue of whether the former and new positions are similar is for the Commissioner of Education to

resolve.

Contrary to petitioner's contention, the court, in the person of the newly assigned Individual Assignment System (IAS) Judge, properly entertained and granted respondent's motion for leave to reargue (*see* CPLR 2221 [d]), and the court did not thereby violate the doctrine of the law of the case. Justice Wojtaszek had been assigned by administrative order to replace Justice Chimes for this and all other Chautauqua County cases. As a general rule, any motion affecting a prior order, including a motion for leave to reargue a prior motion, must be made "to the judge who signed" the prior order, "unless he or she is for any reason unable to hear it" (CPLR 2221 [a]; *see* CPLR 2217 [a]). However, an exception to that statutory mandate "exists where the Rules of the Chief Administrator of the Courts provide otherwise (*see* CPLR 2221 [b])" (*Matter of New York State Urban Dev. Corp. [Fallsite, LLC]*, 85 AD3d 1723, 1724, *lv dismissed* 18 NY3d 870), including those rules establishing and implementing the IAS system. The IAS rules provide that "[a]ll motions," including those governed by CPLR 2221, "shall be returnable before the assigned judge" (22 NYCRR 202.8 [a]). Thus, "[b]y the adoption of the IAS, 'the CPLR 2221 requirement of referral of motions to a Judge who granted an order on a prior motion has been modified to provide for consistency with the mandate of the [IAS] that all motions in a case shall be addressed to the assigned Judge' " (*New York State Urban Dev. Corp.*, 85 AD3d at 1724). Thus, the motion was properly before Justice Wojtaszek as the assigned Judge.

We further conclude that the court, after granting leave to reargue (*see* CPLR 2221 [d]), properly dismissed the petition based upon the doctrine of primary jurisdiction (*see Matter of DiTanna v Board of Educ. of Ellicottville Cent. Sch. Dist.*, 292 AD2d 772, 773; *see also Matter of Ferencik v Board of Educ. of Amityville Union Free Sch. Dist.*, 69 AD3d 938, 938; *Matter of Donato v Board of Educ. of Plainview, Old Bethpage Cent. Sch. Dist.*, 286 AD2d 388, 388). "Here, the Commissioner of Education has the specialized knowledge and expertise to resolve the factual issue of whether the [petitioner's] former position and the new [UPK teacher] position are similar within the meaning of Education Law § 3013 (3) (a)" (*Donato*, 286 AD2d at 388; *see DiTanna*, 292 AD2d at 773; *see also Ferencik*, 69 AD3d at 938), and the proceeding/action was properly dismissed for petitioner's failure to appeal the matter to the Commissioner of Education (*see Matter of Hessney v Board of Educ. of Pub. Schs. of Tarrytowns*, 228 AD2d 954, 954-955, *lv denied* 89 NY2d 801).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

109

CA 16-00847

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

RICHARD M. BROWN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JARED PRESTON MILLER AND LYNNETTE F. MILLER,
DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HALL AND KARZ, CANANDAIGUA (PETER ROLPH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered August 11, 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 reversed on the law without costs, the motion is granted, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action to recover damages for injuries he allegedly sustained when a vehicle that he was operating collided with a vehicle owned by defendant Lynnette F. Miller and operated by defendant Jared Preston Miller. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102. We agree with defendants that Supreme Court erred in denying the motion.

Defendants met their burden on the motion by submitting the affirmed report of a physician who examined plaintiff and reviewed his prior medical records. The physician concluded that plaintiff sustained only a concussion and a minor cervical and lumbosacral strain in the collision, and that those injuries had resolved. Furthermore, the physician opined that plaintiff’s prior imaging studies revealed preexisting degenerative changes not causally related to the collision, and that the collision did not aggravate or exacerbate plaintiff’s preexisting degenerative condition (*see Bleier v Mulvey*, 126 AD3d 1323, 1324; *French v Symborski*, 118 AD3d 1251, 1251, *lv denied* 24 NY3d 904).

The burden then shifted to plaintiff “to submit competent medical

evidence, based on objective findings and diagnostic tests, raising a triable issue of fact” (*Applebee v Beck*, 118 AD3d 1279, 1280), and we conclude that plaintiff failed to meet that burden. Although plaintiff submitted expert medical evidence establishing that he sustained injuries causally related to the collision, he failed to raise an issue of fact whether those injuries constituted “serious injury” within the meaning of Insurance Law § 5102 (*see Linnane v Szabo*, 111 AD3d 1304, 1305).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

130
KA 14-01899
PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODNEY MCFARLAND, DEFENDANT-APPELLANT.

CATHERINE H. JOSH, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN 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 Supreme Court, Monroe County (Thomas E. Moran, J.), dated August 29, 2014. The order denied the motion of defendant to vacate the judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion pursuant to CPL 440.10 (1) (g) is granted, the judgment of conviction is vacated, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: On a prior appeal, we remitted the matter to Supreme Court to conduct a hearing on defendant's motion pursuant to CPL 440.10 (1) (g) seeking vacatur of the judgment "on the ground that new evidence has been discovered since the entry of the judgment, which could not have been produced at trial with due diligence 'and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant' " (*People v McFarland*, 108 AD3d 1121, 1121, *lv denied* 24 NY3d 1220). Defendant alleged that a statement of a third party that it was he, and not defendant, who shot and killed the victim, constitutes a statement against penal interest and that, if the statement had been admitted in evidence at trial, the verdict would have been more favorable to defendant. We remitted the matter for a hearing to determine whether the third party was unavailable to testify "and, if so, whether there is 'competent evidence independent of the declaration to assure its trustworthiness and reliability' " (*id.* at 1123). Following the hearing, the court denied the motion. That was error. We therefore reverse the order.

The third party appeared at the hearing and exercised his Fifth Amendment right to remain silent. Thus, the court properly determined

that he is unavailable to testify. Defendant called to the stand to testify the person to whom the third party allegedly made the admission. That witness testified that the third party told him in 2003 at the Monroe County Jail that it was he who shot the victim and that he implicated defendant because "he did what he had to do" to avoid "serious jail time." The witness's testimony varied from the factual averments set forth in an affidavit he sent to defendant's counsel in 2007. The witness averred in his affidavit that the third party told him that he and defendant went to the victim's house where he had a confrontation with the victim because the victim owed him money. During the hearing, however, he testified that the third party said that the victim owed defendant money and that, after the victim punched defendant, the third party shot the victim. An eyewitness testified at the trial that "in her quick glance out of a window" she saw defendant engaged in a struggle on the porch with the victim (*id.*). She further testified, however, that while defendant, the victim, and the third party were inside the residence, the third party and the victim were engaged in a loud dispute and that defendant was not part of that dispute. We note that our prior decision erroneously states that other witnesses "testified" that they heard the victim pleading with the third party by name before they heard gunshots (*id.*). That information was provided in defendant's CPL 440.10 motion through statements of those eyewitnesses to the police, but there was no testimony to that effect at defendant's trial. In any event, an investigator hired by defendant's attorney testified during the 440.10 hearing that the third party admitted to her that he was at the scene and that he had a dispute with the victim. He also told the investigator, however, that defendant was not present and that the victim was shot by a person who ran onto the porch and pushed the third party away from the victim. Also admitted in evidence at the 440.10 hearing were letters written by defendant's wife to the third party and letters ostensibly written by the third party to defendant's former attorney.

Following the hearing, the court determined that the testimony of the witness who testified that the third party made the incriminating statement to him was "incredible as a matter of law." The court also determined that the letters ostensibly written by the third party were "lacking in evidentiary foundation, and thus, authentically unreliable and untrustworthy," explaining that it had compared the signatures on those letters with the third party's signature on his statement to police implicating defendant in the crime. The court therefore concluded that the third party's statement would not be admissible at trial as a declaration against penal interest.

As a preliminary matter, it is well settled that a "less stringent standard [of admissibility] applies, where, as here, the declaration is offered by defendant to exonerate himself rather than by the People, to inculpate him" (*People v Backus*, 129 AD3d 1621, 1624, *lv denied* 27 NY3d 991; *see McFarland*, 108 AD3d at 1122). Furthermore, the statements attributed to the third party "all but rule[] out a motive [for the third party] to falsify" the statement that it was he, and not defendant, who shot the victim (*Backus*, 129 AD3d at 1624). Thus, in determining whether there is evidence

constituting “sufficient supportive evidence of a declaration against penal interest[,] . . . [t]he crucial inquiry focuses on the intrinsic trustworthiness of the statement as confirmed by competent evidence independent of the declaration itself . . . Supportive evidence is sufficient if it *establishes a reasonable possibility that the statement might be true.* Whether [the hearing] court believes the statement to be true is irrelevant . . . If the proponent of the statement is able to establish this *possibility of trustworthiness*, it is the function of the jury alone to determine whether the declaration is sufficient to create reasonable doubt of guilt” (*People v Settles,* 46 NY2d 154, 169-170 [emphasis added]).

We conclude that defendant provided sufficient competent evidence at the 440.10 hearing to establish the “possibility of trustworthiness” of the third party’s statement to satisfy the requirement that the statement was a declaration against penal interest. In addition to the trial testimony that the third party was engaged in a dispute with the victim, the third party admitted to the defense investigator that he was present and engaged in a dispute with the victim and that he wrote the letters to defendant’s former attorney. Thus, we conclude that the third party is unavailable and that his alleged statement is “supported by independent proof indicating that it is trustworthy and reliable” and thus that it is a statement against penal interest (*People v Ennis*, 11 NY3d 403, 412-413, *cert denied* 556 US 1240; *see People v Brensic*, 70 NY2d 9, 15). Furthermore, the statement is “clearly exculpatory of the defendant” (*People v Deacon*, 96 AD3d 965, 968, *appeal dismissed* 20 NY3d 1046). We therefore conclude that defendant met his burden of establishing, by a preponderance of the evidence (*see* CPL 440.30 [6]), that the third party’s statement against penal interest was not available at the time of defendant’s trial and “is of such a character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant” (CPL 440.10 [1] [g]; *see People v Bailey*, 144 AD3d 1562, 1564).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

131
KA 10-00287
PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK GARCIA, DEFENDANT-APPELLANT.

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

FRANK GARCIA, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered December 16, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the first degree (two counts) and attempted murder in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count three of the indictment and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for resentencing on that count.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]) and attempted murder in the first degree (§§ 110.00, 125.27 [1] [a] [viii]; [b]). We reject defendant's contention that County Court erred in denying his challenges for cause with respect to three prospective jurors. "CPL 270.20 (1) (b) provides that a party may challenge a potential juror for cause if the juror 'has a state of mind that is likely to preclude him [or her] from rendering an impartial verdict based upon the evidence adduced at the trial' " (*People v Harris*, 19 NY3d 679, 685). A " 'prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the juror states unequivocally on the record that he or she can be fair and impartial' " (*id.* at 685, quoting *People v Chambers*, 97 NY2d 417, 419; *see People v Warrington*, 28 NY3d 1116, 1119-1120). Thus, " 'where [a] prospective juror[] unambiguously state[s] that, *despite preexisting opinions* that might indicate bias, [he or she] will decide the case impartially and based on the evidence, the trial court has discretion to deny the challenge for cause if it determines that the juror's promise to be impartial is

credible’ ” (*Warrington*, 28 NY3d at 1120).

The first prospective juror did not express any doubt concerning his ability to be fair and impartial, and the court therefore properly denied the for cause challenge (*see People v DeFreitas*, 116 AD3d 1078, 1079-1080, *lv denied* 24 NY3d 960; *People v Campanella*, 100 AD3d 1420, 1421, *lv denied* 20 NY3d 1060). The second prospective juror expressed a preexisting opinion that would indicate bias, but she unambiguously stated upon further questioning that she would decide the case impartially based on the evidence (*see Warrington*, 28 NY3d at 1120). Even assuming, arguendo, that we agree with defendant that the stricter standard set forth in *People v Torpey* (63 NY2d 361, 368, *rearg denied* 64 NY2d 885) applies with respect to this prospective juror, we conclude that the record does not show any possibility that the prospective juror’s impressions of defendant might influence her verdict. Finally, with respect to the third prospective juror, her statement that she would give more credit to the testimony of police officers raised serious doubt about her ability to be impartial (*see People v Mitchum*, 130 AD3d 1466, 1467; *People v Lewis*, 71 AD3d 1582, 1583), but the court thereafter elicited an unequivocal assurance that the prospective juror would decide the case impartially (*see People v Rogers*, 103 AD3d 1150, 1152, *lv denied* 21 NY3d 946).

Defendant contends that the court should have granted his motion for a mistrial after two prospective jurors indicated that they heard other prospective jurors discussing the case while awaiting voir dire. We conclude that the court did not abuse its discretion in denying the motion (*see People v Reader*, 142 AD3d 1109, 1109; *People v Dombroff*, 44 AD3d 785, 787, *lv denied* 9 NY3d 1005). The court conducted an inquiry of several deputies who were in the courtroom, and the deputies indicated that they did not hear any discussion amongst the prospective jurors about the case. In addition, the court questioned prospective jurors during individual voir dire if they had already formed an opinion as to defendant’s guilt or innocence.

By failing to pursue his motion to suppress evidence or object to the introduction of such evidence at trial, defendant abandoned his contention that the court should have conducted a hearing on the motion (*see People v Mulligan*, 118 AD3d 1372, 1376, *lv denied* 25 NY3d 1075). We reject defendant’s contention that counsel’s alleged failure to pursue the motion constituted ineffective assistance of counsel. Defendant did not meet his burden of establishing that there was no “strategic or other legitimate explanation[]” (*People v Rivera*, 71 NY2d 705, 709) for counsel’s alleged failure to pursue the motion. “There can be no denial of effective assistance of counsel arising from counsel’s failure to ‘make a motion . . . that has little or no chance of success’ ” (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Here, considering the People’s responsive papers, which set forth the police investigation and identification of defendant as the suspect in the shootings, we conclude that there is no support in the record for a colorable argument for suppression inasmuch as the police had probable cause to arrest defendant (*see People v Carver*, 27 NY3d 418, 420-421;

People v Motter, 235 AD2d 582, 586, *lv denied* 89 NY2d 1038). Defendant's other allegations of ineffective assistance of counsel set forth in his main brief are also simple disagreements with trial strategy and thus cannot serve as a basis for relief (*see People v Barboni*, 90 AD3d 1548, 1548, *affd* 21 NY3d 393). Defendant's allegations of ineffective assistance of counsel raised in his pro se supplemental brief are also without merit, and we conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147).

Defendant's contention that the grand jury proceeding was defective because the indictment was filed after the grand jury term expired for defendant's case is not preserved for our review (*see People v Soto* [appeal No. 2], 163 AD2d 889, 889, *lv denied* 76 NY2d 991), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). As the People correctly concede, the sentence of life without parole for attempted murder in the first degree is illegal (*see* Penal Law § 60.05 [2]). We therefore modify the judgment by vacating the sentence imposed on count three, and we remit the matter to County Court for resentencing on that count.

Defendant failed to preserve for our review his challenge in his pro se supplemental brief to the use of information from certain cellular phone records (*see People v Hall*, 86 AD3d 450, 451-452, *lv denied* 19 NY3d 961, *cert denied* ___ US ___, 133 S Ct 1240). We decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant's challenge in his pro se supplemental brief to the sufficiency of the evidence before the grand jury is not properly before us. " 'Having failed to challenge the [legal] sufficiency of the trial evidence, defendant may not now challenge the [legal] sufficiency of the evidence before the grand jury' " (*People v McCoy*, 100 AD3d 1422, 1423; *see People v Smith*, 4 NY3d 806, 807-808; *People v Lane*, 106 AD3d 1478, 1481-1482, *lv denied* 21 NY3d 1043). We have considered the remaining contentions of defendant raised in his pro se supplemental brief and conclude that they are without merit.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

132

KA 14-00639

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS BROWN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN J. GILSENAN, OF THE PENNSYLVANIA AND MICHIGAN BARS, ADMITTED PRO HAC VICE, 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 (Thomas J. Miller, J.), rendered February 13, 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 [1]). We agree with defendant that his waiver of the right to appeal is invalid because "the minimal inquiry made by County Court [during the plea proceeding] was insufficient to establish that the court engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Williams*, 136 AD3d 1280, 1281, *lv denied* 27 NY3d 1141 [internal quotation marks omitted]). Further, to the extent that the purported waiver of the right to appeal was obtained at sentencing, it is not valid inasmuch as the court failed to obtain a knowing and voluntary waiver of that right at the time of the plea (*see People v Sims*, 129 AD3d 1509, 1510, *lv denied* 26 NY3d 935).

We reject defendant's contention that the court erred in refusing to suppress physical evidence, i.e., cocaine, as the fruit of an allegedly unlawful approach and pursuit of defendant by the police. Here, the evidence adduced at the suppression hearing established that, after having a confidential informant conduct multiple controlled purchases of cocaine from the target of an investigation at a residence in Syracuse and making other observations that were indicative of illegal drug transactions, the police obtained valid

search warrants for the target and the residence. While conducting further surveillance of the residence just prior to the execution of the warrants by other officers, an experienced detective observed the target and another man sitting in lawn chairs in the front yard with a third man standing nearby, and then observed a hand-to-hand interaction that the detective believed was a drug transaction between the third man and another individual who had approached the residence. Approximately 20 to 25 minutes after the detective reported her observations to them, officers wearing vests marked "police" pulled up to the residence in their vehicles to execute the warrants and observed two men, including the target, sitting in lawn chairs and a third man, later identified as defendant, standing nearby. Defendant immediately ran away, was pursued by certain officers and, upon colliding with one officer, he threw away a piece of knotted plastic that was subsequently seized and determined to contain cocaine.

It is well established that, "[i]n evaluating police conduct, the court must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835, *lv denied* 92 NY2d 858; *see People v De Bour*, 40 NY2d 210, 215). We reject defendant's contention that the court erred in concluding that the police had a founded suspicion that criminal activity was afoot when they arrived at the scene. Defendant's physical and temporal proximity to both the residence and the target—each the subject of a valid search warrant issued following police investigation into illegal drug activities—as well as the reported observations of the experienced detective of a possible hand-to-hand drug transaction, provided the officers with founded suspicion that criminal activity was afoot, which was sufficient to justify even a level two intrusion under *De Bour* (*see People v McKinley*, 101 AD3d 1747, 1748, *lv denied* 21 NY3d 1017; *People v Chin*, 25 AD3d 461, 462, *lv denied* 6 NY3d 846; *see generally People v Jones*, 90 NY2d 835, 837).

Contrary to defendant's further contention, the court properly determined that the officers were justified in pursuing him when he fled from the residence. "[I]t is well settled that the police may pursue a fleeing defendant if they have a reasonable suspicion that defendant has committed or is about to commit a crime" (*People v Rainey*, 110 AD3d 1464, 1465 [internal quotation marks omitted]). While flight alone is insufficient to justify pursuit, "defendant's flight in response to an approach by the police, *combined with other specific circumstances indicating that the suspect may be engaged in criminal activity*, may give rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Sierra*, 83 NY2d 928, 929 [emphasis added]; *see Rainey*, 110 AD3d at 1465). Here, defendant's immediate flight upon the arrival of the officers, combined with the search warrants and the detective's observations indicating that defendant may have been engaged in criminal activity, furnished the requisite reasonable suspicion to justify the officers' pursuit of defendant (*see McKinley*, 101 AD3d at 1748-1749; *People v Gray*, 77 AD3d 1308, 1308-1309).

Finally, we note that "a defendant's attempt to discard evidence

generally constitutes 'an independent act involving a calculated risk' and, based on that act of abandonment, a defendant 'los[es] his [or her] right to object to the [police seizing the evidence]' " (*Rainey*, 110 AD3d at 1466). Inasmuch as defendant's abandonment of the piece of knotted plastic containing cocaine during the pursuit was not precipitated by illegal police conduct, defendant had no right to object to the officers' seizure of that evidence, and denial of defendant's motion to suppress was therefore proper (*see Sierra*, 83 NY2d at 930).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

146
CA 16-01197

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

AUTOCRAFTING FLEET SOLUTIONS, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLIANCE FLEET CO., ET AL., DEFENDANTS,
AND JEFF BELL, DEFENDANT-APPELLANT.

LECLAIR KORONA VAHEY COLE LLP, ROCHESTER (STACEY E. TRIEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (DAVID D. SPOTO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered May 6, 2016. The order denied the motion of defendant Jeff Bell to dismiss the complaint against him.

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

Memorandum: Plaintiff commenced this breach of contract action against Alliance Fleet Company (Alliance) and certain individuals, including Jeff Bell (defendant), who executed personal guarantees on the subject asset purchase agreement. In its complaint, plaintiff alleged, inter alia, that Alliance breached its obligation to make payment under section 2.1 of the agreement. Defendant made a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1) and (7), and he asserted that he could not be held liable for a breach of section 2.1 under any provision of the agreement. In opposition, plaintiff asserted that section 9.2 of the agreement, which defendant personally guaranteed, obligated him to indemnify plaintiff for any losses incurred by Alliance's failure to perform under the agreement. Supreme Court denied defendant's motion.

We agree with defendant that the court erred in denying his motion to dismiss the complaint against him. When interpreting a contract, " '[a] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' " (*Potter v Grage*, 133 AD3d 1248, 1249, quoting *Greenfield v Philles Records*, 98 NY2d 562, 569). Moreover, "[a] guaranty is to be interpreted in the strictest manner" (*White Rose Food v Saleh*, 99 NY2d 589, 591; *see Continental Indus. Capital, LLC v*

Lightwave Enters., Inc., 85 AD3d 1639, 1640). Here, the obligation that plaintiff seeks to enforce under section 2.1 was not included in the guarantee clause. By its express terms, that clause was fashioned for the "sole purpose" of securing a guarantee on "Sections 2.2, 2.5, 7.5, 9.2 and 9.4," and thus it must be limited to those enumerated sections. If the parties had wished to hold the individual guarantors personally liable for payment of the purchase price, they could have done so (*see Continental Indus. Capital, LLC*, 85 AD3d at 1640).

We further agree with defendant that the indemnification clause in section 9.2 does not apply to claims between the parties for a breach of section 2.1. " '[A] contract assuming th[e] obligation [to indemnify] must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed' " (*Jeanetti v Casler Masonry, Inc.*, 133 AD3d 1339, 1340, quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491; *see Capretto v City of Buffalo*, 124 AD3d 1304, 1310). In other words, we may not extend the language of an indemnification clause "to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract" (*Jeanetti*, 133 AD3d at 1340 [internal quotation marks omitted]). Here, section 9.2 provides that defendant "shall . . . indemnify" plaintiff for "any and all . . . losses" that plaintiff "may incur by reason" of Alliance's "failure to perform any of its . . . commitments." It is hornbook law that "a promise of indemnity against loss is a promise by the indemnitor to reimburse the indemnitee after the indemnitee has paid [a] third party" (Calamari and Perillo, Contracts § 17.8, at 680 [5th ed 2003]). In our view, it is not reasonable to infer that the boilerplate indemnification language in section 9.2 contemplated defendant's personal liability on an intraparty claim of a breach of section 2.1, particularly in light of the fact that section 2.1 was excluded from the guarantee clause. We thus conclude that, accepting the facts in the complaint as true and according plaintiff the benefit of every favorable inference (*see generally Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63), the court should have granted defendant's motion to dismiss the complaint against him.

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

155
KA 15-00323
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL NANCE, 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 (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), entered January 8, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress the handgun seized from him by Buffalo police officers. We reject that contention.

"It is well established that, in evaluating the legality of police conduct, we 'must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter' " (*People v Howard*, 129 AD3d 1654, 1655, *lv denied* 27 NY3d 999; *see generally People v De Bour*, 40 NY2d 210, 215). Here, contrary to defendant's contention, the court properly concluded that each step in the officers' interactions with defendant was justified. The evidence from the suppression hearing establishes that two officers in a police vehicle initially observed defendant as he walked across a lawn in a high-crime neighborhood. At that time, the officers looked at defendant but took no action. Upon observing the officers, defendant's eyes widened, he changed direction so that he would pass behind one of the two police vehicles at the scene, and he said aloud that the officers were looking at him as if he had done something wrong. As he passed the officers, defendant took his left hand out of the pocket of his jeans, and they noticed that he was wearing a black latex glove on that hand but had no glove on the other hand, and that he had a bulge in his left pocket. Based on their

observations, the officers suspected that defendant had a handgun. As the officers moved their vehicle into defendant's path of travel, defendant began to run and, as he slid or jumped over the hood of their vehicle, he dropped a black handgun. An officer from the second police vehicle apprehended defendant, and another officer from that vehicle recovered the handgun. After the police gave him *Miranda* warnings, defendant admitted to possessing the handgun.

It is well settled that a "defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Sierra*, 83 NY2d 928, 929; *see People v Crisler*, 81 AD3d 1308, 1309, *lv denied* 17 NY3d 793). We conclude under the circumstances of this case that the police officers had the requisite reasonable suspicion to pursue and detain defendant after they made the observations discussed above and defendant fled upon the approach of the officers (*see People v Haynes*, 115 AD3d 676, 676; *People v Britt*, 67 AD3d 1023, 1024, *lv denied* 14 NY3d 770; *People v Cruz*, 14 AD3d 730, 731-732, *lv denied* 4 NY3d 852; *People v Fajardo*, 209 AD2d 284, 284, *lv denied* 84 NY2d 1031). Furthermore, after the officers seized defendant and recovered the weapon, they had probable cause to arrest him (*see People v Leung*, 68 NY2d 734, 736-737).

Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence inasmuch as he failed to make a sufficiently specific motion for a trial order of dismissal at the close of the People's case (*see People v Gray*, 86 NY2d 10, 19). In any event, we reject defendant's contention that the conviction is not supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that the court erred in permitting the prosecution to introduce evidence indicating that a mixture of DNA from several people was found on the handgun, and that defendant could not be excluded as a contributor to that mixture. In any event, that contention is without merit. It is well settled that "all relevant evidence is admissible unless its admission violates some exclusionary rule . . . . Evidence is considered relevant if it has any tendency in reason to prove the existence of any material fact" (*People v Nicholson*, 26 NY3d 813, 829 [internal quotation marks omitted]). Consequently, the fact that defendant could not be excluded as a contributor to the DNA recovered from the handgun is admissible (*see People v Lipford*, 129 AD3d 1528, 1530, *lv denied* 26 NY3d 1041; *People v Roosevelt*, 125 AD3d 1452, 1454, *lv denied* 25 NY3d 1076; *People v Pope*, 96 AD3d 1231, 1234, *lv denied* 20 NY3d 1064; *People v Schouenborg*, 42 AD3d 473, 474, *lv denied* 9 NY3d 926).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct during summation inasmuch as he failed to object to the alleged misconduct (*see People v Paul*, 78 AD3d 1684, 1684-1685, *lv denied* 16 NY3d 834; *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849). In any event, we conclude that any impropriety was not " 'so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Johnson*, 303 AD2d 967, 968, *lv denied* 100 NY2d 583).

We reject defendant's further contention that he was deprived of a fair trial by ineffective assistance of counsel. With respect to defendant's claim that defense counsel was ineffective in failing to move to preclude the DNA evidence, we conclude that "[d]efendant failed to demonstrate that such a motion would have been meritorious, and there is no denial of effective assistance based on the failure to make a motion or argument that has little or no chance of success" (*People v Jackson*, 108 AD3d 1079, 1080, *lv denied* 22 NY3d 997 [internal quotation marks omitted]). Defendant's further challenge to the assistance provided by defense counsel is without merit. It is well settled that "[a] defendant receives effective assistance of counsel [where, as here,] the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Speaks*, 28 NY3d 990, 992 [internal quotation marks omitted]).

Finally, the sentence is not unduly harsh or severe.

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

158
KA 14-01870
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH WALKER, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 7, 2012. 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.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty under indictment No. 2478/11, of robbery in the first degree (Penal Law § 160.15 [3]) arising out of an incident in November 2011. We reject defendant's contention that his plea must be vacated pursuant to *People v Fuggazzatto* (62 NY2d 862) in light of our vacatur of his guilty plea to an unrelated robbery under superior court information No. 36277 (*People v Walker* [appeal No. 2], ___ AD3d ___). Defendant "pleaded without any commitment on sentence," and it is well established that such pleas are not subject to vacatur on *Fuggazzatto* grounds (*People v Clark*, 45 NY2d 432, 440, *rearg denied* 45 NY2d 839; *see People v Pichardo*, 1 NY3d 126, 129; *People v Lowrance*, 41 NY2d 303, 304; *People v LeFrois* [appeal No. 2], 155 AD2d 949, 950, *lv dismissed* 76 NY2d 791; *cf. People v Williams*, 17 NY3d 834, 836). The fact that defendant pleaded guilty to both the indictment and the superior court information as part of a single plea bargain does not change the result. "[T]he pleas are severable, and each should be treated in accordance with its own legal status" (*People v Dinkins*, 118 AD3d 559, 560; *see generally People v Pierre* [appeal No. 1], 124 AD3d 1332, 1332, *lv denied* 25 NY3d 1076; *People v Smith*, 122 AD3d 1420, 1420, *lv denied* 25 NY3d 1172).

Although defendant correctly notes that his waiver of the right to appeal his conviction does not encompass his challenge to the severity of his sentence (*see People v Maracle*, 19 NY3d 925, 928), we

nevertheless conclude that the bargained-for sentence is not unduly harsh or severe (*see People v Grucza*, 145 AD3d 1505, 1506). Moreover, given that defendant was over 19 years old at the time of the crime in November 2011, he is categorically ineligible for youthful offender treatment on this particular conviction (*see* CPL 720.10 [1]). Thus, contrary to defendant's further contention, there is no basis for resentencing pursuant to *People v Middlebrooks* (25 NY3d 516).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

159

KA 16-00958

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH WALKER, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 7, 2012. 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 reversed on the law, the plea is vacated, the superior court information is dismissed, and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him of robbery in the first degree (Penal Law § 160.15 [1]) upon his plea of guilty to a superior court information (SCI). We agree with defendant that the SCI is jurisdictionally defective based on the People's violation of CPL 195.20 and CPL 200.15, and we therefore reverse the judgment, vacate the plea, dismiss the SCI, and remit the matter to Supreme Court for proceedings pursuant to CPL 470.45 (see *People v Pierce*, 14 NY3d 564, 570-571; *People v Mano*, 121 AD3d 1593, 1593, *lv dismissed* 24 NY3d 1121; *People v Tun Aung*, 117 AD3d 1492, 1492).

CPL 195.20 provides in relevant part that "[t]he offenses named [in the written waiver of indictment and charged in the subsequent SCI] may include any offense for which the defendant was held for action of a grand jury and any offense or offenses properly joinable therewith." The SCI must therefore charge defendant with either "the same crime as the felony complaint or a lesser included offense of that crime" (*Pierce*, 14 NY3d at 571). Moreover, CPL 195.20 requires that the SCI charge the same underlying criminal conduct as the felony complaint (*see People v Milton*, 21 NY3d 133, 136-137; *see also* Penal Law § 10.00 [1]). Thus, when the SCI charges defendant with a " 'different crime entirely' " than the felony complaint (*People v Stevenson*, 107 AD3d 1576, 1576; *see People v Edwards*, 39 AD3d 875,

876), whether by change of date or change of victim or other "factual discrepancy" (*Milton*, 21 NY3d at 137), the SCI violates CPL 195.20 and is therefore jurisdictionally defective, even if it charges defendant with violating the same section of the Penal Law as the felony complaint.

Here, the felony complaint charged defendant with the commission of robbery in the first degree "on or about the 2nd day of 2011," i.e., January 2, 2011. The written waiver of indictment, however, specified that defendant waived his right to indictment with respect to the commission of robbery in the first degree on February 2, 2012, and the SCI itself charged defendant with the commission of robbery in the first degree on February 2, 2011. Inasmuch as robbery is a single-act offense (*see People v Rosas*, 8 NY3d 493, 503; *People v Ramirez*, 89 NY2d 444, 452), the January 2, 2011 robbery charged in the felony complaint was a " 'different crime entirely' " from both the February 2, 2012 robbery set forth in the waiver of indictment and the February 2, 2011 robbery charged in the SCI (*Stevenson*, 107 AD3d at 1576; *see Edwards*, 39 AD3d at 876; *see also People v Siminions*, 112 AD3d 974, 975, *lv denied* 24 NY3d 1088; *People v Harris*, 267 AD2d 1008, 1009). Indeed, "the [dates] set forth in the [three] instruments," i.e., the felony complaint, the waiver of indictment, and the SCI, "exclude any possibility that they were based on the same criminal conduct" (*People v Colon*, 39 AD3d 661, 662). The SCI therefore violates CPL 195.20 and must be dismissed as jurisdictionally defective (*see Siminions*, 112 AD3d at 975; *Colon*, 39 AD3d at 662; *Harris*, 267 AD2d at 1009).

The SCI is also jurisdictionally defective inasmuch as it violates CPL 200.15, which provides in relevant part that a "superior court information . . . shall not include an offense not named in the written waiver of indictment." That "express prohibition" was violated here (*People v Ashe*, 74 AD3d 503, 508 [McGuire, J., concurring], *affd* 15 NY3d 909), inasmuch as the SCI included an offense, i.e., a robbery in the first degree committed on February 2, 2011 that was not set forth in the written waiver of indictment, which identified only a robbery in the first degree committed on February 2, 2012.

To the extent that our decision in *People v Rossborough* (101 AD3d 1775) conflicts with our decision herein, it should no longer be followed.

In view of the foregoing, defendant's remaining contentions are academic.

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

164
CA 16-00079
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

ACEA MOSEY, AS ADMINISTRATOR OF THE ESTATE OF
LAURA CUMMINGS, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 25, 2015. The order granted in part the motion of defendant for a protective order, and granted the cross motion of plaintiff for leave to renew her motion to strike defendant's answer and, upon renewal, adhered to its prior determination.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of defendant's motion for a protective order related to the documents specified in the first ordering paragraph and ordering those documents to be disclosed to plaintiff within 40 days of service of entry of this order upon defendant, and as modified the order is affirmed without costs.

Memorandum: As noted in a prior appeal, plaintiff commenced this action seeking damages resulting from the wrongful death of Laura Cummings (decedent) in 2010 (*Mosey v County of Erie*, 117 AD3d 1381). After Supreme Court denied plaintiff's CPLR 3126 motion seeking to strike the answer of defendant, County of Erie (County), and granted the County's motion to dismiss the complaint, we modified the order by reinstating four causes of action (*id.* at 1382). Following remittal to the court, the County filed a motion for a protective order related to approximately 673 documents that had been received by the County's attorney following the filing of the prior motions. The County contended that those documents were privileged and thus not subject to disclosure. Plaintiff opposed the motion and cross-moved for leave to renew her motion to strike the County's answer, seeking, again, to strike the County's answer for its alleged "repeated refusal to comply" with the court's May 2011 order directing the County to

produce documents responsive to plaintiff's first notice to produce. In appeal No. 1, plaintiff appeals from the order that denied the County's motion in part and granted it in part by ordering disclosure of most of the allegedly privileged documents, and granted plaintiff's cross motion for leave to renew and, on renewal, denied plaintiff's requested relief of striking the answer.

Meanwhile, plaintiff had filed a second notice to produce seeking, inter alia, "a complete copy of any and all documents consulted, referred to, or relied upon by [the] County Executive . . . in the preparation of the nineteen (19) pieces of proposed legislation" related to child protective services that were discussed in a 2014 memorandum to State Legislators. The County sought a protective order for those documents, contending that they were privileged and, additionally, that they were irrelevant to matters concerning decedent, who was an adult when she was murdered. In appeal No. 2, plaintiff appeals from the order granting the County's motion insofar as it related to the demand concerning the County Executive's documents.

While preparing for the appeal in appeal No. 1, the parties began disputing whether a transcript of oral argument of the motion and cross motion should be included in the record on appeal in appeal No. 1. Plaintiff moved to settle the record and, in appeal No. 3, plaintiff appeals from the order insofar as it denied that part of plaintiff's motion seeking inclusion of the transcript.

Addressing first appeal No. 3, we agree with plaintiff that the court erred in denying plaintiff's motion insofar as it sought inclusion of the transcript of oral argument of the motions at issue in appeal No. 1 (*see Kai Lin v Strong Health* [appeal No. 1], 82 AD3d 1585, 1586, *lv dismissed in part and denied in part* 17 NY3d 899, *rearg denied* 18 NY3d 878; *see also* CPLR 5526; 22 NYCRR 1000.4 [a] [2]).

Addressing next appeal No. 2, we agree with the County that the court properly granted its motion for a protective order. It is well settled that the court "is invested with broad discretion to supervise discovery and to determine what is material and necessary as that phrase is used in CPLR 3101 (a) . . . , and only a clear abuse of discretion will prompt appellate action" (*Community Dev. Assn. v Warren-Hoffman & Assoc.*, 4 AD3d 755, 755 [internal quotation marks omitted]). Here, the record on appeal includes the 19 pieces of proposed legislation, which sought "to improve the provision of child protective services to New York's children and families." We see no basis to disturb the court's determination inasmuch as the records sought are irrelevant to the issues raised by plaintiff and are thus "not material and necessary to the prosecution . . . of this proceeding" (*Matter of 425 Park Ave. Co. v Finance Adm'r of City of N.Y.*, 69 NY2d 645, 648). In our view, plaintiff's demands were improperly "based upon hypothetical speculations calculated to justify a fishing expedition" (*Forman v Henkin*, 134 AD3d 529, 530 [internal quotation marks omitted]).

With respect to appeal No. 1, we reject plaintiff's contention

that the court abused or improvidently exercised its discretion when it denied her renewed motion to strike the County's answer. As we stated in the prior appeal, "[t]he nature and degree of a sanction to be imposed on a motion pursuant to CPLR 3126 is within the discretion of the court, and the striking of a pleading is appropriate only upon a clear showing that a party's failure to comply with a discovery demand or order is willful, contumacious, or in bad faith" (*Mosey*, 117 AD3d at 1384). Under the circumstances of this case, which include a change in the County's legal representation (*see Corner Realty 30/7 v Bernstein Mgt. Corp.*, 249 AD2d 191, 193), as well as differing interpretations of communications between the parties, we decline to disturb the court's determination that the extreme sanction of striking the answer is not warranted (*see* CPLR 3126; *Sayomi v Rolls Kohn & Assoc., LLP*, 16 AD3d 1069, 1070; *cf. Hann v Black*, 96 AD3d 1503, 1504-1505).

We agree with plaintiff, however, that the court erred in denying disclosure of the documents listed in the first ordering paragraph, i.e., the adult protective services (APS) documents created after decedent's death, and we therefore modify the order accordingly. Inasmuch as decedent is the subject of those documents, her agent or legal representative is entitled to disclosure of them under Social Services Law § 473-e. Moreover, based upon our review of the documents and the fact that they were all generated long before any notice of claim or complaint was filed against the County, we conclude that the County "failed to carry its burden of demonstrating that the materials sought were prepared solely in anticipation of litigation" (*Zampatori v United Parcel Serv.*, 94 AD2d 974, 975; *see* CPLR 3101 [d] [2]; *Flex-O-Vit USA v Niagara Mohawk Power Corp.*, 281 AD2d 980, 981).

We reject the County's contention that the documents are privileged under the deliberative process privilege. That privilege is also known as the "inter-agency or intra-agency materials" exemption under Public Officers Law § 87 (2) (g) (*see Matter of Russo v Nassau County Community Coll.*, 81 NY2d 690, 699). The question is whether that statutory exemption contained in the Freedom of Information Law ([FOIL] Public Officers Law art 6) also applies to discovery in civil actions. We conclude that it does not.

Both the CPLR and FOIL provide for disclosure of documents. The former controls discovery between litigants in court proceedings, and the latter permits disclosure of governmental records to the public even in the absence of litigation. "When a public agency is one of the litigants, this means that it has the distinct disadvantage of having to offer its adversary two routes into its records" (Siegel, NY Prac § 348 at 581 [5th ed 2011]; *see Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 80-81). The deliberative process privilege or exemption under FOIL seeks "to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 276 [internal quotation marks omitted]). While some courts have applied that privilege outside the FOIL context (*see Matter of Entergy Nuclear Indian Point 2, LLC v New York State Dept.*

of State, 130 AD3d 1190, 1197; *Mecca v Shang*, 55 AD3d 570, 571; *New York Tel. Co. v Nassau County*, 54 AD3d 368, 369-370), we decline to do so inasmuch as the Court of Appeals "has never created nor recognized a generalized 'deliberative process privilege' " (*Matter of 91st St. Crane Collapse Litig.*, 31 Misc 3d 1207[A], 2010 NY Slip Op 52395[U], *3 [Sup Ct, NY County 2010]).

We "recognize[] the existence of some cases which all too casually mention the 'deliberate process privilege' and purport to apply it outside the context of a FOIL proceeding" (*id.* at *3). Nevertheless, it is also important to recognize that "privileges simply do not exist in the absence of either constitutional or statutory authority, or, when created as a matter of jurisprudence" (*id.*). Although the County seeks to assert "the so-called 'deliberative process privilege[,]' " in the context of a civil litigation, "neither the Court of Appeals' case law nor that of the [Fourth] Department can be construed [as] having created a distinct 'deliberate process privilege' outside the context of a FOIL proceeding" (*id.* at *3-4).

Inasmuch as this case involves "a request under the CPLR by a party in a pending action for documents in the possession of another party," as opposed to a request by a member of the public for a document under the Public Officers Law (*Marten v Eden Park Health Servs.*, 250 AD2d 44, 47; *see Matter of Schwartz*, 130 Misc 2d 786, 787-789), we agree with plaintiff that the deliberative process exemption under FOIL should not be afforded privilege status under the CPLR. Here, as in *Marten*, "[i]t is clear that the public interest protected by FOIL . . . is not served by barring [plaintiff, i.e., the agent for the subject of the APS records], from obtaining such information from [the County]" (*id.* at 47-48).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

165
CA 16-00080
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

ACEA MOSEY, AS ADMINISTRATOR OF THE ESTATE OF
LAURA CUMMINGS, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered May 11, 2015. The order, insofar as appealed from, granted that part of the motion of defendant for a protective order with respect to the demand concerning documents from the County Executive.

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

Same memorandum as in *Mosey v County of Erie* ([appeal No. 1] ___ AD3d ___ [Mar. 24, 2017]).

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

166

CA 16-00842

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

ACEA MOSEY, AS ADMINISTRATOR OF THE ESTATE OF
LAURA CUMMINGS, DECEASED, PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered May 3, 2016. The order, insofar as appealed from, denied that part of plaintiff's motion to settle the record with respect to inclusion of a transcript of oral argument of the motions at issue in appeal No. 1.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, and that part of plaintiff's motion seeking inclusion of the transcript of oral argument in the record on appeal in appeal No. 1 is granted.

Same memorandum as in *Mosey v County of Erie* ([appeal No. 1] ___ AD3d ___ [Mar. 24, 2017]).

Entered: March 24, 2017   Frances E. Cafarell
                                                           Clerk of the Court

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

176
KA 13-00677
PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MOSES MADDEN, III, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Gail A. Donofrio, J.), rendered January 23, 2013. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the first degree and aggravated criminal contempt.

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 reckless endangerment in the first degree (Penal Law § 120.25) and aggravated criminal contempt (§ 215.52 [1]). As the People correctly concede, defendant's written waiver of the right to appeal is invalid because the record establishes that Supreme Court did not explain the written waiver to defendant or ascertain that he understood its contents (*see People v Bradshaw*, 18 NY3d 257, 264-265; *People v Callahan*, 80 NY2d 273, 283; *People v Terry*, 138 AD3d 1484, 1484, *lv denied* 27 NY3d 1156). Indeed, a "written waiver does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his or her right to appeal" (*People v Banks*, 125 AD3d 1276, 1277, *lv denied* 25 NY3d 1159 [internal quotation marks omitted]). Moreover, the record does not support the People's contention that defendant pleaded guilty before the court ruled on his suppression motion and thus forfeited his challenge to the court's suppression determination (*see generally People v Fernandez*, 67 NY2d 686, 688; *People v Scaccia*, 6 AD3d 1105, 1105, *lv denied* 3 NY3d 681). Although the court noted during the plea colloquy that it had not yet issued a written order denying defendant's motion, the court did issue an oral suppression ruling, and a written order is not required in seeking to review an adverse suppression ruling pursuant to CPL 710.70 (2) (*see People v Elmer*, 19 NY3d 501, 505). Contrary to the People's contention, the court's comments that it intended to issue a written order did not constitute

a retraction of its oral order.

On the merits, however, we conclude that the court properly refused to suppress defendant's statements to the police on the ground that his indelible right to counsel was allegedly violated. Defendant failed to meet his burden of establishing that his indelible right to counsel had attached before he made his statements to the police (*see People v Castor*, 128 AD3d 1357, 1358, *lv denied* 26 NY3d 927; *People v Brown*, 46 AD3d 1128, 1129; *see generally People v Cohen*, 90 NY2d 632, 638-639).

Finally, we reject defendant's challenge to the factual sufficiency of his plea allocution. It is well established that a defendant who pleads guilty need not "acknowledge[] committing every element of the pleaded-to offense . . . or provide[] a factual exposition for each element of the pleaded-to offense" (*People v Seeber*, 4 NY3d 780, 781). A plea will not be vacated where, as here, the defendant does not negate an element of the pleaded-to offense during the colloquy or otherwise cast doubt on his or her guilt or the voluntariness of the plea (*see Seeber*, 4 NY3d at 781-782; *People v Jeanty*, 41 AD3d 1223, 1223, *lv denied* 9 NY3d 923). Thus, we conclude that, "even if 'defendant's allocution did not establish the essential elements of the crime to which he pleaded guilty, it would not require vacatur of his plea since there is no suggestion in the record that the plea was improvident or baseless' " (*People v O'Keefe*, 170 AD2d 1020, 1020, *lv denied* 77 NY2d 965; *see People v Pratcher*, 50 AD3d 1063, 1064, *lv denied* 11 NY3d 793).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

177

KA 11-01538

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD MCGUIRE, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered June 8, 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 reversed on the law and a new trial is granted on counts two and four of the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We conclude that, when viewed 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; *People v Carrasquillo*, 142 AD3d 1359, 1360).

As the People concede, however, County Court erred in refusing to sever defendant's trial from that of his codefendants (*see* CPL 200.40 [1]). We note at the outset that, "[w]hile a trial court must decide a severance motion 'prospectively, based on its discretionary assessments of the strategies and evidence as forecast by the parties,' appellate courts have the benefit of a 'full trial record by which they may, within the ambit of their . . . review powers, determine the existence of irreconcilable conflict and its possible effect on the verdict' " (*People v Cardwell*, 78 NY2d 996, 998, quoting *People v Mahboubian*, 74 NY2d 174, 184-185).

Defendant and his two codefendants were jointly charged with various offenses arising from the seizure by the police of a handgun

from the vehicle in which defendant and his codefendants were riding. In support of his motion for severance, defendant contended that his counsel had consulted with counsel for his codefendants and determined that their respective trial strategies were irreconcilable because the codefendants had made statements implicating one another in the possession of the weapon. During the trial, defendant did not take the stand, and defense counsel attempted to establish that defendant did not possess the handgun. The codefendants testified that they did not know that defendant had a handgun but that, just as the police were stopping the vehicle, defendant pulled a gun from his waistband and tried to give it to one of the codefendants. When that codefendant refused to take the gun, defendant tried to hide it beneath or behind the other codefendant’s seat. Thus, both codefendants denied possessing the gun and testified that it was in defendant’s possession. Additionally, one of the codefendants testified that, following the arrest, defendant offered him $10,000 to take responsibility for the gun.

We conclude that the codefendants’ respective attorneys “took an aggressive adversarial stance against [defendant at trial], in effect becoming a second [and a third] prosecutor” (*Cardwell*, 78 NY2d at 998; *see People v Nixon*, 77 AD3d 1443, 1444). We further conclude that the “ ‘essence or core of the defenses [were] in conflict, such that the jury, in order to believe the core of one defense, . . . necessarily [had to] disbelieve the core of the other’ ” (*Mahboubian*, 74 NY2d at 184; *see Nixon*, 77 AD3d at 1444). Thus, in retrospect (*see Cardwell*, 78 NY2d at 998), there was “a significant danger . . . that the conflict alone would lead the jury to infer defendant’s guilt,” and therefore severance was required (*Mahboubian*, 74 NY2d at 184; *see Cardwell*, 78 NY2d at 998; *Nixon*, 77 AD3d at 1444). Consequently, we reverse the judgment and grant a new trial on counts two and four of the indictment. Inasmuch as both codefendants were acquitted at trial, defendant’s severance motion itself is now moot (*see Nixon*, 77 AD3d at 1444).

In view of our determination, we do not consider defendant’s remaining contentions.

Entered: March 24, 2017

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 14-00196
PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROSS SANFORD, JR., DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN MCDERMOTT 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 (Joseph E. Fahey, J.), rendered January 17, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree as a sexually motivated felony (Penal Law §§ 130.91 [1]; 140.25 [2]). The conviction arises from the victim's report that, one night while she was sleeping, her neighbor had entered her apartment, disrobed, pounced onto her in bed, held a towel over her mouth, and told her that he had tried to "do stuff" with her in the past. Eventually, defendant let go of the victim, put his clothes back on, and left. Defendant contends that his conviction is based on legally insufficient evidence and that the verdict is against the weight of the evidence. We reject those contentions. Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), we conclude that "there is a valid line of reasoning and permissible inferences to support the jury's finding that defendant committed the crime[] of which he was convicted based on the evidence presented at trial" (*People v Scott*, 93 AD3d 1193, 1194, *lv denied* 19 NY3d 967, *reconsideration denied* 19 NY3d 1001; *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).

Defendant failed to preserve for our review his contention that the court improperly denied his use of a peremptory challenge to

excuse a prospective juror, who was ultimately seated on the jury. We are unable to determine from our review of the record "whether defendant in fact exercised [a] peremptory challenge[]" to the prospective juror (*People v Watkins*, 229 AD2d 957, 958, *lv denied* 89 NY2d 931), and the record does not establish that the court was made aware "that the defense wanted him to rule otherwise" (*People v Rosario-Boria*, 110 AD3d 1486, 1486 [internal quotation marks omitted). 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 the indictment was jurisdictionally defective. Contrary to the People's contention, preservation was not required (*see People v Iannone*, 45 NY2d 589, 600-601; *People v Holmes*, 101 AD3d 1632, 1633, *lv denied* 21 NY3d 944). "[A]n indictment is jurisdictionally defective only if it does not effectively charge the defendant with the commission of a particular crime[, such as] if it fails to allege that a defendant committed acts constituting every material element of the crime charged" (*Iannone*, 45 NY2d at 600). In that regard, it is well established that " 'incorporation [in an indictment] by specific reference to the statute [defining the crime charged] operates without more to constitute allegations of all the elements of the crime' " (*People v Boula*, 106 AD3d 1371, 1372, *lv denied* 21 NY3d 1040, quoting *People v Cohen*, 52 NY2d 584, 586). Here, the indictment charged defendant with "burglary in the second degree (as a sexually motivated felony)," and thereby incorporated by reference the elements of the crime of a sexually motivated felony, i.e., that he committed the "specified offense for the purpose, in whole or substantial part, of his or her own direct sexual gratification" (Penal Law § 130.91 [1]). Although the indictment omitted the Penal Law section number for the charged offense, we conclude that the indictment was not jurisdictionally defective inasmuch as it correctly referred to the specified crime by name (*see People v Parrilla*, 145 AD3d 629, 629-630; *People v Bishop*, 115 AD3d 1243, 1244, *lv denied* 23 NY3d 1018, *reconsideration denied* 24 NY3d 1082). Insofar as defendant contends that the indictment is defective under CPL 200.50 (7) (e), he did not challenge the indictment on that ground in a motion to dismiss the indictment within 45 days of arraignment (*see* CPL 210.20 [1] [a]; 255.20 [1]; *People v Marshall*, 299 AD2d 809, 810), and he therefore failed to preserve his contention for our review (*see People v Slingerland*, 101 AD3d 1265, 1265-1266, *lv denied* 20 NY3d 1104).

Defendant further contends that the jury instruction with respect to the elements of the crime of which he was convicted was erroneous because it allowed the jury to convict him on an uncharged theory of the crime. Preliminarily, contrary to the People's contention, defendant was not required to preserve his contention for our review because he " 'has a fundamental and nonwaivable right to be tried only on the crimes charged' " (*People v Graves*, 136 AD3d 1347, 1348, *lv denied* 27 NY3d 1069). We nonetheless reject his contention. When charging a defendant with a burglary, "[i]f the People expressly limit[ ] their theory of the 'intent to commit a crime therein' element to a particular crime, then they [must] prove that the

defendant intended to commit that crime" (*People v Lewis*, 5 NY3d 546, 552 n 7; *see People v James*, 114 AD3d 1202, 1204, *lv denied* 22 NY3d 1199). "Where the court's jury instruction on a particular count erroneously contains an additional theory that differs from the theory alleged in the indictment . . . and the evidence adduced at trial could have established either theory, reversal of the conviction on that count is required because there is a possibility that the jury could have convicted the defendant upon the uncharged theory" (*Graves*, 136 AD3d at 1348; *see People v Martinez*, 83 NY2d 26, 32-35, *cert denied* 511 US 1137). Although we agree with defendant that the People expressly limited their theory of defendant's intent to commit a crime therein to his intent to commit the crime of sexual abuse in the first degree (Penal Law § 130.65 [1]), we reject defendant's contention that the jury instruction allowed the jurors to convict him if they found that he had only a general criminal intent at the time that he entered the victim's apartment. We conclude that the court properly instructed the jurors that they could convict defendant only if they found that he intended to commit the crime of sexual abuse in the first degree at the time he entered the victim's apartment.

Contrary to defendant's further contention, we conclude that the court properly denied his request to charge the jury on renunciation. "[O]nce the crime in question was committed, the defense of renunciation is not available as an affirmative defense" (*People v Stevens*, 65 AD3d 759, 763, *lv denied* 13 NY3d 839; *see* Penal Law § 40.10 [3]). A burglary is complete at the moment of the unlawful entry with the appropriate mens rea (*see generally James*, 114 AD3d at 1204), and we conclude that there is no reasonable view of the evidence that entitled defendant to a renunciation charge (*see People v Franco*, 287 AD2d 367, 367-368, *lv denied* 97 NY2d 681; *cf. People v Ervin*, 57 AD3d 1398, 1399).

Defendant contends that the court erred in permitting the victim and the victim's friend to testify about the substance of the victim's disclosure under the prompt outcry exception to the hearsay rule (*see generally People v McDaniel*, 81 NY2d 10, 16-17). Even assuming, arguendo, that the minimal details to which the victim and the victim's friend testified went beyond the scope of what is allowable under this exception to the hearsay rule, we conclude that the error is harmless. The proof of defendant's guilt is overwhelming, and there is no significant probability that he would have been acquitted but for the error (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Defendant concedes that his contention that he was denied a fair trial by prosecutorial misconduct on summation is not preserved for our review inasmuch as no objection was made to the allegedly improper remarks (*see People v Jones*, 114 AD3d 1239, 1241, *lv denied* 23 NY3d 1038, 25 NY3d 1166), 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]). Furthermore, viewing the evidence, the law, and the circumstances of this particular case, in totality and as of the time of the representation, we conclude that defense counsel provided defendant with meaningful representation (*see generally*

People v Baldi, 54 NY2d 137, 147). Finally, defendant's sentence is not unduly harsh or severe.

Entered: March 24, 2017

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 15-00159

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

PERNELL PARKER, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered January 20, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fifth degree and tampering with physical evidence.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of tampering with physical evidence to attempted tampering with physical evidence and by vacating the sentence imposed on count two of the indictment and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for sentencing on the conviction of attempted tampering with physical evidence.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]) and tampering with physical evidence (§ 215.40 [2]). Defendant contends that defense counsel was ineffective for failing to move to suppress the physical evidence on the ground that he was unlawfully seized when the police officers pursued him into a store without reasonable suspicion of criminal activity. We reject that contention. It is well settled that “a showing that [defense] counsel failed to make a particular pretrial motion generally does not, by itself, establish ineffective assistance of counsel” (*People v Rivera*, 71 NY2d 705, 709; *see People v Biro*, 85 AD3d 1570, 1571), and it is equally well settled that, in order “[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel’s failure to request a particular hearing. Absent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgment in not pursuing a hearing” (*Rivera*, 71 NY2d at 709). Futhermore, “[t]here can be no denial of effective assistance of . . .

counsel arising from [defense] counsel’s failure to ‘make a motion or argument that has little or no chance of success’ ” (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Here, defendant failed to demonstrate the absence of legitimate explanations for defense counsel’s failure to make that particular suppression motion, or that the “ ‘motion, if made, would have been successful and that defense counsel’s failure to make that motion deprived him of meaningful representation’ ” (*People v Bassett*, 55 AD3d 1434, 1437-1438, *lv denied* 11 NY3d 922).

We reject defendant’s contention that the conviction of criminal possession of a controlled substance in the fifth degree is based on legally insufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant’s further contention that the verdict with respect to that count is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that the evidence is legally insufficient to support the conviction of tampering with physical evidence. Insofar as relevant here, a person is guilty of that crime when, “[b]elieving that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he [or she] suppresses it by any act of concealment” (Penal Law § 215.40 [2]). The People’s theory was that defendant tampered with physical evidence by throwing bags of cocaine onto the floor of a store with the intent of concealing the drugs from the pursuing police officers and thereby preventing the use of the drugs in a prospective official proceeding. The evidence at trial established that officers observed defendant throw bags of suspected crack cocaine onto the floor when he passed through the front entrance of the store. Although the offense of tampering with physical evidence does not require the actual suppression of physical evidence, there must be an act of concealment while intending to suppress the evidence (*see People v Eaglesgrave*, 108 AD3d 434, 434, *lv denied* 21 NY3d 1073). We conclude that the evidence is legally insufficient to establish that defendant accomplished an act of concealment inasmuch as he dropped the items onto the floor in plain sight of the officers (*cf. People v Atkins*, 95 AD3d 731, 731, *lv denied* 19 NY3d 994). We further conclude, however, that there is legally sufficient evidence to sustain a conviction of attempted tampering with physical evidence (§§ 110.00, 215.40 [2]; *Eaglesgrave*, 108 AD3d at 435). We therefore modify the judgment by reducing defendant’s conviction of tampering with physical evidence to attempted tampering with physical evidence and vacating the sentence imposed on count two of the indictment (*see* CPL 470.15 [2] [a]), and we remit the matter to County Court for sentencing on the conviction of attempted tampering with physical evidence.

Entered: March 24, 2017 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 14-01214

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE FOREST, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB 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 February 5, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of incarceration of 10 years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [2] [b]). We agree with defendant that his waiver of the right to appeal, even if valid, "does not foreclose review of [his] contention that he was denied due process in the hearing conducted to determine if he violated a condition of the plea agreement," thereby warranting the imposition of an enhanced sentence (*People v Butler*, 49 AD3d 894, 895, *lv denied* 10 NY3d 932, *reconsideration denied* 11 NY3d 830; *see People v Scott*, 101 AD3d 1773, 1773, *lv denied* 21 NY3d 1019; *People v Peck*, 90 AD3d 1500, 1501). We further conclude that defendant's contention that County Court failed to conduct a sufficient inquiry pursuant to *People v Outley* (80 NY2d 702) to determine whether there was a legitimate basis for defendant's post plea arrest is reviewable inasmuch as "his arguments regarding the alleged sentencing error are readily discernible from the hearing transcript" (*People v Albergotti*, 17 NY3d 748, 750). On the merits, however, we reject that contention. The record establishes that "there was a sufficient inquiry made to support 'the existence of a legitimate basis for the arrest' " (*People v Fumia*, 104 AD3d 1281, 1281-1282, *lv denied* 21 NY3d 1004, quoting *Outley*, 80 NY2d at 713; *see People v Ayen*, 55 AD3d 1305, 1306). Although defendant stated during the *Outley* hearing that he was not involved in the robbery that led to the postplea arrest, the fact "[t]hat the court chose not to credit

defendant's account of events is not a ground for reversal" (*Albergotti*, 17 NY3d at 750).

We agree with defendant that the waiver of the right to appeal is invalid because the minimal inquiry made by the court was "insufficient to establish that the 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 Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]). Indeed, on this record there is no basis upon which to conclude that the court ensured "that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256).

We also agree with defendant that the imposition of a determinate term of incarceration of 15 years, the maximum allowed for a class C violent felony, is unduly harsh and severe under the circumstances of this case. We note that our "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783), and that we may " 'substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' " (*People v Johnson*, 136 AD3d 1417, 1418, *lv denied* 27 NY3d 1134). We conclude that a reduction in the sentence is appropriate and, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentence to a determinate term of incarceration of 10 years (*see* CPL 470.20 [6]; *Johnson*, 136 AD3d at 1418), to be followed by the five years of postrelease supervision imposed by the court.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

185
CA 16-01257
PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF ALFRED G. GILBERT,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PLANNING BOARD OF TOWN OF IRONDEQUOIT,
RESPONDENT-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR PETITIONER-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (MEGHAN K. MCGUIRE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (William K. Taylor, J.), entered May 6, 2016 in a proceeding pursuant to CPLR article 78. The judgment granted respondent's motion to dismiss the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and respondent is granted 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to vacate and annul a decision of respondent. Respondent moved pursuant to CPLR 3211 and 7804 (f) to dismiss the petition on the ground that it failed to state a claim and was untimely. We conclude that Supreme Court erred in granting the motion. We therefore reverse the judgment and reinstate the petition, and we grant respondent 20 days from service of the order of this Court with notice of entry to serve and file an answer (*see Matter of Timmons v Green*, 57 AD3d 1393, 1395).

Petitioner owns property located within a Woodlot Overlay Protection District in the Town of Irondequoit, as set forth on the Woodlots Map of the Town of Irondequoit. Irondequoit Town Code (Town Code) § 235-43 provides that the locations and boundaries of an environmental protection overlay district (EPOD) shall be delineated on the official set of maps, but further states that those maps "shall be used for reference purposes only and shall not be used to delineate specific or exact boundaries of the various overlay districts. Field investigations and/or other environmental analyses may be required in

order to determine whether or not a particular piece of property is included within one or more of the overlay districts." Section 235-44 then provides that the "Town Department of Planning and Zoning shall be responsible for interpreting [EPOD] boundaries based on an interpretation of the Official Town of Irondequoit EPOD Maps, as well as the use of various criteria set forth in this article for determining such district boundaries." For a Woodlot EPOD, those criteria are set forth at section 235-53 (B) of the Town Code and include, inter alia, that the property have "communities" of certain species of trees. Finally, section 235-44 provides that "[a]ppeals from a determination of the Town Department of Planning and Zoning regarding boundaries of overlay districts shall be made to the Town Planning Board in accordance with the public hearing procedures."

Pursuant to Town Code § 235-44, petitioner appealed to respondent regarding the boundaries of the Woodlot EPOD that encompassed his property, and he submitted evidence in support of his assertion that his property did not meet the criteria for a Woodlot EPOD as set forth in section 235-53 (B). Respondent denied the appeal, and petitioner then commenced this CPLR article 78 proceeding.

"In considering a motion to dismiss a CPLR article 78 proceeding pursuant to CPLR 3211 (a) (7) and 7804 (f), all of the allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference" (*Matter of Eastern Oaks Dev., LLC v Town of Clinton*, 76 AD3d 676, 678; *see Leon v Martinez*, 84 NY2d 83, 87-88; *Matter of Haberman v Zoning Bd. of Appeals of City of Long Beach*, 94 AD3d 997, 1000-1001, *lv dismissed* 19 NY3d 951). We conclude that petitioner stated a claim that respondent acted arbitrarily and capriciously in denying the appeal because the criteria set forth in Town Code § 235-53 (B) were not considered by respondent. Based on Town Code §§ 235-43 and 235-44, respondent is responsible for interpreting the boundary of the particular Woodlot EPOD encompassing petitioner's property, based on the criteria set forth in Town Code § 235-53 (B). Contrary to respondent's contention, the Town Code does not prohibit respondent from changing the boundary lines of an EPOD as shown on the EPOD maps, and respondent's authority to make such changes is not limited to those situations in which the property is located near the existing boundary as shown on the EPOD map.

We disagree with the court that it defied common sense that respondent would be given the power "to drastically change [Woodlot] EPOD[] designations at any time without input from the entity that created the districts in the first place - the Town Board." In interpreting a zoning law, we must "show a healthy respect for the plain language employed," and the law must "be construed in favor of the property owner and against the municipality which adopted and seeks to enforce it" (*City of New York v Les Hommes*, 94 NY2d 267, 273). Here, the plain language of the relevant provisions of the Town Code does not limit respondent's authority when interpreting the boundaries of an EPOD.

We also agree with petitioner that the court erred in concluding

that the petition was untimely. We reject respondent’s contention that petitioner was actually challenging the existence of the Woodlot EPOD that encompasses his property and that was shown on the Woodlots map that was created and made a part of the Town Code in 1986. Petitioner’s application was pursuant to Town Code § 235-44, which specifically gives respondent the authority to hear appeals on overlay district boundaries. That section does not set forth any time limitation for when property owners may seek an interpretation of overlay district boundaries.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

187
CA 16-00776
PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

JEROL K. MELNICK, SR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RONALD E. CHASE, AS PARENT AND NATURAL GUARDIAN
OF BRADLEY E. CHASE, AN INFANT, AND KARON
FARMS, INC., DEFENDANTS-RESPONDENTS.

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

WALSH, ROBERTS & GRACE, BUFFALO (JOSEPH EMMINGER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Paul B. Wojtaszek, J.), entered January 22, 2016. The order denied plaintiff's motion to set aside the jury verdict and for a new trial on the issue of damages.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and setting aside the verdict with respect to damages for past pain and suffering, and a new trial is granted on that element of damages only, and as modified the order is the affirmed without costs.

Memorandum: In this action to recover damages for injuries sustained by plaintiff in a motorcycle accident, the jury returned a verdict that, inter alia, awarded plaintiff no damages for past pain and suffering and $20,000 for future pain and suffering. Plaintiff appeals from an order that denied his motion to set aside the jury verdict with respect to damages as inconsistent and against the weight of the evidence, and for a new trial on both elements of damages. We conclude that plaintiff has failed to preserve for our review his contention that the verdict is inconsistent inasmuch as he failed to raise that contention before the discharge of the jury (*see Barry v Manglass*, 55 NY2d 803, 806, *rearg denied* 55 NY2d 1039; *Berner v Little*, 137 AD3d 1675, 1676).

We further conclude that the jury's failure to award plaintiff any damages for past pain and suffering is against the weight of the evidence (*see Simmons v Dendis Constr.*, 270 AD2d 919, 920; *Laylon v Shaver*, 187 AD2d 983, 984). In reaching that conclusion, we note that defendants' own expert testified that, as a result of the motorcycle accident, plaintiff sustained a lumbosacral strain or sprain that

aggravated his degenerative spinal condition and would have lasted for three to six months before healing. In light of that testimony, and the testimony of plaintiff's treating orthopedic surgeon that plaintiff sustained a painful and debilitating L-3 endplate fracture that caused a herniated disc, we conclude that the verdict awarding plaintiff no damages for past pain and suffering is contrary to the weight of the evidence and that there should be a new trial on that element of damages (*see generally Zimnoch v Bridge View Palace, LLC*, 69 AD3d 928, 929-930). We modify the order accordingly.

We reject plaintiff's contention, however, that the award of future damages is against the weight of the evidence. There was conflicting expert testimony concerning the likelihood, severity, and causation of plaintiff's alleged future pain and suffering, and we thus conclude that the verdict in that respect should not be disturbed (*see Lai Nguyen v Kiraly* [appeal No. 2], 82 AD3d 1579, 1580; *Sanfilippo v City of New York*, 272 AD2d 201, 202, *lv dismissed* 95 NY2d 887; *see generally Leonard v Irwin*, 280 AD2d 935, 936).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

197
KA 13-01468
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON B. MORGAN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (LINDA M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 19, 2013. The judgment convicted defendant, upon a jury verdict, of rape 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: On appeal from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]) and criminal trespass in the second degree (§ 140.15 [1]), defendant contends that he was denied his right to present a complete defense when Supreme Court refused to allow him to present the testimony of a private investigator, who would testify that the investigator was unable to enter the victim's apartment through the window allegedly used by defendant to enter the apartment. We reject that contention. While it is true that a defendant's right to present witnesses to establish a defense is a "fundamental element of due process of law" (*Washington v Texas*, 388 US 14, 19), "a defendant's right to present evidence is not absolute, but is subject to rules of evidence and procedure" (*People v Brown*, 107 AD3d 1145, 1148, *lv denied* 22 NY3d 1039). Here, the testimony of the private investigator was not relevant to the issues at trial. Whether defendant's investigator was able to enter the apartment through the window at issue has no " 'tendency in reason to prove the existence of any material fact' " (*People v McCullough*, 117 AD3d 1415, 1416, *lv denied* 23 NY3d 1040), and the court therefore properly excluded that testimony.

We also reject defendant's contention that the court erred in admitting a recording of a telephone call between defendant and the victim wherein he threatened her three weeks before he raped her. Contrary to defendant's contention, the court applied the proper legal

standard in determining that the People established a proper foundation for the recording's admission (*see generally People v Ely*, 68 NY2d 520, 527).

Defendant further contends that he was denied a fair trial by prosecutorial misconduct on summation. Defendant failed to preserve his contention for our review to the extent that he alleges that the prosecutor improperly vouched for the victim's credibility and denigrated the defense (*see People v Simmons*, 133 AD3d 1227, 1228), and we decline to exercise our power to review those allegations as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to defendant's contention that the prosecutor engaged in misconduct by mischaracterizing the evidence on summation, we conclude that the prosecutor's statement on summation was isolated, and the court's instructions during the jury charge ameliorated any prejudice to defendant (*see generally People v Currier*, 83 AD3d 1421, 1422-1423, *amended on rearg* 85 AD3d 1657).

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 further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming that a contrary verdict would not have been unreasonable, we conclude that nothing about the victim's testimony rendered it manifestly unworthy of belief, and "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942).

We reject defendant's challenge to the severity of the sentence. We have examined defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

205
CA 16-00363
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, AND SCUDDER, JJ.

BN PARTNERS ASSOCIATES, LLC, LECHASE CONSTRUCTION SERVICES, LLC, AND THE GOLUB CORPORATION,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V   MEMORANDUM AND ORDER

SELECTIVE WAY INSURANCE CO.,
DEFENDANT-APPELLANT-RESPONDENT,
AND JAG I, LLC, DEFENDANT.

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (JENNIFER SCHAUERMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered March 31, 2015. The order, among other things, denied plaintiffs' motion for summary judgment and granted in part the cross motion of defendant Selective Way Insurance Co. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the cross motion of defendant Selective Way Insurance Co. in its entirety and granting judgment in favor of that defendant as follows:

> It is ADJUDGED and DECLARED that defendant Selective Way Insurance Co. is not obligated to defend and indemnify plaintiffs in the underlying action,

and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking a declaration that defendant Selective Way Insurance Co. (Selective) is obligated to defend and indemnify plaintiffs in the underlying personal injury action pursuant to a commercial general liability insurance policy issued to defendant JAG I, LLC (JAG). The underlying action arose when an employee of JAG was injured while working on property owned by plaintiff BN Partners Associates, LLC (BN) and leased to plaintiff The Golub Corporation (Golub) pursuant to a subcontract between JAG and plaintiff LeChase Construction Services, LLC (LeChase), the general contractor.

The employee commenced the underlying action against BN and LeChase on June 16, 2011, and commenced a related action against Golub on October 5, 2011. Thereafter, plaintiffs commenced the instant action on November 30, 2012. Selective answered, asserting several affirmative defenses including that plaintiffs did not timely notify Selective of the claim or the underlying lawsuit, and that plaintiffs failed to immediately forward copies of legal papers received in connection with the lawsuit. Selective therefore asserted that it had no obligation to defend or indemnify plaintiffs.

Plaintiffs moved for, inter alia, summary judgment on their declaratory judgment cause of action on the ground that they provided timely notice to Selective in the form of (1) a letter that LeChase's insurance carrier sent to JAG, dated September 27, 2011, informing it of the lawsuit and advising JAG to turn the matter over to its general liability carrier, and (2) a voicemail message with JAG's insurance agent following up on that letter. Selective cross-moved for summary judgment, seeking a declaration that it has no obligation to defend or indemnify plaintiffs in the underlying lawsuit because, inter alia, it did not receive notice of the claim or lawsuit until December 5, 2012, when it was served in the instant matter, and that a delay of nearly 17 months after plaintiffs learned of the lawsuit is untimely as a matter of law. Selective further argued that notice to JAG's insurance agent did not suffice insofar as it was not written notice as required by the policy and was not notice to Selective's agent.

Supreme Court determined, inter alia, that BN and Golub did not provide Selective with any notice of the underlying occurrence or claim, but that there is a question of fact whether LeChase had done so. That was error. We conclude that plaintiffs did not provide Selective with notice of the claim or lawsuit as required under the policy and, thus, the court should have granted that part of Selective's cross motion seeking a declaration that Selective had no duty to defend or indemnify plaintiffs in the underlying action. Furthermore, we note that the court failed to declare the rights of the parties in connection with the duty to defend and indemnify (*see Kemper Independence Ins. Co. v Ellis*, 128 AD3d 1529, 1530). We therefore modify the order accordingly.

It is well settled that, "[i]n determining a dispute over insurance coverage, we first look to the language of the policy" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221). "As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . , and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267). "If the terms of a policy are ambiguous, however, any ambiguity must be construed in favor of the insured and against the insurer" (*id.; see Christodoulides v First Unum Life Ins. Co.*, 96 AD3d 1603, 1604-1605). Further, "[n]otice requirements are to be liberally construed in favor of the insured, with substantial, rather than strict, compliance being adequate" (*Greenburgh Eleven Union Free Sch. Dist. v National Union Fire Ins. Co. of Pittsburgh, PA*, 304 AD2d 334, 335-336).

Here, we conclude that the policy unambiguously requires an insured to provide Selective with written notice of a claim or lawsuit brought against an insured and to send Selective copies of any legal papers received in connection with the claim or lawsuit. We further conclude that Selective met its initial burden of establishing that plaintiffs failed to provide notice of the claim or lawsuit as a matter of law inasmuch as Selective's employee averred that Selective did not receive notice of the underlying lawsuit until nearly 17 months after the undisputed latest date when plaintiffs learned of the underlying lawsuit and where plaintiffs offered no excuse for the delay (*see Anglero v George Units, LLC*, 61 AD3d 564, 565; *Gershow Recycling Corp. v Transcontinental Ins. Co.*, 22 AD3d 460, 461-462; *Zugnoni v Travelers Ins. Cos.*, 179 AD2d 1033, 1033).

Plaintiffs failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We reject plaintiffs' contention that they provided Selective with adequate notice via the voicemail message left with JAG's insurance agent and the letter sent to JAG informing each of the underlying lawsuit. The inadmissible double hearsay submitted by plaintiffs with respect to the letter is, standing alone, insufficient to defeat Selective's cross motion (*see Raux v City of Utica*, 59 AD3d 984, 985). Inasmuch as the plain language of the policy requires that plaintiffs "see to it that [Selective] receive[s] *written notice* of the claim or 'suit' as soon as practicable" ([emphasis added]; *see Bretton v Mutual of Omaha Ins. Co.*, 110 AD2d 46, 49-50, *affd* 66 NY2d 1020), we conclude that a telephonic voicemail message does not constitute the requisite notice in writing (*see First City Acceptance Corp. v Gulf Ins. Co.*, 245 AD2d 649, 651). We reject plaintiffs' further contention that JAG's insurance agent was an agent of Selective (*cf. U.S. Underwriters Ins. Co. v Manhattan Demolition Co.*, 250 AD2d 600, 600-601).

Finally, we reject plaintiffs' contention that Selective's decision to afford JAG a courtesy defense raised an issue of fact with respect to the timeliness of plaintiffs' notice to Selective. We conclude that Selective used the same standard in determining whether to afford plaintiffs a defense as it did with respect to JAG (*see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 715), and that questions concerning the reasonableness of JAG's failure to provide timely notice warranted the provision of a courtesy defense rather than an outright disclaimer of the duty to defend and indemnify (*see generally Lang v Hanover Ins. Co.*, 3 NY3d 350, 356).

In light of the foregoing determinations, we need not address plaintiffs' remaining contentions.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

209
CA 16-00194
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

DIPIZIO CONSTRUCTION COMPANY, INC.,
PLAINTIFF-APPELLANT,
AND TRAVELERS CASUALTY AND SURETY COMPANY OF
AMERICA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE CANAL HARBOR DEVELOPMENT CORPORATION,
DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

DIPIZIO CONSTRUCTION COMPANY, INC.,
PLAINTIFF-APPELLANT,
AND TRAVELERS CASUALTY AND SURETY COMPANY OF
AMERICA, PLAINTIFF-RESPONDENT,

V

ERIE CANAL HARBOR DEVELOPMENT CORPORATION,
DEFENDANT-RESPONDENT.
(ACTION NO. 2.)

DIPIZIO CONSTRUCTION COMPANY, INC.,
PLAINTIFF-APPELLANT,

V

NEW YORK STATE URBAN DEVELOPMENT CORPORATION,
DOING BUSINESS AS EMPIRE STATE DEVELOPMENT, ERIE
CANAL HARBOR DEVELOPMENT CORPORATION, SAM HOYT,
THOMAS DEE AND MARK E. SMITH,
DEFENDANTS-RESPONDENTS.
(ACTION NO. 3.)

LAW OFFICES OF DANIEL W. ISAACS, PLLC, NEW YORK CITY (DANIEL W. ISAACS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TORRES, LENTZ, GAMELL, GARY & RITTMASTER, LLP, JERICHO (BENJAMIN D. LENTZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

MANCABELLI LAW PLLC, ORCHARD PARK (PATRICIA A. MANCABELLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment and order (denominated order) of the

Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 24, 2015. The judgment and order, among other things, determined that plaintiff Travelers Casualty and Surety Company of America is the real party in interest.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We add only that, to the extent our decision in *Peerless Ins. Co. v Talia Constr. Co.* (272 AD2d 919) may be construed to provide that acts constituting bad faith on the part of a surety are restricted to fraud and collusion, it should instead be read to provide that fraud and collusion are merely examples of such acts (*see generally Maryland Cas. Co. v Grace*, 292 NY 194, 200).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

212
CA 16-01264
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

THERESA A. LAMPHRON-READ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVIS MONTGOMERY AND DESMOND J. MONTGOMERY,
DEFENDANTS-APPELLANTS.

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

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

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered March 21, 2016. The order granted plaintiff's motion to set aside the verdict and for a new trial on damages, unless defendants agree to stipulate to increase the award for past pain and suffering to $65,000, and agree to stipulate to an award of $65,000 for future pain and suffering.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she sustained when her motor vehicle was struck head-on by a vehicle owned by defendant Davis Montgomery and driven by defendant Desmond J. Montgomery. The issue of liability was resolved by Supreme Court in favor of plaintiff, and a jury trial on the issue of damages was conducted. The jury awarded plaintiff $25,000 for past pain and suffering, but made no award for future pain and suffering.

We conclude that the court properly granted plaintiff's motion pursuant to CPLR 4404 (a) to set aside the verdict with respect to damages as against the weight of the evidence. Plaintiff sustained fractures of the transverse processes of her thoracic spine at vertebrae T-5 to T-9, an L-1 left-sided transverse process fracture of her lumbar spine, and a C-4 vertebral fracture of her cervical spine. It is undisputed that plaintiff was in significant pain as a result of her injuries, was hospitalized for a week, and was unable to perform most daily activities without assistance for a couple weeks after her return home (*see e.g. Simmons v Dendis Constr.*, 270 AD2d 919, 920). Plaintiff was required to wear a cervical collar brace and a Thoracic-Lumbar-Sacral Orthosis (TLSO) for three months (*see e.g. Stewart v Manhattan & Bronx Surface Tr. Operating Auth.*, 60 AD3d 445, 446; *Pares*

v LaPrade [appeal No. 2], 266 AD2d 852, 853), and those devices immobilized plaintiff "[a]s much as [one could] be without any type of surgery" (*see e.g. Bouzas v Kosher Deluxe Rest.*, 83 AD3d 538, 538). Plaintiff was unable to walk, sit, or stand for prolonged periods without aggravating her back pain (*see e.g. Deyo v Laidlaw Tr.*, 285 AD2d 853, 854; *Diglio v Gray Dorchester Assoc.*, 255 AD2d 911, 912; *Wroblewski v National Fuel Gas Distrib. Corp.*, 247 AD2d 917, 917). Even routine actions, such as carrying groceries or mowing the lawn, caused her pain and required her to stop and rest (*see e.g. Wroblewski*, 247 AD2d at 917). Plaintiff's ability to engage in home improvement projects, recreational activities, and long-distance visits with her family has been curtailed (*see e.g. Barrow v Dubois*, 82 AD3d 1685, 1687; *Palmer v CSX Transp., Inc.* [appeal No. 2], 68 AD3d 1626, 1627; *Simmons*, 270 AD2d at 920; *Diglio*, 255 AD2d at 912), and her pain has also interfered with her ability to sleep (*see e.g. Barrow*, 82 AD3d at 1687).

Plaintiff's independent medical examiner, a board certified orthopedic surgeon, testified that plaintiff's neck and lower back pain had subsided and no longer required treatment. It was uncontroverted, however, that plaintiff's thoracic spine fractures caused permanent paraspinal muscular injuries, resulting in chronic activity-related back pain for which there was no available remedy (*see e.g. Simmons*, 270 AD2d at 920; *Scott v Yurkewecz*, 234 AD2d 673, 675; *see generally Inzinna v Brinker Rest. Corp.* [appeal No. 2], 302 AD2d 967, 968). The orthopedic surgeon also testified that plaintiff's subjective descriptions of pain were consistent with her injuries (*see e.g. Wroblewski*, 247 AD2d at 918), and that the type of compressive force necessary to cause her multiple fractures had to have been "significant." We note that, although plaintiff was examined by a physician chosen by the defense, defendants did not present the testimony of that physician or any other medical expert (*see e.g. Beckwith v Rute*, 235 AD2d 892, 894).

In light of the uncontroverted evidence that plaintiff suffered substantial pain from seven vertebral fractures, was temporarily immobilized, has continued to suffer pain from daily activities, and has been limited in her enjoyment of recreational activities, we conclude that the award of $25,000 for plaintiff's past pain and suffering "is inadequate and could not have been reached upon any fair interpretation of the evidence" (*Inzinna*, 302 AD2d at 968). Moreover, given the uncontroverted medical testimony that plaintiff continues to suffer from permanent and chronic activity-related pain that is causally related to this motor vehicle accident, the failure to award damages for plaintiff's future pain and suffering is also against the weight of the evidence (*see Inzinna*, 302 AD2d at 968; *Scott*, 234 AD2d at 675; *see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746). We further conclude that the court properly determined in the alternative that the award of $25,000 for plaintiff's past pain and suffering and the failure to award any damages for future pain and suffering deviates materially from what would be reasonable compensation (*see Barrow*, 82 AD3d at 1686-1687; *Grigoli v Passantino*,

15 AD3d 349, 350; *Trala v Egloff*, 298 AD2d 878, 880).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

213
CA 16-01198
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

STEPHEN REUS AND JANINE REUS,
PLAINTIFFS-APPELLANTS,

V ORDER

CHURCHVILLE CHILI CENTRAL SCHOOL DISTRICT,
D'AGOSTINO GENERAL CONTRACTORS, INC.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (RICHARD S. POVEROMO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered May 18, 2016. The order, insofar as appealed from, denied the motion of plaintiffs for partial summary judgment pursuant to Labor Law § 240 (1).

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 7, 2017,

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

220
KA 16-00216
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TINA KRENKEL, DEFENDANT-APPELLANT.

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

THEODORE A. BRENNER, DEPUTY 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 January 12, 2016. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Bald*, 34 AD3d 1362, 1362).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

221
KA 15-01529
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW J. ASKINS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Ontario County Court (William F. Kocher, J.), dated November 18, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that County Court erred in assessing 10 points in the risk assessment instrument for failing to accept responsibility. Defendant contends that he accepted responsibility by pleading guilty and by admitting his guilt in sex offender therapy. In his postarrest statements to the police, however, defendant denied any sexual contact with the victim (*see People v Teagle*, 64 AD3d 549, 550). In addition, in therapy, defendant substantially minimized the extent of the contact he had with the victim. Taking all of defendant's statements together, we conclude that they "do not reflect a genuine acceptance of responsibility as required by the risk assessment guidelines developed by the Board [of Examiners of Sex Offenders]" (*People v Noriega*, 26 AD3d 767, 767, *lv denied* 6 NY3d 713 [internal quotation marks omitted]; *see People v Benitez*, 140 AD3d 1140, 1140-1141, *lv denied* 28 NY3d 908).

Defendant further contends that the court erred in denying his request for a downward departure because the victim's lack of consent was based only on her age, and a psychologist's evaluation of defendant using the Static-99R found that he was at a low to moderate risk of reoffending. Defendant's contention is preserved for our review only in part (*see People v Iverson*, 90 AD3d 1561, 1562, *lv*

denied 18 NY3d 811). In any event, we reject his contention. The psychologist did not dispute that other risk assessment instruments showed that defendant was at a moderate to high risk of reoffending. In addition, while the nonforcible nature of the offense may be a mitigating factor (*see People v George*, 141 AD3d 1177, 1178), the court "was not required to consider the mitigating factor in a vacuum without considering any aggravating factors that would weigh against a downward departure" (*People v Sincerbeaux*, 27 NY3d 683, 690). Here, defendant violated the terms of his probation by possessing pornography, which contained themes of rape, violence, and bestiality. That aggravating factor was not adequately taken into account by the risk assessment instrument (*see People v Widom*, 143 AD3d 688, 689; *People v Burke*, 139 AD3d 1268, 1269-1270, *lv denied* 28 NY3d 909). Therefore, considering the "totality of the circumstances," we conclude that the court providently exercised its discretion in denying defendant's request for a downward departure (*People v Gillotti*, 23 NY3d 841, 861).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

222

KA 15-00909

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. KING, JR., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), dated April 24, 2015. 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: We reject defendant’s contention that County Court erred in determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Even assuming, arguendo, that defendant preserved for our review his contention that the court should have granted him a downward departure to a level one risk, we conclude that his contention is without merit. Defendant failed to allege a mitigating circumstance that is, as a matter of law, of a kind or to a degree not adequately taken into account by the risk assessment guidelines and, to the extent that defendant adequately identified a mitigating circumstance, he failed to prove its existence by a preponderance of the evidence (*see People v Gillotti*, 23 NY3d 841, 861; *People v Voymas*, 122 AD3d 1336, 1337, *lv denied* 25 NY3d 913; *see also People v Filkins*, 128 AD3d 1231, 1231-1232, *lv denied* 26 NY3d 904).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

223

KA 15-00984

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL NEWMAN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered April 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: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that Supreme Court engaged in impermissible double-counting because his underlying conviction of criminal sexual act in the first degree (Penal Law § 130.50 [4]), which is addressed by risk factor 2, included as an element the age of the victim while the age of the victim is also addressed under risk factor 5. We reject that contention. To preclude consideration of the victim's age under risk factor 5 in cases in which the victim's age is an element of the underlying offense would contravene SORA's protective purpose (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 2 [2006]*; see also People v Cabrera*, 91 AD3d 479, 480, *lv denied* 19 NY3d 801*; see generally People v Alemany*, 13 NY3d 424, 430-431).

We likewise reject defendant's challenge to the court's assessment of 15 points for a history of drug or alcohol abuse. Defendant's case summary and presentence report indicated that he began to use marihuana at the age of 15, and started to drink alcohol at the age of 21. Defendant also admitted that he had "a prior history of treatment for his chemical use [and] . . . that he did not finish" those treatment programs. "The statements in the case summary and presentence report with respect to defendant's substance abuse constitute reliable hearsay supporting the court's assessment of

points under the risk factor for history of drug or alcohol abuse" (*People v Ramos*, 41 AD3d 1250, 1250, *lv denied* 9 NY3d 809; *see People v Jackson*, 134 AD3d 1580, 1580). Defendant's assertions of sobriety were undermined by the fact that he "was required to attend drug and alcohol treatment while incarcerated, thus further supporting the court's assessment of points for a history of drug or alcohol abuse" (*People v Mundo*, 98 AD3d 1292, 1293, *lv denied* 20 NY3d 855; *see People v Lowery*, 140 AD3d 1141, 1142, *lv denied* 28 NY3d 903; *People v Perez*, 138 AD3d 1081, 1081, *lv denied* 27 NY3d 913). Although defendant contends that he is "expected to complete the treatment before his release," we note that any " 'recent history of abstinence while incarcerated is not necessarily predictive of his behavior when no longer under such supervision' " (*People v Vangorder*, 72 AD3d 1614, 1614; *see Jackson*, 134 AD3d at 1580-1581; *People v Urbanski*, 74 AD3d 1882, 1883, *lv denied* 15 NY3d 707).

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

224

KA 11-02039

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRIE J. RUSH, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, PHILLIPS LYTLE LLP, BUFFALO (DEENA K. MUELLER 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 (Melchor E. Castro, A.J.), rendered August 12, 2011. The judgment convicted defendant, upon a jury verdict, of identity theft in the first degree and criminal possession of a forged instrument in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of identity theft in the first degree (Penal Law § 190.80 [3]) and criminal possession of a forged instrument in the second degree (§ 170.25). Defendant is convicted of assuming the identity of another person by using the name of another person and depositing a forged instrument into a bank account set up in the name of that person. The People presented evidence that the check at issue had been stolen from the company named as payor within a month before the transaction at issue occurred. The person named as payee on the check at issue and in whose purported account the check was deposited testified that he did not set up the bank account, nor did he endorse the check at issue or ask defendant to conduct any banking transactions for him. Photos depicting a woman making a deposit at the time the check at issue was deposited and depicting a woman withdrawing funds from that account at an ATM in temporal proximity to the deposit also were in evidence. Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction of identity theft in the first degree (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's contention that the phrase "assumes the identity of another person" is a discrete element that must be proved

(*see People v Yuson*, 133 AD3d 1221, 1221-1222, *lv denied* 27 NY3d 1157; *see also People v Box*, 145 AD3d 1510, 1511). In *Yuson*, we expressly declined to follow the decision of the First Department in *People v Barden* (117 AD3d 216, 224-230, *revd on other grounds* 27 NY3d 550), and we wrote that "the statute is unambiguous and defines the phrase 'assumes the identity of another person' by the phrase that immediately follows it, i.e., by, inter alia, using the personal identifying information of that person" (*id.* at 1222). We thus concluded in *Yuson* that, "inasmuch as the People established that defendant used the personal identifying information of the victims, they thereby established that defendant assumed their identities for the purposes of the statute" (*id.*). Likewise, here the People established that defendant used the personal identifying information of another person, i.e., that person's name and bank account number (*see* Penal Law § 190.77 [1]), to defraud the bank herein (*see* § 190.80).

We also reject defendant's contention that, even assuming that she used the person's personal identifying information, she did not "thereby" commit the offense of criminal possession of a forged instrument because she possessed the check before she deposited it and the use of the identifying information did not cause her to commit the offense. We reject defendant's overly restrictive interpretation of the term "thereby" to mean "because of this" or "as a result of this action," and we instead conclude that the correct interpretation of the term is "[b]y that means" or "in that way" (Black's Law Dictionary 1707 [10th ed 2014]). We therefore conclude that the evidence is legally sufficient to establish that there is 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" (*Bleakley*, 69 NY2d at 495), i.e., that defendant assumed the identity of another person by using personal identifying information of that person and thereby committed the crime of criminal possession of a forged instrument by uttering the check, that is, by presenting it as if it were genuine (*see* Black's Law Dictionary 1781 [10th ed 2014]; *see also* William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 30, Penal Law § 170.00, at 330).

We further conclude that, contrary to the contention of defendant, when viewing 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 with respect to the element of knowledge, and with respect to identity (*see generally Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that the jury did not fail to give the evidence the weight it should be accorded (*see id.*). Specifically, the People presented evidence that defendant both deposited the stolen check at issue into the account and withdrew funds from that account, and the named payee and account holder testified that he did not set up the account, did not endorse the check and did not authorize defendant to conduct any banking transactions on his behalf. Furthermore, the jury had the opportunity to compare the photos of the person making a deposit and a withdrawal

at the ATM at the relevant times and was in a position to make "an independent assessment regarding whether the [person] in the bank photographs was indeed the defendant" (*People v Russell*, 79 NY2d 1024, 1025). Contrary to defendant's further contention, the photographic evidence taken at the ATM machine was relevant with respect to intent, knowledge and identity, and thus County Court did not abuse its discretion in admitting that evidence upon determining that it was more probative than prejudicial (*see People v Goodrell*, 130 AD3d 1502, 1503).

We agree with defendant, however, that the court erred in closing the courtroom during jury selection because, inter alia, there was standing room only, thereby excluding the father of defendant's children from the courtroom (*see People v Floyd*, 21 NY3d 892, 893-894; *People v Torres* [appeal No. 1], 97 AD3d 1125, 1126, *affd* 20 NY3d 890; *People v Martin*, 16 NY3d 607, 611). Indeed, under those circumstances, the court was "required to consider alternatives even if neither party [had] suggest[ed] any" (*Martin*, 16 NY3d at 612). We conclude, however, that, under the circumstances presented here, the court properly denied defendant's motion pursuant to CPL 330.30 (1), seeking to set aside the verdict based on the courtroom closure.

As an initial matter, by requesting a hearing based upon the court's recollection that a deputy left the courtroom after the venire panel was seated in order to locate defendant's companion, defendant waived her contention that the court improperly expanded the record when it conducted a hearing on her CPL 330.30 (1) motion. The trial record establishes that, rather than closing the courtroom until some prospective jurors were *excused* (*cf. Floyd*, 21 NY3d at 893; *Torres*, 97 AD3d at 1127; *Martin*, 16 NY3d at 610), the court stated that defendant's companion was required to leave the courtroom until the first 21 prospective jurors were *seated* for voir dire, and that the man would be notified when that process was completed. The court security officer testified at the hearing that, after the first 21 prospective jurors were seated, she and the other court security officer cleared the rear row of the courtroom and she went into the lobby to find defendant's companion (*cf. Torres*, 97 AD3d at 1127), but that no one was out there, with the exception of another deputy. She testified that "the judge was just beginning to give his speech to the jury panel" when she exited the courtroom to look for defendant's companion. She advised defense counsel at the first break that the man was "gone." She testified that she looked through the windows of the courtroom doors throughout the day and did not see the man. We conclude that under the circumstances presented here, where the process of jury selection had not yet begun before the courtroom was reopened (*cf. Torres*, 97 AD3d at 1126-1127; *Martin*, 16 NY3d at 613; *see generally People Alvarez*, 20 NY3d 75, 81, *cert denied* ___ US ___, 133 S Ct 2004), the improper closing of the courtroom was "too trivial to warrant the remedy of nullifying an otherwise properly conducted . . . criminal trial" (*Gibbons v Savage*, 555 F3d 112, 121 [2nd Cir

2009], *cert denied* 558 US 932).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

226

KA 15-00994

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWAYNE HOLLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered October 4, 2012. The judgment convicted defendant, upon a nonjury verdict, of 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 nonjury verdict of robbery in the first degree (Penal Law § 160.15 [4]). Defendant contends that Supreme Court erred in refusing to suppress evidence seized from his girlfriend's apartment, where he spent many nights, because his girlfriend's consent to search her apartment was not voluntarily given. We reject that contention. Defendant's girlfriend gave both oral and written consent to search her apartment and, based on the totality of the circumstances, we conclude that the consent was voluntary and not the product of coercion (*see People v Nance*, 132 AD3d 1389, 1390, *lv denied* 26 NY3d 1091; *People v Caldwell*, 221 AD2d 972, 972-973, *lv denied* 87 NY2d 920). Indeed, the record establishes that "the atmosphere was not one of 'overbearing official pressure' " (*People v Oldacre*, 53 AD3d 675, 677, quoting *People v Gonzalez*, 39 NY2d 122, 128). We further reject defendant's contention that the police improperly detained him in order to prevent him from objecting to the search of the apartment (*see Nance*, 132 AD3d at 1389). The police suspected defendant of an armed bank robbery that had occurred earlier that day, thus giving the police a reasonable basis for detaining him for officer safety (*see id.* at 1389-1390).

Defendant's contention that there was a *Payton* violation is likewise without merit. " 'Where a person with ostensible authority consents to police presence on the premises, either explicitly or tacitly, the right to be secure against warrantless arrests in private

premises as expressed in *Payton v New York* (445 US 573 [1980]) is not violated' " (*People v Bunce*, 141 AD3d 536, 537, *lv denied* 28 NY3d 969; *see People v Kozikowski*, 23 AD3d 990, 990, *lv denied* 6 NY3d 755). Here, the conduct of defendant's girlfriend when the police arrived at her apartment established that she consented to the police entering her home (*see People v Richardson*, 143 AD3d 1252, 1254; *People v Sigl*, 107 AD3d 1585, 1586-1587, *lv denied* 21 NY3d 1077). Defendant's contention that the police lacked probable cause to arrest him is not preserved for our review (*see Nance*, 132 AD3d at 1390), and is without merit in any event (*see People v Reyes*, 191 AD2d 467, 468).

Contrary to defendant's contention, the evidence is legally sufficient to establish that he was the perpetrator of the robbery (*see generally People v Bleakley*, 69 NY2d 490, 495). The bank teller identified defendant as the perpetrator, and that identification was buttressed by " 'a compelling chain of circumstantial evidence that had no reasonable explanation except that defendant was . . . the perpetrator[]' " (*People v Daniels*, 125 AD3d 1432, 1433, *lv denied* 25 NY3d 1071, *reconsideration denied* 26 NY3d 928). Viewing the evidence in light of the elements of the crime in this nonjury trial (*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).

We reject defendant's contention that the court erred in refusing to suppress his statements as involuntarily made. The police officers' reference to a surveillance video, while deceptive, "was not so fundamentally unfair as to deny defendant due process," nor was it "accompanied by a promise or threat likely to produce a false confession" (*People v Dickson*, 260 AD2d 931, 932, *lv denied* 93 NY2d 1017, citing *People v Tarsia*, 50 NY2d 1, 11; *see People v Lewis*, 93 AD3d 1264, 1265-1266, *appeal dismissed* 19 NY3d 963). The sentence, which was close to the minimum, is not unduly harsh or severe.

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

228

KA 16-00647

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. STEVENS, DEFENDANT-APPELLANT.

KURT HAMELINE, NEW HARTFORD, FOR DEFENDANT-APPELLANT.

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 April 12, 2016. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Oneida County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [3]) and resisting arrest (§ 205.30). Defendant's sole contention on appeal is that the People failed to present legally sufficient evidence establishing that the officers had probable cause to arrest him for disorderly conduct, which resulted in the crimes of which he was convicted. Defendant failed to renew his motion for a trial order of dismissal after presenting evidence, and he therefore failed to preserve his contention for our review (*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 People v Sowell*, 25 AD3d 386, 387, *lv denied* 7 NY3d 763; *People v Sekoll*, 254 AD2d 797, 797, *lv denied* 92 NY2d 1053; *see also People v Tichenor*, 89 NY2d 769, 776-777, *cert denied* 522 US 918).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

229

KA 11-01294

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN D. TAYLOR, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 Monroe County Court (Victoria M. Argento, J.), rendered May 19, 2011. 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: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial 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 [1]). In appeal No. 2, defendant appeals from an order denying his motion pursuant to CPL 440.10 seeking to vacate the judgment in appeal No. 1.

Defendant failed to preserve for our review his contention in appeal No. 1 that the evidence is legally insufficient to support his conviction of criminal possession of a weapon in the second degree under Penal Law § 265.03 (1) (b) because he failed to renew his motion for a trial order of dismissal after presenting evidence in his defense (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we reject that contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction (*see People v Bleakley*, 69 NY2d 490, 495). An eyewitness testified that defendant had a gun when he was at her residence, where it was ultimately recovered by police, and the recording of her 911 call, reporting that defendant was waving the gun and threatening her nephew as the incident was happening, was admitted in evidence. Furthermore, one of the police witnesses testified that

he saw defendant holding what appeared to be a gun before he entered the residence. 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). The jury was free to credit the testimony of the People's witnesses, rather than defendant's testimony, and we perceive no reason to reject those credibility determinations (*see generally id.*).

We reject defendant's further contention in appeal No. 1 that County Court erred in permitting the People to offer *Molineux* evidence from a police witness that, approximately three months prior to this incident, while conducting surveillance, he heard defendant say to another individual "Don't f*** with me; you know, I'll use my pistol." We conclude that the evidence was relevant with respect to the element of intent (*see People v Alvino*, 71 NY2d 233, 241-242), inasmuch as the weapon that was recovered was a .32 caliber automatic "Pistole," a type of handgun. Further, the court properly weighed the probative value of the evidence against the prejudicial impact by limiting the testimony to that statement (*see People v Rivers*, 82 AD3d 1623, 1623, *lv denied* 17 NY3d 904), and the court minimized the potential prejudice by providing a curative instruction (*see People v Holmes*, 104 AD3d 1288, 1289, *lv denied* 22 NY3d 1041). In any event, any error in permitting the testimony is harmless. The evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted if that evidence had been excluded (*see People v Casado*, 99 AD3d 1208, 1211-1212, *lv denied* 20 NY3d 985; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his challenge in appeal No. 1 to that ruling (*see People v Reyes*, 144 AD3d 1683, 1685). In any event, that contention lacks merit because " '[t]he court's *Sandoval* compromise . . . reflects a proper exercise of the court's discretion' " (*People v Monk*, 57 AD3d 1497, 1499, *lv denied* 12 NY3d 785). We reject defendant's further contention in appeal No. 1 that the court abused its discretion in denying his request for new counsel on the eve of trial inasmuch as defendant failed to show good cause for the request (*see People v Farmer*, 132 AD3d 1238, 1238-1239, *lv denied* 27 NY3d 1068; *see generally People v Porto*, 16 NY3d 93, 99-100). Finally, with respect to appeal No. 1, the sentence is not unduly harsh or severe.

With respect to appeal No. 2, we conclude that the court did not err in denying defendant's motion seeking to vacate the judgment either on the ground that there was an alleged *Brady* violation or on the ground that he was denied effective assistance of counsel. Both grounds for defendant's motion are based upon an alleged conflict of interest related to a prosecution witness. Defendant contends that the People violated their *Brady* obligation by failing to provide information regarding convictions that a witness had in 1993 for petit larceny, and that defense counsel was ineffective inasmuch as his office had previously represented the prosecution witness, in 1998,

2001 and 2006. With respect to the alleged *Brady* violation, we agree with defendant that the convictions constitute *Brady* material (*see People v Valentin*, 1 AD3d 982, 982-983, *lv denied* 1 NY3d 602). However, even assuming, arguendo, that the information regarding those convictions was available to the People (*see id.* at 983), we conclude that there is no " 'reasonable possibility' " that the information "would have changed the result of the proceedings" (*People v Fuentes*, 12 NY3d 259, 263, *rearg denied* 13 NY3d 766).

We further conclude that defendant was not denied effective assistance of counsel. "To prevail on an ineffective assistance of counsel claim, a defendant must first demonstrate the existence of a potential conflict of interest . . . Defendant must also show that the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation . . . , and defendant failed to make such a showing here . . . In light of the fact that defense counsel did not know of the conflict at the time of the trial, there is no basis to conclude that the potential conflict hindered his representation of defendant" (*People v Weeks*, 15 AD3d 845, 847, *lv denied* 4 NY3d 892 [internal quotation marks omitted]).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

230
KA 15-00341
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN D. TAYLOR, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE 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 Monroe County Court (Victoria M. Argento, J.), entered January 5, 2015. The order denied the motion of defendant pursuant to CPL 440.10.

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

Same memorandum as in *People v Taylor* ([appeal No. 1] ___ AD3d ___ [Mar. 24, 2017]).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

231
KA 14-02247
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD M. SWITTS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LINDA M. CAMPBELL, SYRACUSE, 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 December 8, 2014. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the second degree (six counts), sexual abuse in the second degree (two counts), and sexual abuse in the third degree (three counts).

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 a jury verdict of, inter alia, six counts of criminal sexual act in the second degree (Penal Law § 130.45 [1]). In appeal No. 2, defendant appeals from an order denying, without a hearing, his motion pursuant to CPL 440.10 seeking to vacate the judgment of conviction.

We reject defendant’s contention in appeal No. 1 that County Court erred in excluding evidence based on the Rape Shield Law (CPL 60.42; *see People v Scott*, 16 NY3d 589, 593-594). All of the evidence in question, including evidence related to emergency contraception, was within the scope of the statute as “[e]vidence of [the] victim’s sexual conduct” (CPL 60.42; *see generally People v Vogel*, 66 AD3d 1367, 1368, *lv denied* 13 NY3d 942; *People v Davis*, 45 AD3d 1351, 1351-1352), and “defendant failed to demonstrate that such evidence was ‘relevant and admissible in the interests of justice’ ” (*Davis*, 45 AD3d at 1351, quoting CPL 60.42 [5]; *see People v Halter*, 19 NY3d 1046, 1049; *People v Williams*, 61 AD3d 1383, 1383, *lv denied* 13 NY3d 751). Inasmuch as defendant was able to testify to alternative explanations for the ambiguous content of a recorded telephone conversation he had with the victim that was alleged by the People to refer to the charged crimes, the court did not abuse its discretion in precluding testimony that the conversation referred to other sexual

conduct involving the victim (*see generally Halter*, 19 NY3d at 1049-1050; *People v Simmons*, 106 AD3d 1115, 1116, *lv denied* 22 NY3d 1043). Moreover, the alleged connection between one of the precluded lines of testimony and a motive for the victim to fabricate her allegations was speculative and " 'so tenuous that the [line of testimony] was entirely irrelevant' " (*People v Carrasquillo*, 85 AD3d 1618, 1619, *lv denied* 17 NY3d 814; *see People v Perryman*, 178 AD2d 916, 917, *lv denied* 79 NY2d 1005).

Contrary to defendant's further contention in appeal No. 1, the court did not err in denying his *Batson* application concerning the People's use of a peremptory challenge to excuse the sole Asian-American prospective juror. The prosecutor gave race-neutral reasons for excluding that prospective juror, i.e., her body language (*see People v Harris*, 50 AD3d 1608, 1608, *lv denied* 10 NY3d 959; *People v Bodine*, 283 AD2d 979, 979, *lv denied* 96 NY2d 898), her disclosure that her stepdaughter had a conviction from a neighboring county (*see People v Ball*, 11 AD3d 904, 905, *lv denied* 3 NY3d 755, *reconsideration denied* 4 NY3d 471; *see also People v Buntley*, 286 AD2d 909, 909, *lv denied* 97 NY2d 751), and her performance of work for the court's law clerk (*see generally People v Allen*, 86 NY2d 101, 110), and defendant did not meet his ultimate burden of establishing that those reasons were pretextual (*see People v Torres*, 129 AD3d 1535, 1536, *lv denied* 26 NY3d 936).

Defendant contends in appeal No. 2 that the court erred in denying his CPL 440.10 motion without a hearing to the extent that it alleged that the People committed *Brady* and *Rosario* violations by failing to disclose a flash drive containing a typewritten statement by the victim that a police investigator used as a basis for the victim's supporting deposition. The People disclosed hard copies of the typewritten statement and deposition prior to trial, and defense counsel did not raise any objection when the investigator mentioned the flash drive in his trial testimony. Even assuming, arguendo, that the relevant part of the motion was not subject to denial on procedural grounds (*cf.* CPL 440.10 [2] [b]; [3] [a]), we reject defendant's contention. Defendant did not make a prima facie showing of a reasonable possibility that the nondisclosure of the flash drive contributed to his conviction. Thus, regardless of whether he made a specific discovery request encompassing the flash drive for purposes of his *Brady* claim, he failed to establish materiality under *Brady* or prejudice under *Rosario* (*see People v Fuentes*, 12 NY3d 259, 263-264, *rearg denied* 13 NY3d 766; *People v Jackson*, 78 NY2d 638, 648-649; *People v Pennington*, 107 AD3d 1602, 1603, *lv denied* 22 NY3d 958; *People v Saxton*, 93 AD3d 1077, 1078-1079, *lv denied* 18 NY3d 998).

Finally, we reject defendant's contention in both appeals that he was denied effective assistance of counsel. Defendant was not entitled to a hearing on the part of his CPL 440.10 motion alleging ineffective assistance of counsel because the trial record and the motion submissions, including an affidavit from defendant's trial counsel, sufficiently established that counsel's trial strategy was consistent with the actions of a reasonably competent attorney (*see*

People v Satterfield, 66 NY2d 796, 799-800; *People v King*, 44 AD3d 366, 366, *lv denied* 9 NY3d 1035; *see generally People v Henderson*, 27 NY3d 509, 514). Contrary to defendant's contentions, counsel was not ineffective in failing to conduct a more "hard-hitting" cross-examination of the victim (*see People v Izzo*, 104 AD3d 964, 967, *lv denied* 21 NY3d 1005; *People v De Marco*, 33 AD3d 1045, 1046; *see also People v Gaffney*, 30 AD3d 1096, 1097, *lv denied* 7 NY3d 789), or in failing to use the jury selection process to demonstrate that expert testimony on child sexual abuse accommodation syndrome should be precluded because the subject was within the understanding of the jurors (*see generally People v Nicholson*, 26 NY3d 813, 829; *People v Morgan*, 77 AD3d 1419, 1420, *lv denied* 15 NY3d 922).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

232
KA 15-02066
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD M. SWITTS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK 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 Oswego County Court (Donald E. Todd, J.), dated November 5, 2015. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of criminal sexual act in the second degree (six counts), sexual abuse in the second degree (two counts), and sexual abuse in the third degree (three counts).

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

Same memorandum as in *People v Switts* ([appeal No. 1] ___ AD3d ___ [Mar. 24, 2017]).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

233
CA 16-00596
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

ALBERT G. FRACCOLA, JR., INDIVIDUALLY, AND AS
50 PERCENT SHAREHOLDER, OFFICER AND DIRECTOR OF
1ST CHOICE REALTY, INC., PLAINTIFF-APPELLANT,

V   ORDER

1ST CHOICE REALTY, INC., ET AL., DEFENDANTS,
AND CHAD CARSTENSEN, AS EXECUTOR OF THE ESTATE OF
PHYLLIS FRACCOLA, DECEASED, DEFENDANT-RESPONDENT.

ALBERT G. FRACCOLA, JR., PLAINTIFF-APPELLANT PRO SE.

FELT EVANS, LLP, CLINTON (JAY G. WILLIAMS, III, OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered July 20, 2015. The order and judgment determined that plaintiff had engaged in frivolous conduct and awarded defendant-respondent attorney’s fees in the amount of $1,200.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

234
CA 15-02101
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF DENIS AKGUN, CONSECUTIVE NO. 21956, 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.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA
(BRYCE THERRIEN OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered November 10, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order determined that petitioner is a detained sex offender who currently suffers from a mental abnormality and directed that petitioner be placed on strict and intensive supervision and treatment.

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

Memorandum: Petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a detained sex offender who currently suffers from a mental abnormality as defined by section 10.03 (i) and discharging him to a regimen of strict and intensive supervision and treatment (*see* §§ 10.03 [q] [2]; 10.09 [h]). Petitioner contends that the evidence is legally insufficient to support the finding that he suffers from a mental abnormality within the meaning of the statute because the evidence presented by respondents at the hearing did not establish that he has “serious difficulty in controlling” his sex-offending conduct (§ 10.03 [i]). We reject that contention.

Respondents presented the testimony and examination report of a psychologist who opined that, pursuant to the DSM-V, petitioner suffers from other specified paraphilic disorder (non-consent, with

sadistic traits) and antisocial personality disorder. The psychologist further opined that petitioner's conditions predisposed him to the commission of conduct constituting a sex offense and resulted in his having serious difficulty in controlling his sex-offending conduct. The psychologist explained that, among other factors, her opinion was based upon petitioner's pattern of sexual misconduct during which he committed increasingly violent rapes of several women over a short period of time; his admissions and other evidence that he was, and continued to be, aroused by elements of fear, humiliation and control; and his inadequate progress in treatment with respect to understanding and addressing his arousal patterns and sadistic form of sexual deviance, which prevented him from developing adequate skills to manage the risks associated therewith (*see Matter of Rene I. v State of New York*, 146 AD3d 1056, 1057-1058; *Matter of Wright v State of New York*, 134 AD3d 1483, 1486). Indeed, the psychologist further explained that petitioner continued to refer to himself during sex offender treatment as an "anger rapist" who had issues with power and control, but there was insufficient evidence that petitioner had adequately addressed that issue while in treatment (*see Matter of State of New York v Dennis K.*, 27 NY3d 718, 734, *cert denied* ___ US ___, 137 S Ct 579). The psychologist also noted that petitioner continued to harbor negative views and hostility toward women, and that petitioner's score on a VRS:SO test that she administered indicated that petitioner was in the high risk group for reoffending sexually (*see Rene I.*, 146 AD3d at 1058; *Wright*, 134 AD3d at 1486-1487). Viewing the evidence in the light most favorable to respondents, we conclude that respondents "provided '[a] detailed psychological portrait' of [petitioner] that met [their] burden of demonstrating by clear and convincing evidence that he had 'serious difficulty' in controlling his sex-offending conduct" (*Dennis K.*, 27 NY3d at 751).

To the extent that petitioner also contends that the determination is against the weight of the evidence, we reject that contention. The 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 Billinger v State of New York*, 137 AD3d 1757, 1758, *lv denied* 27 NY3d 911 [internal quotation marks omitted]).

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

235
CA 16-00235
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

DANA S. HORVATH, AS EXECUTOR OF THE ESTATE OF
JUDITH L. HUTCHINSON (DECEASED),
PLAINTIFF-RESPONDENT,

V ORDER

JAMES M. HUTCHINSON, JR., AS ADMINISTRATOR OF
THE ESTATE OF DAVID R. HUTCHINSON, DECEASED,
DEFENDANT-APPELLANT.

LIONEL LEE HECTOR, WATERTOWN, FOR DEFENDANT-APPELLANT.

SCHWERZMANN & WISE, P.C., WATERTOWN (KEITH B. CAUGHLIN OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Jefferson County (James P. McClusky, J.), entered June 26, 2015 in a divorce action. The judgment, among other things, granted a divorce, nunc pro tunc.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

236
CA 16-00289
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

MOUNTAIN MEADOWS CAMPERS ASSOCIATION, INC.,
PLAINTIFF-APPELLANT,

V   ORDER

CAMPERS RESORTS, INC., ET AL.,
DEFENDANTS-RESPONDENTS.

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered April 28, 2015. The order, among other things, granted the cross motion of defendants for summary judgment.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

237
CA 16-00779
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

JERAD M. ZARNOCH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT W. LUCKINA, INDIVIDUALLY AND DOING
BUSINESS AS ROB LUCKINA CONSTRUCTION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

EDWARD C. COSGROVE, BUFFALO, FOR PLAINTIFF-APPELLANT.

ROSSI & ROSSI, ATTORNEYS AT LAW PLLC, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered July 23, 2015. The order, among other things, denied the cross motion of plaintiff to dismiss the affirmative defense of special employment.

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

Same memorandum as in *Zarnoch v Luckina* ([appeal No. 2] ___ AD3d ___ [Mar. 24, 2017]).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

238

CA 16-00780

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

JERAD M. ZARNOCH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT W. LUCKINA, INDIVIDUALLY AND DOING
BUSINESS AS ROB LUCKINA CONSTRUCTION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

EDWARD C. COSGROVE, BUFFALO, FOR PLAINTIFF-APPELLANT.

ROSSI & ROSSI, ATTORNEYS AT LAW PLLC, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered January 5, 2016. The judgment and order dismissed the complaint upon a jury verdict and denied the cross motion of plaintiff to set aside the verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in a construction accident. The accident occurred when plaintiff was assisting defendant and four other men in raising an exterior wall as part of the construction of a single-family residence. Plaintiff was employed by the general contractor, and defendant was the framing subcontractor. As plaintiff, defendant and the other men attempted to raise the wall by hand, defendant determined that the wall was too heavy and instructed the men to lower it. Plaintiff was injured when the wall fell on him as it was being lowered.

On a prior appeal, this Court affirmed an order that, inter alia, granted plaintiff’s motion for partial summary judgment on Labor Law § 240 (1) liability, and granted that part of defendant’s cross motion seeking leave to amend the answer to assert as an affirmative defense that plaintiff was his special employee (*Zarnoch v Luckina*, 112 AD3d 1336). Thereafter, defendant moved to bifurcate the trial, and plaintiff cross-moved to dismiss the affirmative defense of special employment pursuant to CPLR 3211 (b) and 3212. By the order in appeal No. 1, Supreme Court granted the motion and denied the cross motion. A jury trial was conducted on the special employment affirmative defense, and the jury returned a verdict finding that at the time of

the accident plaintiff was a special employee of defendant. By the judgment and order in appeal No. 2, the court granted defendant's motion to dismiss the complaint and denied plaintiff's cross motion to set aside the verdict and for judgment on liability in favor of plaintiff or, alternatively, for a new trial on the ground that the verdict was against the weight of the evidence.

"[W]hen an appeal from an intermediate order is perfected together with an appeal from a final judgment, the appeal from the intermediate order must be dismissed and any error alleged, to the extent that it affects the final judgment, may be reviewed upon the appeal from the final judgment" (*Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567). We therefore dismiss the appeal from the order in appeal No. 1 but, inasmuch as that order affects the final judgment and order, plaintiff's contentions with respect to that order are properly before us upon the appeal from the judgment and order (*see* CPLR 5501 [a] [1]; *State of New York v Wolowitz*, 96 AD2d 47, 55).

We agree with plaintiff that the court erred in denying his pretrial cross motion to dismiss the special employment affirmative defense as untimely under CPLR 3212 (a) (*see generally Brill v City of New York*, 2 NY3d 648, 650-652). To the extent that the cross motion sought relief pursuant to CPLR 3211 (b), it was not subject to the time limit for summary judgment motions under CPLR 3212 (a) (*see* Siegel, NY Prac § 272 at 470 [5th ed 2011]). The cross motion was nevertheless properly denied because plaintiff failed to meet his burden of establishing that the affirmative defense was without merit as a matter of law (*see Bank of N.Y. v Penalver*, 125 AD3d 796, 797).

With respect to appeal No. 2, we conclude that the court properly denied plaintiff's posttrial cross motion. On the issue of legal sufficiency, we conclude that plaintiff failed to establish that there was "simply no valid line of reasoning and permissible inferences" that could possibly lead rational jurors to find that he was a special employee of defendant (*Cohen v Hallmark Cards*, 45 NY2d 493, 499; *see Faulk v Rockaway One Co., LLC*, 107 AD3d 475, 475). Nor did the evidence so preponderate in plaintiff's favor that the jury could not have reached its verdict by any fair interpretation of the evidence, and thus we further conclude that the verdict was not against the weight of the evidence (*see Faulk*, 107 AD3d at 475; *see generally Pena v Automatic Data Processing, Inc.*, 105 AD3d 924, 925). At trial, defendant presented evidence that he alone controlled and directed " 'the manner, details and ultimate result of [plaintiff's] work' " on the day of the accident (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 359), and that "the work being performed was in furtherance of [his] business" rather than the general employer's business (*Schramm v Cold Spring Harbor Lab.*, 17 AD3d 661, 662). The conflicting evidence presented by plaintiff raised a question of fact concerning the existence of a special employment relationship that the jury was entitled to determine in defendant's favor (*see generally Pena*, 105 AD3d at 925).

Plaintiff's nonspecific objection to the jury charge, which

challenged the charge insofar as it was at variance with plaintiff's written request, was insufficient to preserve for our review his specific contention that the court erred in failing to instruct the jury that the formation of a special employment relationship required the consent of the employee and the relinquishment of control by the general employer (*see generally Hunt v Bankers & Shippers Ins. Co. of N.Y.*, 50 NY2d 938, 940). In any event, the alleged error did not prevent the jury from fairly considering the issue (*see Wood v Strong Mem. Hosp. of Univ. of Rochester*, 273 AD2d 929, 930-931), and the charge as a whole conveyed the appropriate legal standards. Finally, we conclude that the court properly refused to charge the jury with respect to the limited purpose for which evidence concerning workers' compensation benefits is admitted (*see* PJI 1:65.1), inasmuch as that charge was not warranted here.

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

239
CA 16-01305
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

DANIELLE N. CARR AND MATTHEW G. NAUSE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CHRISTOPHER F. SHEEHAN AND BLAKE ANN SHEEHAN,
DEFENDANTS-APPELLANTS.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (TIMOTHY J. FENNELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (DAVID B. GEURTSEN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered October 9, 2015. The order granted the motion of plaintiffs to enforce a settlement agreement.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration that they held a prescriptive easement over defendants' property for parking purposes. On the day scheduled for trial, the parties reached a settlement agreement that was placed on the record. Pursuant to the stipulation, defendants agreed to convey the northern portion of their parcel to plaintiffs. The parties identified the boundaries using a survey, but they agreed to meet with a surveyor at the property to provide exact measurements. Defendants' attorney described the southern boundary by referring to a surveyor's pin at the northeastern corner of the parcel and stating that the line would run perpendicular to the adjacent road. He stated that the surveyor was needed to draw the boundary line such that the area was wide enough between that line and defendants' garage to enable defendants to move their boat and trailer. Defendants' attorney stated that "[a]s long as [defendants] have the ability to do that . . . [the stipulation] was acceptable to them." Two months later, the parties and their attorneys met at the site and determined that defendants' boat and trailer measured eight feet in width, but defendants rejected the proposed boundary line. Plaintiffs obtained a survey map and legal description from the surveyor, which drew the boundary line such that there was 10 feet of space between the boundary line and defendants' garage. When defendants still refused to convey the property, plaintiffs moved to enforce the stipulation

and compel defendants to convey the northern parcel to plaintiffs. Supreme Court granted the motion, and defendants now appeal.

"It is well settled that '[a]n oral stipulation of settlement that is made in open court and stenographically recorded is enforceable as a contract and is governed by general contract principles for its interpretation and effect' " (*Gay v Gay*, 118 AD3d 1331, 1332, *lv dismissed* 25 NY3d 1015; *see Walker v Walker*, 42 AD3d 928, 928, *lv dismissed* 9 NY3d 947). We reject defendants' contention that the stipulation was simply "an agreement to agree." "If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482, *rearg denied* 75 NY2d 863, *cert denied* 498 US 816; *see Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91; *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109). Thus, "a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*Joseph Martin, Jr., Delicatessen*, 52 NY2d at 109; *see 166 Mamaroneck Ave Corp.*, 78 NY2d at 91). Nevertheless, the "doctrine of definiteness" should not be applied rigidly (*166 Mamaroneck Ave. Corp.*, 78 NY2d at 91; *see Cobble Hill Nursing Home*, 74 NY2d at 482-483). "[W]here it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain" (*166 Mamaroneck Ave. Corp.*, 78 NY2d at 91; *see Joseph Martin, Jr., Delicatessen*, 52 NY2d at 110).

Here, although the precise location of the boundary line was missing from the stipulation, the stipulation was sufficiently definite to be enforceable because it included an "objective method" for determining whether the proposed boundary line drawn by the surveyor was satisfactory (*166 Mamaroneck Ave. Corp.*, 78 NY2d at 91; *see Samonek v Pratt*, 112 AD3d 1044, 1045). The parties' approval of the proposed boundary line was conditioned solely on whether there was enough clearance for defendants' boat and trailer and, in opposition to the motion, defendants did not argue that 10 feet of clearance was insufficient. Defendants' mere disagreement with the boundary line that was drawn by the surveyor was not enough to set aside the stipulation (*see Hamilton v Murphy*, 79 AD3d 1210, 1212, *lv dismissed* 16 NY3d 794, *rearg denied* 16 NY3d 885; *Doolittle v Quiggle*, 238 AD2d 949, 949).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

240
CA 16-00137
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF LEROY PIERCE, CONSECUTIVE NO. 265463, 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.

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

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

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered December 22, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, continued petitioner’s commitment to a secure treatment facility.

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

Memorandum: In this proceeding pursuant to Mental Hygiene Law article 10, petitioner appeals from an order, entered after an annual review hearing (§ 10.09 [d]), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]). We affirm.

Petitioner contends that the evidence is legally insufficient to support the finding that he is a dangerous sex offender requiring confinement within the meaning of the statute because the evidence presented by respondents failed to establish that he has such an inability to control his behavior that he was likely to be a danger to others and to commit sex offenses if not confined (*see* Mental Hygiene Law § 10.03 [e]). We reject that contention. Here, respondents’ expert conducted a psychiatric examination in anticipation of petitioner’s annual review hearing and issued a report pursuant to Mental Hygiene Law § 10.09 (b) that, among other things, documented

petitioner's history of criminal sexual conduct against female teenagers and children; indicated that petitioner suffered from conditions including pedophilic disorder; noted that petitioner minimized and avoided his deviant sexual attraction to children in favor of explaining that his offenses resulted from his seeking emotional gratification; and reviewed the actuarial tests and dynamic factors that resulted in an assessment of petitioner's recidivism risk as "moderate-high." Petitioner's independent psychiatric examiner initially agreed with respondents' expert that petitioner was a dangerous sex offender requiring confinement, and the proceeding was stayed for a significant period of time until petitioner sought a hearing after his examiner issued an addendum indicating that, upon review of petitioner's most recent treatment records, he no longer required confinement.

Respondents' expert explained at the hearing conducted two years after she issued her initial report that, although petitioner had declined to be re-interviewed by her, she updated her information through a conversation with petitioner's treatment providers and a review of petitioner's service plans and progress notes covering the intervening period. Respondents' expert concluded that, even after the additional treatment while confined, petitioner remained unable to control his sex-offending behaviors based upon, among other things, his history of sex crimes and violations when released to the community; his chronic pedophilic disorder that he had not adequately addressed in treatment through comprehensive discussion of all of his offenses; his difficulty identifying why he gravitated to children for sexual gratification as opposed to adults; his display of cognitive distortions in referring to his offenses; and his failure to address and understand all components of his offense cycle given his lack of focus on his fantasies and sexual arousal to children (*see Matter of Wright v State of New York*, 134 AD3d 1483, 1486-1487; *see generally Matter of State of New York v Walter W.*, 94 AD3d 1177, 1179, *lv denied* 19 NY3d 810).

With respect to petitioner's offense cycle, respondents' expert was particularly concerned that petitioner had focused exclusively on his teenage victims and that his intervention strategies were inapplicable to his child victims, especially those who were strangers to him. As petitioner correctly notes, respondents' expert acknowledged that a recent service plan by petitioner's treatment providers indicated that petitioner's goal of addressing his sexual deviance and emotional identification had been achieved and discontinued. Respondents' expert further explained, however, that the progress notes in the service plan indicated that petitioner had gained insight only with respect to his sexual misconduct against teenagers and he had not adequately addressed his sexual deviance against children, including all of his younger victims, and the service plan was subsequently amended to reinstate petitioner's goal of adequately addressing his sexual deviance.

Contrary to petitioner's further contention, additional factors including his recidivism risk, with which his own examiner agreed even after accounting for petitioner's increase in age, indicated that

petitioner would not be able to comply with the rules of the strict and intensive supervision and treatment program (*see Matter of State of New York v Robert F.*, 25 NY3d 448, 454-455; *Matter of State of New York v Breeden*, 140 AD3d 1649, 1650).

Thus, 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 Robert F.*, 25 NY3d at 454-455; *Matter of Billinger v State of New York*, 137 AD3d 1757, 1758, *lv denied* 27 NY3d 911).

Petitioner further contends that the determination is against the weight of the evidence because respondents' expert interfered with the treatment providers' assessment of petitioner's progress, and her opinion was inconsistent with petitioner's treatment notes and the opinion of petitioner's expert that he did not require confinement. We reject that contention.

Respondents' expert explained that she was concerned with the recent change in petitioner's service plan discontinuing his goal of addressing his criminogenic need of sexual deviance, and thus chose to conference with petitioner's treatment providers to determine the reason for the change, particularly because petitioner had not consented to a re-interview with her, and the clinical notes indicated that petitioner had been focused on his teenage victims rather than incorporating each of his child victims into his treatment. Respondents' expert also explained that she had no ability to request an updated service plan and that the treatment providers had, upon additional review, determined prior to the conference that they should not have discontinued the goal addressing sexual deviance. The evidence established that the treatment providers subsequently issued an amended service plan indicating that petitioner needed to continue exploring his offense history in order to identify his attraction to younger children and the offending patterns associated with each victim, and to develop substantial interventions that would ensure his safe presence in the community.

The court was in the best position to evaluate the weight and credibility of this evidence and the conflicting expert testimony at the hearing and, upon review of the record as a whole and in light of her explanations, we see no reason to disturb the court's decision to credit the testimony of respondents' expert that petitioner remains a dangerous sex offender requiring confinement (*see Matter of State of New York v Parrott*, 125 AD3d 1438, 1439, *lv denied* 25 NY3d 911; *see also Matter of Sincere KK. v State of New York*, 129 AD3d 1254, 1255, *lv denied* 26 NY3d 906; *Matter of State of New York v Barry W.*, 114

AD3d 1093, 1095).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

241
CA 15-01757
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

ED FERRIS, PLAINTIFF-APPELLANT,

V   ORDER

BENTON B. KENDIG, III, AND MICHELLE MERCIER,
AS EXECUTORS OF THE ESTATE OF GEORGE MERCIER,
DECEASED, AND GMC MANAGEMENT CORP.,
DEFENDANTS-RESPONDENTS.

ED FERRIS, PLAINTIFF-APPELLANT PRO SE.

WOODS OVIATT GILMAN LLP, ROCHESTER (F. MICHAEL OSTRANDER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 23, 2015. The order granted the motion of defendants to dismiss the complaint, dismissed the complaint and awarded defendants disbursements and attorney's fees in the amount of $3,549.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

242
CA 16-01420
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ.

IN THE MATTER OF BETHLEHEM STEEL CORPORATION,
PETITIONER-APPELLANT,

V   MEMORANDUM AND ORDER

COUNTY OF ERIE AND ERIE COUNTY SEWER DISTRICT
NO. 6, RESPONDENTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG A. LESLIE OF COUNSEL), FOR
PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR
RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 30, 2015 in CPLR article 78 proceedings. The judgment granted the motion of respondents for leave to amend their answers and for summary judgment and denied the motion of petitioner for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the first decretal paragraph and denying that part of respondents' motion for leave to amend their answers and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced these consolidated CPLR article 78 proceedings in the years 2002-2006 and 2008-2015 challenging the sanitary sewer assessments for its 1,000-acre property located in sewer district No. 6, operated by respondents. Petitioner alleges that the assessments are arbitrary and capricious and without a rational basis insofar as they include a "parcel charge," and that they are in violation of petitioner's substantive due process and equal protection rights. As a preliminary matter, we agree with petitioner that Supreme Court abused its discretion in granting that part of respondents' motion seeking leave to amend their answers to allege additional affirmative defenses where, as here, there was an extended delay in moving to amend the answers and a failure on the part of respondents to establish a reasonable excuse for the delay (*see generally Webber v Webber*, 145 AD3d 1499, 1503; *Jablonski v County of Erie*, 286 AD2d 927, 928). We therefore modify the judgment accordingly.

Disregarding respondents' amended answers, we nevertheless reject

petitioner's contention that the court erred in granting that part of respondents' motion seeking summary judgment dismissing the petitions and denying its motion for summary judgment seeking a reduction in the respective assessments and a corresponding refund of payments. It is undisputed that, when petitioner announced that it was closing its steel production plant, the City of Lackawanna faced severe financial difficulties, in part due to the approximately $10 million debt that was incurred in upgrading its sewer infrastructure. A plan was developed whereby respondent County of Erie (County) would take over the sewer operations and create a new district as a benefit assessment district, respondent Erie County Sewer District No. 6 (District), which was defined by the Lackawanna city limits.

In order to fund the related costs and debt, a three-part formula was developed to determine the amount each property owner would be assessed for sanitary sewer benefits. Two of the three components of the formula are not at issue, i.e., the use charge and the valuation charge based on the assessed value of each property. At issue here is the third component: the parcel charge, a benefit charge that varies depending on the nature and size of the property. All residential properties are assessed one parcel charge, regardless of size. All nonresidential properties less than one acre also are assessed one parcel charge. The remaining nonresidential properties, of which there are approximately 180, are assessed five parcel charges per acre, known as the "five times multiplier." Respondents' employee explained in a deposition that the five times multiplier was developed because approximately 60% of an acre can be developed for residential use and the remaining 40% is comprised of rights-of-way. He explained that the average residential parcel size is 4,800 square feet, and thus "60 percent of one acre would be the equivalent of about five times 4,800 square feet." He explained that the nonresidential property owners whose property exceeds one acre were treated as having the most benefit from the system because the system can accommodate any future development on the property.

It is well established that "[t]here is a presumption of validity to the assessments requiring petitioners to show by affirmative proof that they have not benefited from the improvement or that it is nonassessable in the first instance" (*Matter of Nolan v Bureau of Assessors of N.Y. City Fin. Admin.*, 31 NY2d 90, 93, *remittitur amended* 31 NY2d 696, *rearg denied* 31 NY2d 1059; *see Pikas v Town of Grand Is.*, 106 AD2d 887, 888-889). Furthermore, "[i]t is well settled that even property that has no current use for sewer services can be deemed [benefited] by the improvement" (*Matter of Carriero v Town Bd. of the Town of Stillwater*, 72 AD3d 1479, 1480). We conclude that respondents established their entitlement to judgment that the parcel charge has a rational basis, is not arbitrary and capricious and does not violate petitioner's constitutional rights, and that petitioner failed to raise an issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We conclude that there is a "rational basis for [the] legislative classification" inasmuch as larger nonresidential properties have the most potential for future development and increased use of the system

(*Arcuri v Village of Remsen*, 202 AD2d 991, 992). We further conclude that "there is nothing inherently improper with relating the amount of benefits received to [acreage]" (*Pikas*, 106 AD2d at 888), and that respondents established that the parcel charge, including the five times multiplier, is a rational, nonarbitrary manner in which to apportion the sewer costs in the District (*see generally Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 61). We have reviewed petitioner's remaining contentions and conclude that they are without merit.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

245
KA 14-01059
PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE A. PRYCE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (CHRIS EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered October 2, 2013. The judgment convicted defendant, upon his plea of guilty, of bail jumping in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of bail jumping in the second degree (Penal Law § 215.56). Defendant's contention that his plea was not knowingly, voluntarily, or intelligently entered because he did not personally recite the elements of the crime to which he pleaded guilty is actually a challenge to the factual sufficiency of the plea allocution, and that contention is not preserved for our review inasmuch as defendant did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Loper*, 118 AD3d 1394, 1394-1395, *lv denied* 25 NY3d 1204; *see also People v Rinker*, 141 AD3d 1177, 1177, *lv denied* 28 NY3d 1030). This case does not fall within the narrow exception to the preservation requirement because nothing in the plea colloquy negates an essential element of bail jumping in the second degree, raises a potential defense to that charge, or otherwise casts doubt on defendant's guilt (*see People v Lopez*, 71 NY2d 662, 666-667; *People v Brinson*, 130 AD3d 1493, 1493, *lv denied* 26 NY3d 965). In any event, defendant's contention is without merit. Defendant's "monosyllabic responses to [County Court's] questions did not render the plea invalid" (*People v Gordon*, 98 AD3d 1230, 1230, *lv denied* 20 NY3d 932 [internal quotation marks omitted]; *see Lopez*, 118 AD3d at 1395). Further, " 'there is no requirement that a defendant personally recite the facts underlying his or her crime[] during the plea colloquy, and, here, [t]he record establishes that defendant

confirmed the accuracy of [the court's] recitation of the facts underlying the crime' " (*Gordon*, 98 AD3d at 1230).

We have considered defendant's challenge to the severity of the agreed-upon sentence and conclude that it is without merit.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

247
KA 16-00427
PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL N. LIGHTFOOT, DEFENDANT-APPELLANT.

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

THEODORE A. BRENNER, DEPUTY DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered January 13, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). 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 defendant's challenge 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).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

248
TP 15-00796
PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF KHALID EMERSON, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENT.

DIANE CIURCZAK, BUFFALO, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA 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, Erie County [John A. Michalek, J.], entered May 8, 2015) to review a determination of respondent. The determination denied the request of petitioner that an indicated report be amended to unfounded and sealed.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul respondent’s determination, after a fair hearing, denying his request to amend to unfounded an indicated report of maltreatment. Respondent determined that a preponderance of the evidence supported the conclusion that petitioner abused and maltreated a child during an incident that took place in the course of petitioner’s employment.

“[O]ur review is limited to whether the determination to deny the request to amend and seal the [indicated] report is supported by substantial evidence in the record” (*Matter of Dawn M. v New York State Cent. Register of Child Abuse & Maltreatment*, 138 AD3d 1492, 1493). Substantial evidence is “ ‘such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact’ ” (*Matter of Kordasiewicz v Erie County Dept. of Social Servs.*, 119 AD3d 1425, 1426). Here, contrary to petitioner’s contention, we conclude that the evidence of maltreatment, including testimony that the subject child told a nurse and a child protective services caseworker that petitioner punched him and struck him with a shoe, testimony of a witness to that incident, and evidence that the child sustained scratches and redness consistent with such an event, constituted substantial evidence supporting the determination (*see*

generally Matter of Garzon v New York State Off. of Children and Family Servs., 85 AD3d 1603, 1604; *Matter of Kenneth VV. v Wing*, 235 AD2d 1007, 1007-1008). Contrary to petitioner's further contention, the existence of contrary evidence does not require a different result. Where, as here, "conflicting versions of events create credibility issues, it is [respondent's] responsibility to resolve them, and that assessment will not be disturbed as long as it is supported by substantial evidence" (*Matter of Jeannette LL. v Johnson*, 2 AD3d 1261, 1263). It " 'is not within this Court's discretion to weigh conflicting testimony or substitute its own judgment for that of the administrative finder of fact' " (*Matter of Pitts v New York State Off. of Children & Family Servs.*, 128 AD3d 1394, 1395; *see Matter of Ribya BB. v Wing*, 243 AD2d 1013, 1014).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

249

TP 16-01478

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

IN THE MATTER OF MICHAEL LAFFERTY, PETITIONER,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY 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 August 26, 2016) to review a determination of respondent. The determination revoked petitioner's parole.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of the Administrative Law Judge (ALJ) revoking his release to parole supervision. We reject petitioner's contention that Supreme Court improperly transferred this matter to this Court. Preliminarily, we note that petitioner confuses the regulations applicable to an administrative appeal to the Board of Parole pursuant to 9 NYCRR part 8006 with the rules that apply to a CPLR article 78 proceeding. To the extent that petitioner challenges the sufficiency of the evidence presented during the contested final parole revocation hearing regarding charge 5, we agree with respondent that the court properly transferred the matter to this Court.

Turning to petitioner's contention regarding the sufficiency of the evidence presented in support of charge 5, which alleges that petitioner intentionally and knowingly possessed a sexual performance by a child less than 16 years of age, we conclude that petitioner failed to preserve his contention that there is insufficient evidence that the children depicted in the images of child pornography found on petitioner's computer were under the age of 16. Indeed, defense counsel conceded that the images found on petitioner's computer and admitted in evidence "certainly would constitute child pornography.

We’re not going to quibble over that. The images are disgusting. There is no question about that” (*see Matter of Washington v Annucci*, 144 AD3d 1541, 1542; *Matter of Kirk v Hammock*, 119 AD2d 851, 853-854; *see also Matter of McCollum v Fischer*, 61 AD3d 1194, 1194, *lv denied* 13 NY3d 703).

In any event, “[i]t is well settled that a determination to revoke parole will be confirmed if the procedural requirements were followed and there is evidence [that], if credited, would support such determination” (*Matter of Rosa v Fischer*, 108 AD3d 1227, 1228, *lv denied* 22 NY3d 855 [internal quotation marks omitted]). We conclude that the ALJ’s determination that petitioner intentionally and knowingly possessed a sexual performance by a child less than 16 years of age is supported by substantial evidence, namely, 12 images of child pornography found on petitioner’s computer, as well as the testimony of law enforcement officers who found 60 images of child pornography on petitioner’s computer.

We reject petitioner’s further contention that the 48-month time assessment imposed against him is excessive. “The Executive Law does not place an outer limit on the length of that assessment, and the [ALJ’s] determination may not be modified upon judicial review in the absence of impropriety” (*Rosa*, 108 AD3d at 1228 [internal quotation marks omitted]; *see Matter of Bell v Lemons*, 78 AD3d 1393, 1393-1394). Here, the ALJ considered the appropriate factors and, “given petitioner’s violent criminal record and his . . . disregard for the conditions of his parole, we perceive nothing improper in the assessment imposed” (*Rosa*, 108 AD3d at 1228 [internal quotation marks omitted]; *see Bell*, 78 AD3d at 1394).

Petitioner’s remaining contentions are without merit.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

250
KA 14-00990
PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

WAYNE A. PRYCE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (CHRIS EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered January 11, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), we reject defendant's challenge to County Court's acceptance of the guilty plea. Defendant's contention that his plea was not knowingly, voluntarily, or intelligently entered because he did not personally recite the elements of the crime to which he pleaded guilty is actually a challenge to the factual sufficiency of the plea allocution, and that contention is not preserved for our review inasmuch as defendant did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Loper*, 118 AD3d 1394, 1395, *lv denied* 25 NY3d 1204; *see also People v Rinker*, 141 AD3d 1177, 1177, *lv denied* 28 NY3d 1030). Contrary to defendant's contention, we conclude that this case does not fall within the narrow exception to the preservation requirement (*see People v Bonacci*, 119 AD3d 1348, 1349, *lv denied* 24 NY3d 1042; *see generally People v Lopez*, 71 NY2d 665, 666-667). In any event, the court was not required to have defendant personally recite the facts underlying the crime during the plea colloquy where, as here, the record establishes that defendant confirmed the accuracy of the court's recitation of the facts underlying the crime (*see People v Gordon*, 98 AD3d 1230, 1230, *lv denied* 20 NY3d 932). Moreover, the fact that defendant gave " 'monosyllabic responses to [the court's] questions did not render the plea invalid' " (*id.* at 1230).

Defendant additionally contends that the court erred in imposing an enhanced sentence based on his failure to appear at sentencing without affording him an opportunity to withdraw his plea. That contention is not preserved for our review inasmuch as defendant did not object to the enhanced sentence, and he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Sprague*, 82 AD3d 1649, 1649, *lv denied* 17 NY3d 801; *see also People v Blake*, 126 AD3d 1375, 1375-1376, *lv denied* 26 NY3d 1143). In any event, the record establishes that the court informed defendant during the plea proceeding that it could and would impose an enhanced sentence in the event that he failed to appear at sentencing. Thus, "[b]y failing to appear at the scheduled sentencing, defendant violated the terms of the plea agreement[,] and the court was no longer bound by the agreed-upon sentence" (*People v Goodman*, 79 AD3d 1285, 1286; *see Blake*, 126 AD3d at 1376).

We have considered defendant's challenge to the severity of his sentence and conclude that it is without merit.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

253
CAF 16-00919
PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF DIANA HARRISON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STEVEN HARRISON, RESPONDENT-RESPONDENT.

BENNETT SCHECHTER ARCURI & WILL, LLP, BUFFALO (KRISTIN L. ARCURI OF COUNSEL), FOR PETITIONER-APPELLANT.

KADISH & FIORDALISO, BUFFALO (KEITH I. KADISH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered August 18, 2015 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objection to an order of the Support Magistrate, which dismissed the petition with prejudice.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the objection is granted, the petition is reinstated and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: In this child support modification proceeding pursuant to Family Court Act article 4, petitioner mother appeals from an order denying her objection to an order that dismissed her petition with prejudice. The mother sought modification of her child support obligation as set forth in a 2013 oral stipulation, which was incorporated but not merged in the judgment of divorce, on the ground that respondent father's income had increased by more than 15%. The Support Magistrate dismissed the petition on the ground that the mother failed to establish a substantial change in circumstances since the entry of the stipulation. Family Court denied the mother's objection, stating that, although "a petition for modification of child support may be brought based on an increase in a party's income of 15% or more, there [must be] a showing of a **substantial** change of circumstances in order to be successful." We agree with the mother that the court applied an incorrect standard in denying her objection, and we therefore reverse the order, grant the objection, reinstate the petition and remit the matter to Family Court for further proceedings, including a new hearing if necessary.

Prior to 2010, in order to support a request for an upward modification of an existing child support obligation, a parent was

required to establish that there had been a substantial change in circumstances (*see Matter of Boden v Boden*, 42 NY2d 210, 213), and that, after consideration of all of the relevant factors, "the children's best interests require an upward modification of the child support award" (*Matter of Brescia v Fitts*, 56 NY2d 132, 141). In October 2010, however, the Legislature amended the Family Court Act to provide other bases upon which to seek a modification of a preexisting child support obligation. Therefore, a court may now modify an order of child support, "including an order incorporating without merging an agreement or stipulation of the parties" (§ 451 [3] [a]), where, inter alia, "there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted" (§ 451 [3] [b] [ii]). Thus, "[s]ection 451 of the Family Court Act 'allows a court to modify an order of child support, without requiring a party to allege or demonstrate a substantial change in circumstances' " (*Matter of Thomas v Fosmire*, 138 AD3d 1007, 1007; *see generally Matter of Muok v Muok*, 138 AD3d 1458, 1459). The stipulation at issue here was executed in 2013 (*cf. Matter of Zibell v Zibell*, 112 AD3d 1101, 1102), and thus the amendments to the statute apply to the mother's petition (*see* L 2010, ch 182, § 13).

In this case, because the court and the Support Magistrate failed to address Family Court Act § 451 (3) (b) (ii), the petition was denied upon application of the incorrect standard. Consequently, in making the determination on the petition, the Support Magistrate failed to make several necessary findings of fact, including the amount of the father's income at the time of the stipulation in 2013, whether that income included monies the father earned from playing music, and whether the mother established that the father's income had increased by the requisite 15% at the time of the filing of the petition. Thus, upon remittal, the court should determine, inter alia, whether the father's income has increased by 15% between the time of the stipulation and the filing of the petition and, if so, whether the mother is entitled to an increase in child support.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

258
CA 16-01580
PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

REBECCA A. AMERMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CAITLYN S. REEVES, ET AL., DEFENDANTS,
AND ALAN M. BROWN, DEFENDANT-RESPONDENT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF SANTACROSE & FRARY, ALBANY (LISA DIAZ-ORDAZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered March 8, 2016. The order denied the motion of plaintiff for, inter alia, summary judgment on the issue of negligence against defendant Alan M. Brown.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking summary judgment on the issue of defendant Alan M. Brown's negligence, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for personal injuries that she allegedly sustained as the result of a motor vehicle accident. The accident occurred at an intersection controlled by a traffic signal, with the respective vehicles of plaintiff and Alan M. Brown (defendant) approaching the intersection from opposite directions on the same road. Plaintiff testified at her deposition that the light was green as she approached the intersection from the south, and defendant testified that the light was green as he neared the intersection from the north. As the vehicle driven by plaintiff proceeded through the intersection, it was struck in the driver's side by defendant's vehicle, which turned left. Plaintiff moved for, inter alia, partial summary judgment on the issue of defendant's negligence. Supreme Court denied the motion, and we now modify the order by granting that part of the motion seeking summary judgment on the issue of defendant's negligence.

Contrary to plaintiff's initial contention, defendant's plea of guilty to violating Vehicle and Traffic Law § 1111 (a) (1) does not entitle her to summary judgment on the issue of defendant's negligence. It is well settled that a "plea of guilty to the infraction of failure to yield the [right-of-way would] not establish

defendant's negligence as a matter of law” (*Harris v Moyer*, 255 AD2d 890, 891-892; *see Kelley v Kronenberg* [appeal No. 2], 2 AD3d 1406, 1407). “Rather, it is the ‘*unexcused* violation of the Vehicle and Traffic Law [that] constitutes negligence per se’ ” (*Shaw v Rosha Enters., Inc.*, 129 AD3d 1574, 1576). We agree with plaintiff, however, that she met her burden on the motion by submitting evidence of defendant’s statutory violation along with other evidence, including her deposition testimony, establishing that she proceeded straight through the intersection with the right-of-way and was struck by defendant’s turning vehicle. By that evidence, “plaintiff[] demonstrated, prima facie, that [defendant] was negligent in attempting to make the left turn when it was not reasonably safe to do so” (*Sharpton v New York City Tr. Auth.*, 136 AD3d 712, 713; *see generally Simeone v Cianciolo*, 118 AD3d 864, 865; *Mazzullo v Loots*, 116 AD3d 677, 678). Thus, plaintiff met her burden of establishing that defendant was negligent, and he failed to raise a triable issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Nevertheless, the court properly denied the motion insofar as it, at least impliedly, sought summary judgment on the issues of plaintiff’s comparative negligence, proximate cause of the collision, and dismissal of defendant’s first affirmative defense (*see generally Canh Du v Hamell*, 19 AD3d 1000, 1001-1002). In support of the motion, plaintiff submitted, among other things, defendant’s deposition testimony, in which he testified that plaintiff activated her right turn signal and moved to the right as if she were making a right turn, but then proceeded straight through the intersection. Although that testimony did not raise a triable issue of fact regarding defendant’s negligence, inasmuch as he had a duty to yield to all vehicles in the intersection (*see* Vehicle and Traffic Law § 1111 [a] [1]), it raised a triable issue of fact whether, “by activating [her right] turn signal under the circumstances then present, [plaintiff] violated the standard of reasonable care expected of drivers and contributed to the occurrence of the accident by falsely manifesting an intention to turn” right (*Gray v Dembeck*, 48 AD3d 748, 750). Thus, the court properly denied the remainder of plaintiff’s motion because she failed to eliminate a triable issue of fact whether she “may have been comparatively at fault in the occurrence of the accident” (*Mazzullo*, 116 AD3d at 678; *see Halbina v Brege*, 41 AD3d 1218, 1219).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

259
CA 16-01328
PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF JENNIFER WAITE, DAVID WILLIAMS, JONATHAN SCHELL, DARRELL HARRIS AND JOSEPH LAWLER, RESIDENT TAXPAYERS, ELECTORS AND LEGAL VOTERS IN THE TOWN OF CHAMPION FIRE PROTECTION DISTRICT, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF CHAMPION, RESPONDENT-RESPONDENT.

PINSKY LAW GROUP, PLLC, SYRACUSE (BRADLEY M. PINSKY OF COUNSEL), FOR PETITIONERS-APPELLANTS.

SLYE LAW OFFICES, P.C., WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered December 16, 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.

Memorandum: Petitioners appeal from a judgment dismissing their CPLR article 78 petition seeking a determination that respondent's dissolution plan is void and a determination that respondent must comply with General Municipal Law, article 17-A, title 3. We agree with respondent that Supreme Court properly dismissed the petition inasmuch as respondent complied with the statute (*see* § 786 [1]). The majority of electors voted for dissolution of the Champion Fire Protection District, and respondent consequently fulfilled its duty of devising a dissolution plan (*see* § 782 [2]). Petitioners failed either to attain the requisite number of signatures to challenge the dissolution plan by referendum (*see* § 785 [2] [a]), or to petition for the establishment of a fire district (*see* Town Law § 171 [1]).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

265

TP 16-01480

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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IN THE MATTER OF EDDIE MCLOYD, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS 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 August 26, 2016) 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 petition is dismissed.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

266
KA 15-00565
PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS J. CALKINS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered January 5, 2015. The judgment convicted defendant, upon his plea of guilty, of unlawful manufacture of methamphetamine in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of unlawful manufacture of methamphetamine in the third degree (Penal Law § 220.73 [1]), defendant contends that his waiver of the right to appeal is unenforceable and that his sentence is unduly harsh and severe. As the People correctly concede, the record is devoid of a valid waiver of the right to appeal. Although the prosecutor stated during the plea proceeding that a waiver of the right to appeal was a part of the plea agreement, County Court did not engage in any colloquy with defendant concerning the waiver of the right to appeal and thus failed to ensure that there was a knowing, intelligent and voluntary waiver of that right (*see generally People v Lopez*, 6 NY3d 248, 257). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

269
KA 14-01674
PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIE D. MCKOY, JR., DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (MELANIE J. BAILEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered April 23, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (three counts).

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

270
KA 16-01650
PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

ROBERT WYCHE, DEFENDANT-RESPONDENT.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), dated June 1, 2016. The order, inter alia, granted that part of the omnibus motion of defendant seeking to merge the kidnapping in the second degree count of the indictment with the robbery in the second degree count of the indictment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at Supreme Court.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

271
KA 09-02205
PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES A. ZEITZ, DEFENDANT-APPELLANT.

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

THEODORE A. BRENNER, DEPUTY DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered March 19, 2004. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, rape in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, course of sexual conduct against a child in the first degree (Penal Law former § 130.75 [a]) and rape in the second degree (§ 130.30 [1]). By failing to object when the victim testified, defendant failed to preserve for our review his contention that County Court abused its discretion in allowing the victim to offer sworn testimony without inquiring into her capacity (*see People v Peppard*, 27 AD3d 1143, 1143, *lv denied* 7 NY3d 793; *People v Reed*, 247 AD2d 900, 900, *lv denied* 92 NY2d 859; *People v Strong*, 172 AD2d 1059, 1059). In any event, that contention lacks merit. The victim, who was 16 years old at the time of the trial, was presumed competent to testify, and voir dire was not mandatory (*see* CPL 60.20 [2]; *People v Martina*, 48 AD3d 1271, 1272, *lv denied* 10 NY3d 961; *Peppard*, 27 AD3d at 1143), and we conclude that there is no indication in the record that the court abused its discretion in permitting the victim to give sworn testimony (*see Reed*, 247 AD2d at 901; *see generally People v Parks*, 41 NY2d 36, 45-46).

Defendant further contends that the verdict is against the weight of the evidence. At the outset, we conclude that "a different verdict would not have been unreasonable inasmuch as this case rests largely on the jury's credibility findings with respect to the testimony of the victim" (*People v Roman*, 107 AD3d 1441, 1442, *lv denied* 21 NY3d

1045; *see generally People v Bleakley*, 69 NY2d 490, 495). Nevertheless, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and "affording the requisite 'great deference to the jury given its opportunity to view the witnesses' " (*Roman*, 107 AD3d at 1442), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Despite some minor inconsistencies in her trial testimony, we conclude that "nothing in the record suggests that the victim was 'so unworthy of belief as to be incredible as a matter of law' or otherwise tends to establish defendant's innocence of those crimes . . . , and thus it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Woods*, 26 AD3d 818, 819, *lv denied* 7 NY3d 765; *see People v Olson*, 110 AD3d 1373, 1374, *lv denied* 23 NY3d 1023; *Roman*, 107 AD3d at 1442).

Contrary to defendant's contention, any inconsistencies in the testimony with respect to the dates of the crimes merely presented a credibility issue for the jury to resolve (*see People v Woolson*, 122 AD3d 1353, 1355, *lv denied* 25 NY3d 1078), and "the fact that [the victim's] testimony concerning the time frame in which defendant ceased his sexual contact with her was vague and contradictory at times does not render her testimony incredible as a matter of law" (*People v Bassett*, 55 AD3d 1434, 1436, *lv denied* 11 NY3d 922). Contrary to defendant's further contention, no corroboration of the victim's testimony was required inasmuch as the victim was competent to testify under oath (*see* CPL 60.20 [2], [3]; *People v Izzo*, 104 AD3d 964, 966, *lv denied* 21 NY3d 1005). In any event, "several aspects of the victim's testimony were corroborated by other witnesses," including the victim's mother (*Roman*, 107 AD3d at 1443). The testimony of the victim's mother was not " 'so inconsistent or unbelievable as to render it incredible as a matter of law' " (*People v Shinebarger*, 110 AD3d 1478, 1479, *lv denied* 24 NY3d 1088).

We reject defendant's contention that the circumstances under which the victim disclosed the abuse establishes that her testimony is not credible. Rather, we conclude that the jury was entitled to credit the testimony of the People's expert that victims of abuse often, as part of child sexual abuse accommodation syndrome, exhibit a "[d]elayed, conflicted, or unconvincing disclosure" of the abuse (*see Woolson*, 122 AD3d at 1355-1356; *see generally People v Spicola*, 16 NY3d 441, 465, *cert denied* 565 US 942). Moreover, the jury was entitled to credit the victim's testimony that defendant exhibited violent behavior and threatened to harm her if she disclosed the abuse (*see Olson*, 110 AD3d at 1374). We note that the victim's testimony in that regard was corroborated by the testimony of the mother, who also explained that she had not disclosed the sexual abuse that she had witnessed out of fear for her own safety and that of her children given defendant's threats and history of domestic violence (*see generally People v Knapp*, 138 AD3d 1157, 1158; *Olson*, 110 AD3d at 1374).

We have considered defendant's remaining contention and conclude

that it is without merit.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

272

KA 15-00935

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILFREDO MORALES, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered January 22, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), defendant contends that Supreme Court erred in failing to follow the requirements of CPL article 730 to determine whether he was competent to stand trial (*see* CPL 730.30 [1]), and thus reversal is required. We reject that contention. "The record indicates that the court granted defense counsel's request for a 'forensic [evaluation]' of defendant by ordering only an informal psychological examination and not by issuing an order of examination pursuant to CPL article 730" (*People v Castro*, 119 AD3d 1377, 1378, *lv denied* 24 NY3d 1082; *see People v Johnson*, 252 AD2d 967, 968, *affd* 92 NY2d 976). "[T]he decision of the court to order an informal psychological examination was within its discretion . . . and did not automatically require the court to issue an order of examination or otherwise comply with CPL article 730" (*Castro*, 119 AD3d at 1378 [internal quotation marks omitted]; *see Johnson*, 252 AD2d at 968).

Defendant further contends that his sentence is unduly harsh and severe and that his waiver of the right to appeal does not preclude his challenge to the severity of his sentence. Contrary to defendant's contention, we conclude that "the record demonstrates that [the waiver] was made knowingly, intelligently and voluntarily" (*People v Lopez*, 6 NY3d 248, 256), and that "defendant ha[d] 'a full appreciation of the consequences' of such waiver" (*People v Bradshaw*,

18 NY3d 257, 264). We further conclude that the waiver encompasses defendant's challenge to the severity of the sentence. First, the waiver occurred following the court's discussion of the maximum sentence defendant faced (*see People v Hidalgo*, 91 NY2d 733, 737). Second, although the court, during its oral colloquy, asked defendant if he understood that he was waiving his "right to appeal the conviction" (*see People v Maracle*, 19 NY3d 925, 928) and his right to challenge "any errors or mistakes" without mentioning any challenge to the severity of the sentence (*see People v Dilley*, 133 AD3d 1380, 1381), defendant executed and acknowledged on the record a written waiver of the right to appeal, which specifically referenced the fact that he was waiving his right to appeal the "sentence" except for any challenge to the legality of the sentence. Based on the combination of a lengthy oral colloquy, a written waiver wherein defendant "expressly waived [his] right to appeal without limitation," and an acknowledgment of that written waiver during the oral colloquy, we conclude that the valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*Hidalgo*, 91 NY2d at 737; *cf*. *People v Doblinger*, 117 AD3d 1484, 1485).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

275

KA 13-01770

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALVAN ROBINSON, DEFENDANT-APPELLANT.

ANTHONY J. LANA, BUFFALO, FOR DEFENDANT-APPELLANT.

THEODORE A. BRENNER, DEPUTY DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered August 19, 2013. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, sexual abuse in the first degree and rape in the third 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 Niagara County Court for resentencing in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of rape in the first degree (Penal Law § 130.35 [2]), sexual abuse in the first degree (§ 130.65 [2]), and rape in the third degree (§ 130.25 [3]). We reject defendant's contention that the evidence is legally insufficient to establish that the victim was "incapable of consent[ing]" to the intercourse or the sexual contact by reason of being "physically helpless," as required to convict defendant under sections 130.35 (2) and 130.65 (2). Penal Law § 130.00 (7) states that a person is "physically helpless" when that "person is unconscious or for any other reason is physically unable to communicate unwillingness to an act." The "definition of physically helpless is broad enough to cover a sleeping victim" (*People v Smith*, 16 AD3d 1033, 1034, *affd* 6 NY3d 827, *cert denied* 548 US 905), "particularly where the sleep was drug and alcohol induced" (*People v Fuller*, 50 AD3d 1171, 1174, *lv denied* 11 NY3d 788 [internal quotation marks omitted]; *see People v Kessler*, 122 AD3d 1402, 1403, *lv denied* 25 NY3d 990). Here, the victim testified that she woke up after a night of drinking and being sick to her stomach to find that all of her clothing was off and that defendant was penetrating her vaginally. That evidence is legally sufficient to demonstrate that the victim was physically helpless at the time of the offenses and thus is legally sufficient to support the jury's verdict of guilty on the first two counts (*see Kessler*, 122 AD3d at 1403; *People v Yontz*, 116 AD3d 1242, 1242-1243, *lv denied* 23 NY3d 1026; *Fuller*, 50 AD3d at 1174). Further,

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 with respect to all three counts (*see Kessler*, 122 AD3d at 1403; *Yontz*, 116 AD3d at 1243; *see generally People v Bleakley*, 49 NY2d 490, 495).

We agree with defendant that he was improperly sentenced as a second felony offender on the basis of his 2005 federal conviction of conspiracy to possess with intent to distribute 50 kilograms or more of marihuana (21 USC § 846; *see* § 841 [a] [1]; [b]). In order to be subject to sentencing as a second felony offender, defendant's prior out-of-state conviction must have been "of an offense for which a sentence of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed" (Penal Law § 70.06 [1] [b] [i]). Thus, the predicate conviction, if rendered by another jurisdiction, must be equivalent to a New York felony (*see People v Jurgins*, 26 NY3d 607, 613; *People v Muniz*, 74 NY2d 464, 467). The "general rule limits th[e] inquiry 'to a comparison of the crimes' elements as they are respectively defined in the foreign and New York penal statutes' " (*Jurgins*, 26 NY3d at 613, quoting *Muniz*, 74 NY2d at 467-468).

Here, as the People concede, defendant's 2005 federal conviction is not equivalent to a New York felony because there is a "conspicuous difference" between the pertinent federal statute and its New York counterpart (*People v Ramos*, 19 NY3d 417, 419). The New York crime of conspiracy requires proof of an overt act by one of the conspirators in furtherance of the conspiracy (*see* Penal Law § 105.20), but the federal drug conspiracy statute has no such element or requirement (*see Ramos*, 19 NY3d at 419-420). "Because New York law requires proof of an element that federal law does not," the federal conviction cannot serve as a predicate felony conviction (*id.* at 420). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing as a nonpredicate felon (*see id.* at 421).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

276

KA 16-01335

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL SWEAT, DEFENDANT-RESPONDENT.

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

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), dated May 16, 2016. The order granted that part of defendant's omnibus motion to suppress physical evidence and statements made to the police.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: The People appeal from an order granting that part of defendant's omnibus motion to suppress physical evidence, i.e., a gun, and statements made to the police. At the suppression hearing, a police officer testified that he was traveling in a marked patrol vehicle when he saw defendant standing on the porch of a home. After defendant looked in the direction of the approaching patrol vehicle, he turned and entered the home. The officer pulled his vehicle to the side of the road and proceeded on foot to the porch, where he encountered defendant as he reemerged from the home. The officer asked, "What are you doing here?" When defendant did not respond, the officer conducted a search of the home and found a gun in a front closet near the entrance to the porch. Thereafter, defendant was arrested and gave statements. Supreme Court suppressed the weapon and statements on the ground that, because the initial encounter between defendant and the police was an unlawful level one encounter under *People v De Bour* (40 NY2d 210, 223), the ensuing search of the home was unwarranted.

We agree with the People that the court erred in suppressing the gun and statements without making any determination on defendant's standing to challenge the allegedly unlawful search of the home. Because "our review is limited to the issues determined by the court" (*People v Schrock*, 99 AD3d 1196, 1197), and the court failed to rule on the threshold issue of standing, we hold the case, reserve decision, and remit the matter to Supreme Court to rule on that issue.

If the court determines that defendant has standing, the court should then determine whether one of the homeowners consented to the search.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

277
CAF 15-00955
PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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IN THE MATTER OF MICHAEL P. EASLEY, JR.,
PETITIONER-APPELLANT,

V ORDER

KIARA L. RAMOS, RESPONDENT-RESPONDENT.

ELIZABETH CIAMBRONE, BUFFALO, FOR PETITIONER-APPELLANT.

AUDREY ROSE HERMAN, ATTORNEY FOR THE CHILD, KENMORE.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered May 11, 2015 in a proceeding pursuant to Family Court Act article 6. The order granted the petition for visitation only to the extent of permitting correspondence.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

280

CA 16-01380

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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CTS CONTRACTING, INC., FORMERLY KNOWN AS
CUSTOM TOPSOIL, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF CHEEKTOWAGA, DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS, LLP, BUFFALO (CHRIS BERLOTH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered April 27, 2016. The order, among other things, denied defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for breach of its emergency snow removal contract with defendant, Town of Cheektowaga (Town). Plaintiff alleged that the Town breached the contract by engaging another contractor, in addition to plaintiff, to perform snow removal work. We conclude that Supreme Court properly denied the Town's motion for summary judgment dismissing the complaint.

Contrary to the Town's contention, it is not entitled to summary judgment based upon the language of General Municipal Law § 103 (4). That section provides that, "in the case of a public emergency arising out of an accident or other unforeseen occurrence or condition whereby circumstances affecting public buildings, public property or the life, health, safety or property of the inhabitants of a political subdivision or district therein[] require immediate action which cannot await competitive bidding or competitive offering, contracts for public work . . . may be let by the appropriate officer, board or agency of a political subdivision or district therein." "An 'unforeseen' occurrence or condition is one which is not anticipated, which creates a situation which cannot be remedied by the exercise of reasonable care or which is fortuitous" (*Grimm v City of Troy*, 60 Misc 2d 579, 582, citing *Rodin v Director of Purch. of Town of Hempstead*, 38 Misc 2d 362). "[S]ituations of this kind must be such as cannot

reasonably be foreseen in time to advertise for bids" (*id.*). Here, the Town had already completed the competitive bidding process and awarded a contract to plaintiff for emergency snow removal. We thus conclude that section 103 (4) does not apply to this case (*cf. Matter of 4M Holding Co. v Diamante*, 215 AD2d 383, 383-384; *Matter of City of New York v Unsafe Bldg. & Structure No. 97 Columbia Hgts.*, 113 Misc 2d 246, 247-248; *Grimm*, 60 Misc 2d at 582-583).

Also contrary to the Town's contention, it did not establish that it was entitled to summary judgment based upon plaintiff's alleged breach of the emergency snow removal contract's "subletting" provision. The parties agree that the "subletting" provision refers to State Finance Law § 138 as well as General Municipal Law § 109. Section 138 "basically prohibits the assignment or transfer of State-awarded contracts without prior written consent from the State" (*Foster-Lipkins Corp. v State of New York*, 84 AD2d 870, 871; *see Matter of NANCO Envtl. Servs. v Jorling*, 172 AD2d 1, 5-6, *lv denied* 80 NY2d 754), and section 109 prohibits the same for all other municipal contracts (*see e.g. Matter of Turnkey Constr. Corp. v City of Peekskill*, 51 AD2d 729, 729). The two sections are "virtually identical" and are "direct descendants of chapter 444 (§§ 1, 2) of the Laws of 1897" (*National Guardian Sec. Servs. Corp. v City of New York*, 218 AD2d 549, 550). If a contractor violates, assigns, or transfers a publicly awarded contract in violation of section 138 or section 109, the State or other municipality, respectively, is discharged from all liability under the contract (*see* § 109 [2]; *Penn York Constr. Corp. v State of New York*, 92 AD2d 1087, 1088).

Here, we conclude that the Town failed to meet its initial burden on its motion because it did not establish, as a matter of law, that it was entitled to be relieved of liability under section 138 or section 109. Specifically, although it is undisputed that plaintiff used at least seven subcontractors in the course of its emergency snow removal work, the Town failed to establish that it did not waive the remedies available under section 138 or section 109. Indeed, the Town submitted deposition testimony admitting that Town officials had knowledge that plaintiff's subcontractors were performing work and did not object. "A party may not, with full knowledge of all the facts, have the benefit of work done . . . by a sub-contractor without objection, and then urge as an excuse for not paying for the same that the sub-contractor was not consented to by him" (*Ocorr & Rugg Co. v City of Little Falls*, 77 App Div 592, 608, *affd* 178 NY 622; *see National Guardian Sec. Servs. Corp.*, 218 AD2d at 550; *Barr & Creelman Co. v State of New York*, 265 App Div 893, 894). Moreover, notwithstanding the waiver issue, a question of fact remains concerning whether plaintiff's use of subcontractors to perform a portion of the work violated the statutes (*see Ocorr & Rugg Co.*, 77 App Div at 608-609; *see also Lane Constr. Co. v Winona Constr. Co.*, 49 AD2d 142, 147), and that question of fact precludes summary judgment in favor of the Town.

Finally, we reject the Town's contention that it was permitted to engage contractors other than plaintiff to perform emergency snow

removal work because its contract with plaintiff was nonexclusive. A " 'contract must be interpreted so as to give effect to, not nullify, its general or primary purpose' " (*Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1799). In this case, the Town awarded a contract for emergency snow removal to plaintiff, and the Town's interpretation of the contract, which would afford the Town discretion to engage other contractors to perform that same work, would render the contract meaningless.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

281
CA 16-01165
PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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SHARA A. ARMPRESTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. ERICKSON, JR., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-APPELLANT.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (CARRIE L. SMITH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 18, 2015. The order, insofar as appealed from, granted that part of the motion of plaintiff for partial summary judgment on the issue of serious injury.

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

Memorandum: Plaintiff commenced this negligence action to recover damages for injuries that she sustained in successive motor vehicle collisions. In March 2013, plaintiff was driving her vehicle north on Niagara Falls Boulevard at approximately 45 miles per hour when a vehicle driven by Michael J. Erickson, Jr. (defendant) made a left turn out of a gas station parking lot and struck the passenger side of her vehicle. Plaintiff's vehicle spun around three times and came to rest in the center lane of the road. While the parties waited for emergency personnel to arrive, a third vehicle operated by an intoxicated driver collided with plaintiff's vehicle, throwing her from the vehicle onto the pavement beneath defendant's vehicle.

We conclude that Supreme Court properly granted plaintiff's motion insofar as she sought partial summary judgment on the issue whether she sustained a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the initial collision with defendant's vehicle. Although defendant contends that plaintiff failed to establish that her injuries were attributable to the initial collision, we conclude that plaintiff met her initial burden by submitting her deposition testimony and the expert affirmation of her treating physician (*cf. Barnes v Fix*, 63 AD3d 1515, 1516, *lv denied* 13 NY3d 716). Her physician opined with a reasonable degree of medical certainty that plaintiff suffered postconcussion syndrome,

posttraumatic headaches, and cognitive dysfunction as a result of the initial collision with defendant’s vehicle, and defendant does not dispute that those injuries constitute a “significant limitation of use of a body function or system” (§ 5102 [d]). Contrary to defendant’s further contention, we conclude that plaintiff’s deposition testimony that she did not recall having experienced pain during the few minutes between the collisions did not create an issue of fact whether those injuries are attributable to the initial collision. The burden then shifted to defendant, who failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

282
CA 16-01655
PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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JOHN MANN, SR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AUTOZONE NORTHEAST, INC., DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILIP A. MILCH, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered May 11, 2016. The order denied defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he allegedly slipped and fell on ice and snow on a sidewalk in front of a store owned by defendant. On appeal, defendant contends that Supreme Court erred in denying its motion for summary judgment seeking dismissal of the complaint. We agree.

Defendant met its initial burden by establishing that "there was no dangerous or defective condition on the sidewalk at the location where the plaintiff fell" (*DiStefano v Ulta Salon*, 95 AD3d 932, 932). Defendant's submissions, including the deposition testimony of plaintiff and the store manager, and photographs of the scene taken immediately following plaintiff's fall, established that there was no ice or snow on the curb of the sidewalk where plaintiff claimed to have slipped while stepping up with his left foot. Contrary to plaintiff's contention, his deposition testimony does not indicate that his right foot slipped on any purported ice or snow in the lower area of the parking lot abutting the curb. Indeed, viewing the evidence in the light most favorable to plaintiff in the context of defendant's motion for summary judgment (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932), we conclude that plaintiff unequivocally testified that only his left foot slipped on the curb and that his right foot was stable on the ground in the lower area at the moment of his fall. We further conclude that plaintiff failed to raise a triable issue of fact in opposition. Plaintiff's opposing affidavit regarding the nature of his fall and the condition of the

sidewalk contradicts his prior deposition testimony, and thus "its submission 'constitutes an attempt to raise feigned issues of fact where none truly exists' " (*Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1579; *see Telfeyan v City of New York*, 40 AD3d 372, 373).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

284
CA 16-01306
PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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KAYLYN PEREZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSE PEREZ-BRACHE, DEFENDANT-APPELLANT.

SPADAFORA & VERRASTRO, LLP, BUFFALO (KELLY A. FERON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MATTINGLY CAVAGNARO LLP, BUFFALO (CHRISTOPHER S. MATTINGLY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered January 7, 2016. The order denied the application of defendant to modify the parties' judgment of divorce by terminating his maintenance obligation.

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

Memorandum: Defendant appeals from an order denying his application to modify the parties' judgment of divorce by terminating his maintenance obligation based on plaintiff's cohabitation with another man. Pursuant to the parties' support and property settlement agreement (agreement), which was incorporated but not merged into the judgment of divorce, defendant's "maintenance obligation shall be sooner terminated upon [defendant]'s death, or [plaintiff]'s death. ADDITIONALLY, after the fourth (4th) year of such payments, [defendant]'s maintenance obligation shall also terminate upon either [plaintiff]'s remarriage, or [plaintiff]'s cohabitation with an unrelated adult male pursuant to New York State Domestic Relations Law [§] 248." Following an evidentiary hearing, Supreme Court determined that defendant was required under the agreement to prove that plaintiff was habitually living with an unrelated adult male and that she held herself out as his wife, and that he failed to do so. The court also concluded in the alternative that, even if defendant was not required to prove that plaintiff was holding herself out as the other man's wife, defendant nonetheless failed to establish that plaintiff was habitually living with another man.

At the outset, we agree with defendant that the court erred in determining that, pursuant to the terms of the agreement, defendant was required to establish that plaintiff held herself out as another man's wife. " 'It is well settled that the parties to a matrimonial

agreement may condition a husband's obligation to support his wife solely on her refraining from living with another man without the necessity of the husband also proving that she habitually holds herself out as the other man's wife as Domestic Relations § 248 requires' " (*Mastrocovo v Capizzi*, 87 AD3d 1296, 1297). Here, "the fact that the agreement refers only to the cohabitation prong of Domestic Relations Law § 248 compels us to conclude that the parties did not intend to include the second prong of plaintiff holding herself out as another man's wife" (*id.* at 1298).

Nevertheless, we conclude that the court properly determined that defendant failed to establish by a preponderance of the evidence that plaintiff was habitually living with her fiancé (*see Scharnweber v Scharnweber*, 105 AD2d 1080, 1080, *affd* 65 NY2d 1016; *Matter of Ciardullo v Ciardullo*, 27 AD3d 735, 736). The reference to Domestic Relations Law § 248 in the parties' agreement was "solely for the purpose of defining *cohabitation*" (*Mastrocovo*, 87 AD3d at 1297), i.e., "habitually living with another person" (§ 248). Here, the testimony adduced at the trial established that, although plaintiff's fiancé occasionally stayed overnight at plaintiff's residence, he maintained his own separate residence in Canada, where he received his mail and kept his personal belongings. He did not own any real property with plaintiff and did not financially contribute to the payment of any of plaintiff's expenses.

Contrary to defendant's further contention, the court did not abuse its discretion in concluding that the disputed records requested in the subpoena duces tecum served on plaintiff's fiancé were irrelevant and thus that he was not entitled to them (*see generally Matter of Constantine v Leto*, 157 AD2d 376, 378, *affd* 77 NY2d 975; *Kephart v Burke*, 306 AD2d 924, 925; *Kozuch v Certified Ambulance Group, Inc.*, 301 AD2d 840, 840-841).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

285

CA 16-00574

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

DOROTHY SLOMCZEWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES A. ROSS, AMY A. LINEHAN AND ACEA MOSEY, PUBLIC ADMINISTRATOR OF THE ESTATE OF ASSUNTA ROSS, DECEASED, DEFENDANTS-APPELLANTS.

BROWN & KELLY, LLP, BUFFALO (DONALD B. EPPERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE HIGGINS KANE LAW GROUP, P.C., BUFFALO (TERRENCE P. HIGGINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 19, 2016. The judgment awarded plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and a new trial is granted.

Memorandum: Plaintiff commenced this action to recover damages for injuries she sustained when she fell down some steps outside a residence owned by defendants. According to plaintiff, her fall was attributable to the nonuniform configuration of the steps and the fact that the wrought iron stair railing broke off from its anchorages in the concrete steps as plaintiff held onto it. Defendants appeal from a money judgment entered in favor of plaintiff on the basis of a jury verdict rendered at a second trial (conducted after an initial mistrial) on the issues of liability and damages.

We reject defendants’ contention that Supreme Court erred, in a ruling made before the first trial and continued in effect for the second, in precluding the individual who repaired and replaced the railing following the accident from testifying as a fact witness with respect to the condition of the railing at the time of the accident. CPLR 3101 (a) provides that, “[g]enerally[,] [t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” “Although the CPLR does not specifically mention the names and addresses of witnesses or create any disclosure device for obtaining such information, it is within a court’s discretion to require a party to disclose the names and addresses of witnesses to transactions,

occurrence, admissions and the like . . . Thus, a party may reasonably be required to disclose the name and address of a witness whose identity it has learned in investigating a case but of whom the opposing party is ignorant" (*Hunter v Tryzbinski*, 278 AD2d 844, 844-845). Here, in view of defendants' prolonged and almost complete disregard of their pretrial disclosure obligations with regard to the identity of a known fact witness, it was reasonable for the court to preclude the individual from testifying as a fact witness.

We nevertheless conclude that it was an abuse of discretion to preclude that individual from testifying as an expert at the second trial given the timeliness and sufficiency of defendants' expert disclosure (*see Tronolone v Praxair, Inc.*, 39 AD3d 1146, 1147; *Green v Kingdom Garage Corp.*, 34 AD3d 1373, 1374; *cf. Maggio v Dougherty*, 130 AD3d 1446, 1446-1447). We further agree with defendants that, in reversing on the eve of the second trial its initial ruling permitting that very expert testimony, the court abused its discretion in denying defendants' request for a reasonable continuance and thereby giving them only 24 hours in which to retain a new expert, which they were unable to do in such a short time frame (*see Wai Ming Ng v Tow*, 260 AD2d 574, 574; *see also Chamberlain v Dundon* [appeal No. 2], 61 AD3d 1378, 1379; *Balogh v H.R.B. Caterers*, 88 AD2d 136, 140-141).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

287
TP 16-01409
PRESENT: WHALEN, P.J., SMITH, CENTRA, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF STANLEY L. HOWARD, PETITIONER,

V   ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI 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 August 16, 2016) 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

288
KA 15-02153
PRESENT: WHALEN, P.J., SMITH, CENTRA, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM J. SEABOLT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY 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 (Christopher S. Ciaccio, J.), entered November 24, 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 Monroe 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*.). As the People correctly concede, County Court erred in applying an incorrect standard of proof when it granted the People's request for an upward departure to a level three risk. The court found the existence of the aggravating factors by a preponderance of the evidence, but it is well settled that, "because Correction Law § 168-n (3) compels the People to prove the existence of facts supporting a defendant's overall risk level classification by clear and convincing evidence, the People cannot obtain an upward departure pursuant to the guidelines unless they prove the existence of [the alleged] aggravating circumstances by clear and convincing evidence" (*People v Gillotti*, 23 NY3d 841, 861-862). We therefore reverse the order, and we remit the matter to County Court for a determination of the People's request for an upward departure, following a further hearing if necessary.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

289
KA 15-00253
PRESENT: WHALEN, P.J., SMITH, CENTRA, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEPHEN W. MILES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered December 22, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Griffin*, 239 AD2d 936).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

290
KA 14-01913
PRESENT: WHALEN, P.J., SMITH, CENTRA, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERICA P. RECORD, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 7, 2014. The judgment convicted defendant, upon her plea of guilty, of burglary in the second degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]) and petit larceny (§ 155.25). The record establishes that County Court advised defendant of the maximum sentence that could be imposed upon a violation of the conditions of the guilty plea, and thus defendant's waiver of the right to appeal encompasses her contention that the enhanced sentence is unduly harsh and severe (*see People v VanDeViver*, 56 AD3d 1118, 1119, *lv denied* 11 NY3d 931, *reconsideration denied* 12 NY3d 788).

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

291
KA 14-01831
PRESENT: WHALEN, P.J., SMITH, CENTRA, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE K. COLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered August 28, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). Defendant failed to preserve for our review his contention that the prosecutor violated County Court's *Sandoval* ruling during rebuttal testimony and improperly violated the collateral evidence rule with that testimony. In any event, in light of the overwhelming evidence of defendant's guilt, there is no significant probability that defendant otherwise would have been acquitted, and thus we conclude that any error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Defendant also failed to preserve for our review his contention that the prosecutor violated CPL 240.43 by failing to provide notice of uncharged *Sandoval* material that was used to impeach defendant's credibility during cross-examination. In any event, we nevertheless conclude that the contention is without merit. The prosecutor cross-examined defendant with respect to statements he allegedly made to another inmate concerning the offense for which defendant was charged, and not concerning a prior offense (*see People v Dixon*, 228 AD2d 175, 175, *lv denied* 86 NY2d 1068).

We reject defendant's contention that he was denied effective assistance of counsel based upon defense counsel's failure to object to the People's alleged violation of CPL 240.43. "A defendant is not denied effective assistance of trial counsel merely because counsel

does not make a[n] . . . argument that has little or no chance of success” (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 6 NY3d 702). We further conclude that defense counsel’s failure to object to the rebuttal testimony was not “ ‘so egregious and prejudicial’ as to deprive defendant of a fair trial” (*People v Cummings*, 16 NY3d 784, 785, *cert denied* 565 US 862), and that, when viewed in totality, defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

294

KA 14-01615

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDDIE JACKSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB 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 15, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree, assault in the second degree and criminal contempt in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), assault in the second degree (§ 120.05 [2]), and criminal contempt in the second degree (§ 215.50 [3]). We reject defendant's contention that County Court improperly allowed expert testimony on domestic violence. Such testimony " 'may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand' " (*People v Williams*, 20 NY3d 579, 584; *see People v Woodworth*, 111 AD3d 1368, 1369, *lv denied* 23 NY3d 969). Here, the testimony was relevant in light of the victim's testimony regarding her conduct immediately after the assault and with respect to her communication with defendant prior to the first scheduled trial (*see Woodworth*, 111 AD3d at 1369; *People v Hryckewicz*, 221 AD2d 990, 990-991, *lv denied* 88 NY2d 849). In any event, any error in allowing such testimony is harmless. The evidence of guilt is overwhelming, and there is no significant probability that the absence of the error would have led to an acquittal (*see Williams*, 20 NY3d at 585; *People v Eckhardt*, 305 AD2d 860, 864, *lv denied* 100 NY2d 620; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Defendant failed to preserve for our review his contention that prosecutorial misconduct deprived him of a fair trial (*see People v*

Machado, 144 AD3d 1633, 1635; *People v Love*, 134 AD3d 1569, 1570, *lv denied* 27 NY3d 967) and we conclude that defendant's contention is without merit in any event. We reject defendant's further contention that he was penalized for exercising his right to a trial (*see People v Pope*, 141 AD3d 1111, 1112; *see generally People v Martinez*, 26 NY3d 196, 200). Finally, the sentence is not unduly harsh or severe.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

297

KA 16-01433

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL DEITZ, DEFENDANT-APPELLANT.

BRUCE R. BRYAN, SYRACUSE, 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 January 25, 2016. The judgment convicted defendant, upon his plea of guilty, of predatory sexual assault against a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of predatory sexual assault against a child (Penal Law § 130.96). We reject defendant's contention that County Court erred in refusing to suppress his statement to the police as "involuntarily made" (CPL 60.45 [1]). "The voluntariness of a confession is to be determined by examining the totality of the circumstances surrounding the confession" (*People v Coggins*, 234 AD2d 469, 470; *see People v Clark*, 139 AD3d 1368, 1369, *lv denied* 28 NY3d 928). Here, the record establishes that defendant voluntarily agreed to accompany the police officers from his place of employment to another location and, once in the interview room there, he agreed to speak to the officers after receiving *Miranda* warnings (*see People v Jacobson*, 60 AD3d 1326, 1327, *lv denied* 12 NY3d 916). Contrary to defendant's contention, we conclude that the interrogating officer's assurances to defendant that defendant was not a sexual predator or a bad person, and that he would feel better if he told the truth "were not improper or unusual where, as here, there is no evidence that defendant was of subnormal intelligence or susceptible to suggestion" (*Clark*, 139 AD3d at 1369; *see People v Johnson*, 52 AD3d 1286, 1287, *lv denied* 11 NY3d 738). Nor was defendant's statement rendered involuntary by any alleged deception by the officer, inasmuch as no specific promises were made to defendant to induce him to confess (*see People v Johnston*, 143 AD3d 1227, 1228, *lv denied* ___ NY3d ___ [Jan. 4, 2017]), and "it cannot be said that the alleged deception was so fundamentally unfair as to deny [defendant] due process" (*People v*

Clyburn-Dawson, 128 AD3d 1350, 1351, *lv denied* 26 NY3d 966 [internal quotation marks omitted]). In sum, even assuming, arguendo, that the police misled defendant, we conclude that " 'such deception did not create a substantial risk that defendant might falsely incriminate himself' " (*People v Camacho*, 70 AD3d 1393, 1394, *lv denied* 14 NY3d 886).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

298
CA 16-01126
PRESENT: WHALEN, P.J., SMITH, CENTRA, CURRAN, AND SCUDDER, JJ.

RICHARD COOPER AND DEBRA BECKS COOPER,
PLAINTIFFS-RESPONDENTS,

V ORDER

BENAKA, INC., DEFENDANT-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (L. DAMIEN COSTANZA OF COUNSEL), FOR DEFENDANT-APPELLANT.

KELLY WHITE DONOFRIO LLP, ROCHESTER (PAUL D. KELLY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered March 24, 2016. The order, insofar as appealed from, granted the motion of plaintiffs for partial summary judgment on liability pursuant to Labor Law § 240 (1).

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 22, 2017,

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

305
CA 16-01218
PRESENT: WHALEN, P.J., SMITH, CENTRA, CURRAN, AND SCUDDER, JJ.

CLAIRE MCCORMACK, INDIVIDUALLY, AND AS EXECUTOR
OF THE ESTATE OF JOSEPH W. LAMANNA, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

UNIVERSITY OF ROCHESTER, DEFENDANT,
WESTFALL CARDIOLOGY, LLP, AND ADEL B. SOLIMAN, M.D.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

BROWN GRUTTADARO GAUJEN & PRATO, LLC, ROCHESTER (WILLIAM KALISH OF COUNSEL), FOR DEFENDANTS-APPELLANTS WESTFALL CARDIOLOGY, LLP AND ADEL B. SOLIMAN, M.D.

DOMINIC PELLEGRINO, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

OSBORN, REED & BURKE, LLP, ROCHESTER (KATHLEEN B. BENESH OF COUNSEL), FOR DEFENDANT UNIVERSITY OF ROCHESTER.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), rendered October 27, 2015. The order denied the motion of defendants Westfall Cardiology, LLP, and Adel B. Soliman, M.D., for summary judgment.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

306

CA 16-01219

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

CLAIRE MCCORMACK, INDIVIDUALLY, AND AS EXECUTOR
OF THE ESTATE OF JOSEPH W. LAMANNA, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

UNIVERSITY OF ROCHESTER, DEFENDANT-APPELLANT,
WESTFALL CARDIOLOGY, LLP, AND ADEL B. SOLIMAN, M.D.,
DEFENDANTS.
(APPEAL NO. 2.)

OSBORN, REED & BURKE, LLP, ROCHESTER (KATHLEEN B. BENESH OF COUNSEL), FOR DEFENDANT-APPELLANT UNIVERSITY OF ROCHESTER.

DOMINIC PELLEGRINO, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

BROWN GRUTTADARO GAUJEN & PRATO, LLC, ROCHESTER (WILLIAM KALISH OF COUNSEL), FOR DEFENDANTS WESTFALL CARDIOLOGY, LLP AND ADEL B. SOLIMAN, M.D.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), rendered October 27, 2015. The order denied the motion of defendant University of Rochester for summary judgment.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

309
TP 16-01446
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF ADOLPHUS BARKOR, PETITIONER,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, RESPONDENT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (CATHERINE CREIGHTON OF COUNSEL), FOR PETITIONER.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (MARY B. SCARPINE 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, Erie County [Catherine R. Nugent Panepinto, J.], entered August 19, 2016) to review a determination of respondent. The determination denied petitioner benefits pursuant to General Municipal Law § 207-c.

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

Memorandum: Petitioner, a City of Buffalo police officer, commenced this CPLR article 78 proceeding seeking to annul the determination of the Hearing Officer that he is not entitled to General Municipal Law § 207-c benefits. At the time of the subject on-duty injury, petitioner was already receiving benefits pursuant to section 207-c as a result of prior on-duty injuries. After returning to work in a light-duty capacity in the camera room, petitioner twisted his ankle exiting the restroom and allegedly exacerbated the prior injuries. Following a hearing, the Hearing Officer determined that petitioner was able to perform his light-duty assignment in the camera room and thus was not totally disabled. We agree with respondent that the Hearing Officer's determination that petitioner could continue to perform the duties of a camera monitor is supported by substantial evidence (*see Matter of Hensel v City of Utica*, 115 AD3d 1217, 1218, *lv denied* 23 NY3d 908, *rearg denied* 24 NY3d 975; *Matter of Quintana v City of Buffalo*, 114 AD3d 1222, 1223-1224, *lv denied* 23 NY3d 902; *Matter of Clouse v Allegany County*, 46 AD3d 1381, 1381-1382).

Although petitioner presented evidence suggesting that he was not able to work at all, the Hearing Officer instead credited other evidence that petitioner could perform a light-duty assignment. "The

Hearing Officer was entitled to weigh the parties' conflicting medical evidence" (*Clouse*, 46 AD3d at 1382), and " '[w]e may not weigh the evidence or reject [the Hearing Officer's] choice where the evidence is conflicting and room for a choice exists' " (*id.*, quoting *Matter of CUNY-Hostos Community Coll. v State Human Rights Appeal Bd.*, 59 NY2d 69, 75; *see Matter of Anderson v City of Buffalo*, 114 AD3d 1160, 1161; *Quintana*, 114 AD3d at 1224). Further, petitioner did not prove that any medication he was taking sedated him to the point of not being able to perform his duties in the camera room (*see Quintana*, 114 AD3d at 1225).

Inasmuch as petitioner never claimed during the hearing that respondent failed to pay specific medical expenses, his contention in that regard is not properly before us (*see Matter of Molinsky v New York State Dept. of Motor Vehs.*, 105 AD3d 960, 960-961). "It is well established that the scope of [a] CPLR article 78 proceeding, following an administrative hearing, is limited to review of the issues raised and addressed in that hearing" (*Quintana*, 114 AD3d at 1223 [internal quotation marks omitted]).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

313

KA 12-02143

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKEY D. FORD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered September 12, 2012. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law §§ 20.00, 120.05 [2]). This case arose from an incident in which two men attacked the victim outside a bar following a disagreement over a game of darts. Eyewitnesses identified defendant as one of the victim's attackers; the second man remained unidentified.

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' " at the alleged error now raised on appeal (*People v Gray*, 86 NY2d 10, 19; *see People v Simmons*, 133 AD3d 1227, 1227). In any event, we conclude that the evidence is legally sufficient. With respect to the element of use of a "deadly weapon or dangerous instrument" (Penal Law § 120.05 [2]), an expert physician testified that the victim's wounds were consistent with a cut from a sharp object, but not consistent with a tear, and the People introduced photographs of those wounds. Although none of the eyewitnesses observed defendant or the unidentified man use or possess a weapon, we conclude that the circumstantial evidence is legally sufficient to establish that the victim suffered no fewer than five wounds caused by a dangerous instrument (*see People v Robinson*, 288 AD2d 887, 888, *affd* 98 NY2d 755; *People v Dilly*, 84 AD3d 1110, 1111, *lv denied* 17 NY3d 858). We further conclude that the evidence is legally sufficient to establish that defendant intentionally aided the unidentified man in causing the victim physical injury by means of

a dangerous instrument (*see* § 20.00). Regardless whether defendant was initially aware of the presence of a sharp object, his "continued participation in the assault [is] sufficient to support the conclusion that he intentionally aided in the assault with a dangerous instrument" (*People v Gurgov*, 129 AD3d 989, 990). Furthermore, viewing the evidence in light of the elements of the crime of assault in the second degree as an accessory 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 agree with defendant that Supreme Court erred in denying his request for an adverse inference charge based on the People's failure to produce the surveillance video of the interior of the bar (*see People v Handy*, 20 NY3d 663, 669; *People v Butler*, 140 AD3d 1610, 1612, *lv denied* 28 NY3d 969). Nevertheless, we conclude that the error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 237). Finally, defendant failed to preserve his contention that the court denied him the right to exercise a peremptory challenge (*see People v Bester*, 21 AD3d 1366, 1367), 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]).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

314
KA 14-01958
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK VANALST, ALSO KNOWN AS SHAUN JOHNSON,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered July 30, 2014. The judgment revoked a conditional discharge and imposed a term of imprisonment.

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

Memorandum: Defendant appeals from a judgment imposing a term of imprisonment upon the determination of County Court that he violated the terms and conditions of a conditional discharge that had been imposed upon his purported conviction of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]) upon his plea of guilty. The People correctly concede that the parties and the court mistakenly believed that defendant had entered a plea of guilty at a prior appearance, when in fact, no plea proceeding had taken place. Inasmuch as there is no conviction (*see generally* CPL 1.20 [13]), we conclude that the subsequent sentence imposing a conditional discharge, the determination on the declaration of delinquency, and the imposition of a term of imprisonment are void (*see generally* CPL 1.20 [15]). We therefore vacate the judgment and remit the matter to County Court for further proceedings on the indictment (*see generally People v Tyrell*, 22 NY3d 359, 366).

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

315
KA 14-01959
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK VANALST, ALSO KNOWN AS SHAUN AND JUNGLE,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered July 30, 2014. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

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 Ontario County Court for resentencing.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]) in connection with two drug transactions that occurred on different days and with different confidential informants. Contrary to defendant's contention, viewing the evidence in light of the elements of the offenses 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). The testimony of the police witnesses and the two informants was consistent in terms of the procedures utilized by the police to search the informants before and after the respective meetings with defendant, where and how long the transactions occurred, and the fact that the informants promptly turned over to the police small bags of crack cocaine that each informant testified defendant had removed from his mouth. Furthermore, we see no reason to disturb the credibility determinations of the jury (*see People v Smith*, 145 AD3d 1628, 1629).

By agreeing that the use of his nickname “Jungle” was not unduly prejudicial, defendant waived his contention that County Court erred in permitting the prosecutor to refer to defendant by that nickname in his opening statement. Defendant failed to object to the use of his nickname by the informant witnesses or to seek a curative instruction and thus failed to preserve for our review his contention that the use of that name was unduly prejudicial (*see* CPL 470.05 [2]; *cf. People v McCray*, 121 AD3d 1549, 1551, *lv denied* 25 NY3d 1204). In any event, the witnesses knew defendant only by that nickname before learning his legal name while working with the police, and thus it was “permissible for the People to elicit testimony regarding [the] nickname[] at trial for identification purposes” (*People v Tolliver*, 93 AD3d 1150, 1150, *lv denied* 19 NY3d 968; *cf. People v Collier*, 114 AD3d 1136, 1137).

By failing to object to any of the instances that defendant contends constitute prosecutorial misconduct during the prosecutor’s opening statement, in certain testimony that was elicited, and during summation, he failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct (*see* CPL 470.05 [2]; *see generally People v Machado*, 144 AD3d 1633, 1635). We reject defendant’s contention that the elicited testimony was improper. Even assuming, arguendo, that certain remarks the prosecutor made during his opening statement or summation were improper, we conclude that “ ‘[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial’ ” (*People v Jackson*, 108 AD3d 1079, 1080, *lv denied* 22 NY3d 997).

Contrary to defendant’s contention, we conclude that he was provided with meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant failed to allege the absence of any strategic or other legitimate reason for defense counsel’s alleged failure to seek a curative instruction regarding the use of defendant’s nickname, or to object during the prosecutor’s summation, which largely responded to the defense summation that vehemently attacked the credibility of the People’s witnesses (*see generally People v Caban*, 5 NY3d 143, 152).

We agree with defendant, however, that the 14-year determinate sentence is illegal inasmuch as the maximum term that could have been imposed is 12 years (*see* Penal Law § 70.70 [3] [b] [i]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing. In light of our determination, we do not consider defendant’s remaining contention that the sentence is unduly harsh and severe.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

317
KA 11-01819
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARIE R. SIMMONS, ALSO KNOWN AS MARIE LUNDY,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered July 1, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting her upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that Supreme Court (Egan, J.) erred in refusing to suppress statements she made to law enforcement personnel. We reject that contention. Law enforcement officers responded to a call of a stabbing and were informed that an unknown white male had stabbed defendant's husband. Investigators with the City of Rochester Police Department questioned defendant at the scene, and she reiterated her statements that an unknown assailant stabbed her husband. Defendant was then transported by police vehicle to the hospital where her husband was undergoing surgery. While at the hospital, two investigators interviewed defendant in a family waiting room. After noting inconsistencies and discrepancies in defendant's statements, investigators asked defendant if she had been the person to stab the victim. At that point, defendant admitted stabbing the victim during an argument.

For the next 17 minutes, one investigator continued questioning defendant while another made phone calls to a detective and an assistant district attorney. The latter investigator then returned to the family waiting room and informed defendant of her *Miranda* rights. Defendant indicated that she understood her rights and was willing to waive them and discuss the matter with the investigators. Following that waiver, defendant provided the officers with a written statement.

Contrary to defendant's contention, she was not in custody at any time before *Miranda* warnings were issued. A reasonable person, innocent of any crime, would not have thought he or she was in custody either at the scene or while conversing with the investigators in the family waiting room at the hospital (*see People v Figueroa-Norse*, 120 AD3d 913, 913-914, *lv denied* 25 NY3d 1071; *People v Lopez*, 39 AD3d 1231, 1232, *lv denied* 9 NY3d 847; *see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). Although the investigators may have determined to arrest defendant after her initial admission and before the *Miranda* warnings were administered, their subjective views of defendant's custodial status, which were not conveyed to defendant, "ha[ve] no bearing on the question whether [defendant] was in custody at a particular time" (*People v Andrango*, 106 AD3d 461, 461, *lv denied* 21 NY3d 1040 [internal quotation marks omitted]; *see Berkemer v McCarty*, 468 US 420, 442; *see also People v Ealy*, 20 AD3d 933, 934, *lv denied* 5 NY3d 805). Contrary to defendant's further contention, "[t]he record of the suppression hearing supports the court's determination that defendant knowingly, voluntarily and intelligently waived [her] *Miranda* rights before making the [written] statement" (*People v Irvin*, 111 AD3d 1294, 1295, *lv denied* 24 NY3d 1044, *reconsideration denied* 26 NY3d 930; *see People v Pratchett*, 90 AD3d 1678, 1679, *lv denied* 18 NY3d 997).

Finally, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), including the charge on the defense of justification, we conclude that "the jury 'did not fail to give the evidence the weight it should be accorded in rejecting defendant's justification defense' and thus that the verdict is not against the weight of the evidence in that respect" (*People v Barill*, 120 AD3d 951, 951-952, *lv denied* 24 NY3d 1042, *reconsideration denied* 25 NY3d 949; *see People v Reed*, 78 AD3d 1481, 1482, *lv denied* 16 NY3d 745; *see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

319
KA 14-01049
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ORLANDO J. ALICEA, ALSO KNOWN AS CAPO ALICEA,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

ORLANDO J. ALICEA, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered January 31, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (four counts) and criminal possession of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his guilty plea of four counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and one count of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). In appeal No. 2, defendant appeals from a judgment convicting him upon his guilty plea of one count of criminal sale of a controlled substance in the third degree (§ 220.39 [1]). The two pleas were entered in a single plea proceeding.

Defendant contends in each appeal that his respective guilty pleas were not knowingly, voluntarily, and intelligently entered. We note, however, that he failed to preserve that contention for our review inasmuch as he did not move to withdraw his respective pleas or to vacate the respective judgments of conviction on that ground (*see People v Brinson*, 130 AD3d 1493, 1493, *lv denied* 26 NY3d 965). This case does not fall within the rare exception to the preservation doctrine because “nothing in the plea colloqu[ies] casts significant doubt on defendant’s guilt or the voluntariness of the plea[s]” (*id.* [internal quotation marks omitted]; *see generally People v Lopez*, 71 NY2d 662, 666). In any event, defendant’s contention lacks merit. We

conclude that County Court and the prosecutor did not coerce defendant's guilty pleas merely by informing him of the range of sentences he faced if he was convicted after trial, committed additional offenses, or violated the plea agreement (*see People v Pitcher*, 126 AD3d 1471, 1472, *lv denied* 25 NY3d 1169). In addition, we conclude that defendant's " 'yes' and 'no' answers during the plea colloquies do not invalidate his guilty pleas" (*People v Russell*, 133 AD3d 1199, 1199, *lv denied* 26 NY3d 1149). To the contrary, the record shows that " '[d]efendant admitted each element of the offense[s] during his plea [colloquies]' " (*People v Newsome*, 140 AD3d 1695, 1696, *lv denied* 28 NY3d 973; *see Russell*, 133 AD3d at 1199). Moreover, the record "do[es] not indicate that he lacked an understanding of the nature and consequences of his plea[s]" (*People v Emm*, 23 AD3d 983, 984, *lv denied* 6 NY3d 775).

Contrary to the contention concerning both appeals in defendant's pro se supplemental brief, we conclude that the court had jurisdiction to accept his guilty pleas inasmuch as the entry of those pleas complied with CPL 220.10 (*see generally People v Johnson*, 89 NY2d 905, 907). In appeal No. 1, the court properly accepted defendant's plea of guilty to five class B felonies that were charged in the indictment and dismissed the remaining counts (*see* CPL 220.10 [4], [5] [a] [iii]). In appeal No. 2, the court properly accepted defendant's plea of guilty to a class B felony, which constituted the sole count charged in the superior court information (*see* CPL 200.10, 220.10 [2], [5] [a] [iii]).

Finally, the sentence in each appeal is not unduly harsh or severe.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

320

KA 14-00930

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ORLANDO J. ALICEA, ALSO KNOWN AS CAPO ALICEA,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

ORLANDO J. ALICEA, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered January 31, 2014. 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.

Same memorandum as in *People v Alicea* ([appeal No. 1] ___ AD3d ___ [Mar. 24, 2017]).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

323
CA 16-00435
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

JULIE CLACK AND COLLIN CLACK, INDIVIDUALLY AND
AS PARENTS AND NATURAL GUARDIANS OF AN INFANT,
NATHALIE CLACK, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MAGDI E. SAYEGH, M.D., ET AL., DEFENDANTS,
SISTERS OF CHARITY HOSPITAL, CATHOLIC HEALTH
SYSTEM, INC., JODI BALL, M.D., JAIME REHMANN, M.D.,
AND ROBIN BOCHACKI, N.N.P., DEFENDANTS-RESPONDENTS.

FARACI LANGE, LLP, BUFFALO (JENNIFER L. FAY OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

HARRIS BEACH PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered November 30, 2015. The order granted the motion of defendants Sisters of Charity Hospital, Catholic Health System, Inc., Jodi Ball, M.D., Jaime Rehmann, M.D., and Robin Bochacki, N.N.P., for a protective order.

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

Memorandum: Plaintiffs, the biological parents of Nathalie Clack (child), commenced this action seeking damages for injuries allegedly sustained by the child as a result of defendants' negligence during the prenatal care of plaintiff Julie Clack (mother), the labor and delivery of the child, and the care of the child in the neonatal and pediatric intensive care units. During the deposition of nonparty Kathryn Sexton, the certified nurse midwife (CNM) who helped treat and "monitor" the mother during her labor and an employee of defendant Sisters of Charity Hospital (Sisters Hospital), plaintiffs' attorney sought to ask Sexton questions about fetal monitor tracing strips (strips) that were generated between Sexton's last progress note at 12:10 p.m. and the time she last visited the mother's labor and delivery room, i.e., 1:45 p.m. Sexton had testified that, although she did not actively interpret those strips, she had the ability to review those strips at a computer in the nurse's station and could return to the mother's room "if there's a reason . . . to go back into

the room." Sexton further testified that the strips for all of the patients being monitored were "posted on a monitor, . . . so [she] could have glanced at them." At another point in her deposition, Sexton admitted that she "may have been watching the strip [sic]."

Defendants' attorney objected to any questions related to the strips generated during that time period and ultimately halted the deposition. He contended that the questions violated the holding of *Carvalho v New Rochelle Hosp.* (53 AD2d 635), which has been cited authoritatively by this Court (*see e.g. Dare v Byram*, 284 AD2d 990, 991; *Bryant v Bui*, 265 AD2d 848, 849; *Forgays v Merola*, 222 AD2d 1088, 1088). Defendants Sisters Hospital, Catholic Health System, Inc., Jodi Ball, M.D., Jaime Rehmann, M.D., and Robin Bochacki, N.N.P. (collectively, defendants) moved for a protective order "to resolve the question of whether or not CNM Sexton [could] be asked to interpret fetal monitoring strips recorded between 12:10 p.m. and 1:45 p.m." We conclude that Supreme Court erred in resolving that question in favor of defendants.

Although *Carvalho* and its progeny have established that "one defendant physician may not be examined before trial about the professional quality of the services rendered by a codefendant physician if the questions bear solely on the alleged negligence of the codefendant and not on the practice of the witness" (53 AD2d at 635), the questions at issue herein are not precluded by *Carvalho*. Contrary to the contention of defendants, the questions posed to the witness, i.e., questions about the strips generated during a time that the witness was supposed to be monitoring the mother's care, and which the witness may have "glanced at" or "watch[ed]," "relate[] directly to [the witness's] care and treatment . . . and . . . were appropriate" (*Lieblich v Saint Peter's Hosp. of the City of Albany*, 112 AD3d 1202, 1205).

Based on our resolution, we do not address plaintiffs' remaining contention.

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

328
CA 16-01543
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

JAN C. SHINE, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

PAUL R. SHINE, DEFENDANT-APPELLANT-RESPONDENT.

JAMES P. RENDA, BUFFALO, FOR DEFENDANT-APPELLANT-RESPONDENT.

SHAW & SHAW, P.C., HAMBURG (JAMES M. SHAW OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Erie County (James H. Dillon, J.), entered December 4, 2015. The judgment, among other things, adjudged that defendant is to pay spousal maintenance to plaintiff.

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

Memorandum: Defendant appeals and plaintiff cross-appeals from a judgment of divorce that, inter alia, directed defendant to pay maintenance and denied plaintiff's application for attorneys' fees and experts' fees. Contrary to the parties' contentions, the maintenance award is appropriate in its amount and duration. "Although the authority of this Court in determining issues of maintenance is as broad as that of the trial court" (*D'Amato v D'Amato*, 132 AD3d 1424, 1425), "[a]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Gately v Gately*, 113 AD3d 1093, 1093, *lv dismissed* 23 NY3d 1048 [internal quotation marks omitted]). We perceive no abuse of discretion here (*see id.*). Supreme Court "properly considered plaintiff's 'reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors' set forth in the statute" (*Wilkins v Wilkins*, 129 AD3d 1617, 1618, quoting *Hartog v Hartog*, 85 NY2d 36, 52; *see Lazar v Lazar*, 124 AD3d 1242, 1243), and we decline to substitute our discretion for that of the court.

Contrary to plaintiff's further contention, the court did not abuse its discretion in denying her application for attorneys' fees and experts' fees. "Given plaintiff's substantial assets[,] the significant award of maintenance," and the significant amounts of money previously paid by defendant for plaintiff's attorneys and experts, we conclude that the court properly ordered plaintiff to pay her own costs and fees (*Atwal v Atwal* [appeal No. 2], 270 AD2d 799,

799, *lv denied* 95 NY2d 761; *see Gifford v Gifford*, 132 AD3d 1123, 1126; *Heymann v Heymann*, 102 AD3d 832, 835).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

332

KA 13-00818

PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN JONES, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), 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 (John J. Ark, J.), rendered August 14, 2012. The appeal was held by this Court by order entered October 9, 2015, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (132 AD3d 1388). The proceedings were held and completed (Alex R. Renzi, J.).

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We previously held the case, reserved decision, and remitted the matter to Supreme Court for a probable cause hearing to determine the lawfulness of defendant's arrest and the admissibility of evidence obtained by the police as a result thereof (*People v Jones*, 132 AD3d 1388). A different Supreme Court Justice conducted the probable cause hearing upon remittal, and we conclude that the court properly determined that there was reasonable suspicion to detain defendant until the showup identification procedure was conducted.

Contrary to defendant's contention, the People established that there was reasonable suspicion to believe that defendant "was involved in a felony or misdemeanor," thus justifying his forcible stop and detention (*People v Hollman*, 79 NY2d 181, 185; *see generally People v Cantor*, 36 NY2d 106, 112-113). A police officer who had been called to the scene in the early morning hours heard numerous gunshots and saw a cloud of smoke coming from the area of those gunshots, i.e., an area between two vehicles. Immediately thereafter, the officer observed defendant and another man "pop[] up" from behind one of the vehicles. Inasmuch as defendant's temporal and spatial proximity to

the area from where the shots were fired “made it highly unlikely that the suspect had departed and that, almost at the same moment, an innocent person . . . coincidentally arrived on the scene” (*People v Johnson*, 63 AD3d 518, 518, *lv denied* 13 NY3d 797; *cf. People v Mabeus*, 68 AD3d 1557, 1562, *lv denied* 14 NY3d 842), we conclude that the officer had the requisite reasonable suspicion to stop and detain defendant.

Contrary to defendant’s further contention, he was not subjected to a de facto arrest based on the fact that he was held for approximately 45 minutes until the showup identification procedure could take place where, as here, the identification procedure took place “in the course of a continuous, ongoing investigation” (*People v Woodard*, 83 AD3d 1440, 1441, *lv denied* 17 NY3d 803; *see People v Boyd*, 272 AD2d 898, 899, *lv denied* 95 NY2d 850; *cf. People v Ryan*, 12 NY3d 28, 30-31; *see generally People v Brisco*, 99 NY2d 596, 597 n). Finally, we conclude that, once defendant was positively identified by two witnesses, there was probable cause for his arrest (*see People v Carson*, 122 AD3d 1391, 1392, *lv denied* 25 NY3d 1161; *People v Dumbleton*, 67 AD3d 1451, 1452, *lv denied* 14 NY3d 770).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

333
TP 16-01392
PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND NEMOYER, JJ.

IN THE MATTER OF TARA DIXON FUNDERGURG,
PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY
SERVICES, RESPONDENT.

CREIGHTON, JOHNSON & GIROUX, BUFFALO (CANDACE L. MORRISON OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS 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, Erie County [Deborah A. Chimes, J.], entered August 9, 2016) to review a determination of respondent. The determination revoked petitioner's registration to operate a family daycare center.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul respondent's determination revoking her registration to operate a family daycare center. We note at the outset that petitioner challenges only the penalty and does not raise a substantial evidence issue, and thus Supreme Court erred in transferring the proceeding to this Court (*see Matter of Lynch v New York State Dept. of Motor Vehs. Appeals Bd.*, 125 AD3d 1326, 1326). Nevertheless, in the interest of judicial economy, we address the merits of petitioner's challenge (*see id.*).

An administrative penalty will be upheld "unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law" (*Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854). That is not the case here. The evidence at the fair hearing established, inter alia, that petitioner transported herself and 12 children from a church where they were having lunch back to her daycare in a seven-passenger minivan. In addition, of the four children under the age of four in petitioner's care, only one was secured in a child safety seat, in violation of Vehicle and Traffic

Law § 1229-c (1) (a) and 18 NYCRR 416.6 (f).

Contrary to petitioner's contention, there were no mitigating circumstances that would render the penalty shocking to one's sense of fairness. "[P]etitioner was not confronted by unanticipated circumstances, not of her own making, to which she responded appropriately" (*Matter of Briggs v New York State Off. of Children & Family Servs.*, 142 AD3d 1284, 1285; *cf. Matter of Lewis v New York State Off. of Children & Family Servs.*, 114 AD3d 1065, 1067-1068; *Matter of Grady v New York State Off. of Children & Family Servs.*, 39 AD3d 1157, 1158-1159). Rather, as petitioner admitted at the hearing, while there were safe alternatives available, she chose a course of action that presented a "huge safety hazard" for the children in her care. Under the circumstances, revocation of petitioner's registration is not disproportionate to the offense (*see Briggs*, 142 AD3d at 1285).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

334

KA 15-01855

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT SAFFOLD, 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 (Thomas J. Miller, J.), entered August 8, 2013 pursuant to the 2009 Drug Law Reform Act. The order denied the application of defendant to be resentenced upon defendant's 2003 conviction of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree.

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

Memorandum: On appeal from an order denying his application for resentencing pursuant to the 2009 Drug Law Reform Act (*see* CPL 440.46), defendant contends that County Court erred in concluding that certain factors overcame the statutory presumption in favor of resentencing. We conclude that the court did not abuse its discretion in denying defendant's application.

It is well settled that a "defendant who is eligible for resentencing pursuant to CPL 440.46 enjoys a statutory presumption in favor of resentencing . . . However, resentencing is not automatic, and the determination is left to the discretion of the" sentencing court (*People v Bethea*, 145 AD3d 738, 738; *see People v Arroyo*, 99 AD3d 515, 515, *lv denied* 20 NY3d 1059). Contrary to defendant's contention, the court did not abuse its discretion in determining that "substantial justice dictated denial of resentencing, given defendant's violent criminal history and poor prison disciplinary record" (*People v Alvarez*, 94 AD3d 587, 587, *lv denied* 19 NY3d 956; *see People v Welch*, 110 AD3d 1453, 1453, *lv denied* 22 NY3d 1044; *People v Gatewood*, 87 AD3d 825, 826, *lv denied* 17 NY3d 903), and "the seriousness of the instant offense" (*People v Parker*, 107 AD3d 1017,

1019, *lv denied* 21 NY3d 1076).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

335

KA 15-01448

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMAL ASFOUR, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered July 2, 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 determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We reject defendant's contention that he should not have been assessed 30 points under risk factor 5, age of victim, because the People did not establish the victim's age as being less than 11 years of age by clear and convincing evidence. Defendant pleaded guilty to course of sexual conduct against a child in the first degree under Penal Law § 130.75 (1) (a), a necessary element of which is that the victim be a child less than 11 years old. Because "[f]acts previously . . . . elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated" for purposes of a SORA determination (Correction Law § 168-n [3]), Supreme Court properly assessed 30 points under risk factor 5 (*see People v Benitez*, 140 AD3d 1140, 1141, *lv denied* 28 NY3d 908; *see generally People v Law*, 94 AD3d 1561, 1562, *lv denied* 19 NY3d 809).

We agree with defendant, however, that the People failed to establish by the requisite clear and convincing evidence that he should be assessed 20 points under risk factor 13 based upon his conduct while under supervision. Although the People established at the SORA hearing that defendant committed the instant offense while under supervision for a prior conviction of criminal sexual act in the first degree, risk factor 13 is concerned with a sex offender's

post-offense behavior while supervised (*see People v Neuer*, 86 AD3d 926, 927, *lv denied* 17 NY3d 716; *see generally People v Warren*, 42 AD3d 593, 594-595, *lv denied* 9 NY3d 810). Because there is no indication that defendant engaged in any inappropriate behavior while supervised for the present offense, we conclude that the court erred in assessing the 20 points under risk factor 13 (*see Neuer*, 86 AD3d at 927). Nonetheless, defendant remains a level three risk, even subtracting those 20 points from the total of 145 points assessed by the court.

We reject defendant's further contention that the court abused its discretion in denying his request for a downward departure from the presumptive risk level. "A departure from the presumptive risk level is warranted if there is 'an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines' " (*People v Smith*, 122 AD3d 1325, 1325, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006] [guidelines]; *see People v Carlberg*, 145 AD3d 1646, 1646-1647). Contrary to defendant's contention, his young age at the time of his first sex offense is already taken into account by the guidelines, as an *aggravating* factor under factor 8 (*see People v Rodriguez*, 145 AD3d 489, 490, *lv denied* 28 NY3d 916). Additionally, defendant failed to submit any evidence that his alleged low IQ was a factor that reduced his risk of reoffending (*see generally People v Grady*, 81 AD3d 1464, 1465).

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

337

KA 15-01852

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD HOUGH, SR., DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 19, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]). Defendant's contention that County Court erred in accepting his "involuntary and illegal" plea is not preserved for our review inasmuch as defendant did not move to withdraw his plea of guilty or to vacate the judgment of conviction (*see People v Lugg*, 108 AD3d 1074, 1075; *People v Burney*, 93 AD3d 1334, 1334; *see generally People v Pastor*, 28 NY3d 1089, 1090-1091). Moreover, because nothing in the record of the proceedings before the court calls into question the voluntariness of defendant's plea or casts significant doubt upon his guilt, this case does not fall within the exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666; *People v Mobley*, 118 AD3d 1336, 1337, *lv denied* 24 NY3d 1121). There is no merit to defendant's contention that the sentence is illegal (*see* Penal Law § 70.06 [6] [b]). Finally, even assuming, arguendo, that defendant's waiver of the right to appeal was invalid and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Davis*, 114 AD3d 1166, 1167, *lv denied* 23 NY3d 1035; *People v Theall*, 109 AD3d 1107, 1108, *lv denied* 22 NY3d 1159), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

338

KA 14-00631

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NOEL R. RIVERA, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (David D. Egan, J.), rendered March 21, 2011. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree and burglary in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]) and two counts of burglary in the first degree (§ 140.30 [2], [3]). Defendant was sentenced to an indeterminate term of incarceration of 15 years to life for murder, to be served concurrently with determinate terms of 15 years imposed on the burglary counts. With respect to the burglary counts, defendant was also sentenced to five-year periods of postrelease supervision (PRS).

We agree with defendant that Supreme Court breached its obligation to advise him, at the time of the plea, that the sentences imposed upon his conviction of two counts of burglary would include periods of PRS (*see People v Catu*, 4 NY3d 242, 244-245). In these circumstances, however, we conclude that reversal of the judgment of conviction and vacatur of the plea are not required (*cf. id.* at 245; *People v Corsaro*, 128 AD3d 1538, 1538). Because “defendant is subject to ‘lifetime parole supervision, the imposition of postrelease supervision following his imprisonment for [burglary] is duplicative and does not deprive him of the benefit of his plea bargain’ ” (*People v Gillard*, 126 AD3d 1285, 1286, quoting *People v Haynes*, 14 AD3d 789, 791, *lv denied* 4 NY3d 831).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

341
CAF 16-00255
PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND NEMOYER, JJ.

IN THE MATTER OF CHLOE W.

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

AMY W., RESPONDENT-APPELLANT.

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

M. MARK HOWDEN, COUNTY ATTORNEY, LITTLE VALLEY (STEPHEN J. RILEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

SARA E. ROOK, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered January 29, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred guardianship and custody of the subject child to petitioner.

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

Memorandum: Respondent mother appeals from an order adjudicating her child to be permanently neglected and terminating her parental rights with respect to that child. In a prior appeal, we determined that Family Court erred in admitting in evidence at a fact-finding hearing on a neglect petition a 2012 evaluation of the mother by a forensic psychologist who did not testify at that hearing (*Matter of Chloe W. [Amy W.]*, 137 AD3d 1684, 1685). We concluded that the report did not qualify for admission under Family Court Act § 1046 (a) (iv) and that the error in admitting the document was not harmless owing to the fact that the court's determination of neglect "was based largely on findings contained within [that] report" (*Chloe W.*, 137 AD3d at 1685). On this appeal, the mother contends that the court erred in admitting the same report in evidence at a fact-finding hearing on a permanent neglect petition.

Although the mother relies heavily on our prior decision and Family Court Act § 1046 (a) (iv), neither our holding in *Chloe W.* nor section 1046 (a) (iv) is controlling in this matter. Although the admission of such reports in neglect proceedings is governed by the rules of evidence set forth in section 1046 (a) (iv), the admission of

such reports in termination proceedings under Social Services Law § 384-b is governed by CPLR 4518 (*see Matter of Noemi D.*, 43 AD3d 1303, 1304, *lv denied* 9 NY3d 814; *see generally Matter of Leon RR*, 48 NY2d 117, 122-123; *Matter of Shirley A.S. [David A.S.]*, 90 AD3d 1655, 1655, *lv denied* 18 NY3d 811).

On this appeal, the mother does not raise any contentions addressing the foundational requirements for admission of the report under CPLR 4518. Nevertheless, we conclude that, even if petitioner did not meet the foundational requirements for admission of the report, any error in its admission " 'is harmless because the result reached herein would have been the same even had [it] been excluded' " (*Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386, *lv denied* 25 NY3d 910). Unlike the prior appeal, the court in this matter did not base its determination on findings contained within the report (*cf. Chloe W.*, 137 AD3d at 1685). Thus, even without reference to the report, the evidence at the fact-finding hearing established that petitioner made the requisite diligent efforts (*see Matter of Mya B. [Williams B.]*, 84 AD3d 1727, 1727, *lv denied* 17 NY3d 707), and that the "mother did not comply with her service plan, inasmuch as she did not regularly attend visitation, find stable housing, or consistently engage in [her counseling sessions]" (*Matter of Zachary H. [Jessica H.]*, 129 AD3d 1501, 1501, *lv denied* 25 NY3d 915).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

342
CAF 15-01710
PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND NEMOYER, JJ.

IN THE MATTER OF WILLIAM LANTZ,
PETITIONER-RESPONDENT,

V ORDER

CYNTHIA PETERS, RESPONDENT-APPELLANT.

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

KELIANN M. ARGY, ORCHARD PARK, FOR PETITIONER-RESPONDENT.

EMILY A. VELLA, ATTORNEY FOR THE CHILD, SPRINGVILLE.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered September 18, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, directed that petitioner shall have primary physical placement of the subject child.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

343

CA 16-01641

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

RYAN M. FORRESTEL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARGUERITA M.C. JONKMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MARGUERITA M.C. JONKMAN, DEFENDANT-APPELLANT PRO SE.

JOHN P. PIERI, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered December 15, 2015. The order, insofar as appealed from, denied the petition of defendant for sole custody and to limit the visitation of plaintiff.

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

Memorandum: In this postdivorce proceeding, defendant former wife appeals from three orders. By the order in appeal No. 1, Supreme Court denied defendant's petition seeking to modify an existing order of joint custody and visitation that we previously affirmed (*Forrestel v Forrestel*, 125 AD3d 1299, *lv denied* 25 NY3d 904). By the order in appeal No. 2, the court reserved decision on plaintiff former husband's motion seeking payments allegedly owed to him by defendant under the property settlement agreement incorporated in the parties' judgment of divorce, and denied defendant's cross motion seeking, inter alia, similar relief under that agreement. By the order in appeal No. 3, the court denied defendant's motion seeking its recusal.

We conclude in appeal No. 1 that the court properly denied defendant's petition because she failed to "make a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody order should be modified" (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418 [internal quotation marks omitted]; *see Matter of Strachan v Gilliam* [appeal No. 1], 129 AD3d 1679, 1679, *lv dismissed* 26 NY3d 994; *Matter of Sierak v Staring*, 124 AD3d 1397, 1398; *Matter of Chrysler v Fabian*, 66 AD3d 1446, 1447, *lv denied* 13 NY3d 715).

"An order reserving decision is not appealable" (*Matter of Trader v State of New York*, 277 AD2d 978, 978; *see Schlau v City of Buffalo*, 125 AD3d 1546, 1548), and we therefore dismiss appeal No. 2 to the

extent that it concerns that part of the order reserving decision on plaintiff's motion. To the extent that defendant challenges the denial of her cross motion, we affirm the order. The parties' property settlement agreement is not in the record on appeal, and we are thus "unable to review the propriety of" the court's denial of defendant's claim for payments allegedly owed to her by plaintiff under that agreement (*Matter of Wood v Marshall*, 296 AD2d 859, 860, *lv dismissed in part and denied in part* 98 NY2d 755).

Finally, we conclude in appeal No. 3 that the court properly denied defendant's recusal motion. In denying the petition in appeal No. 1, which alleged, inter alia, that plaintiff had unreasonably interfered with defendant's telephone access to the children while they were on vacation with him in Ireland, the court made several references to its own experience of difficulty with communications technology in Ireland. Nonetheless, the record as a whole establishes that the court denied the petition on the ground that it was facially insufficient, rather than by using its personal experience to resolve "disputed evidentiary facts" in plaintiff's favor (22 NYCRR 100.3 [E] [1] [a] [ii]). We therefore conclude that the determination in appeal No. 1 was not affected by the comments at issue (*see Matter of Davis v Davis*, 197 AD2d 622, 623; *see generally Matter of Kasprowicz v Osgood*, 101 AD3d 1760, 1762, *lv denied* 20 NY3d 863), and that the court "was within its discretion in refusing to recuse itself" (*Hass & Gottlieb v Sook Hi Lee*, 55 AD3d 433, 434; *see Matter of Daniel B.*, 134 AD3d 1103, 1104; *Matter of Ryan v Ryan*, 110 AD3d 1176, 1181; *see generally Matter of Roseman v Sierant*, 142 AD3d 1323, 1325).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

344
CA 16-01646
PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND NEMOYER, JJ.

RYAN M. FORRESTEL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARGUERITA M.C. JONKMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MARGUERITA M.C. JONKMAN, DEFENDANT-APPELLANT PRO SE.

JOHN P. PIERI, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered December 15, 2015. The order denied the cross motion of defendant seeking, inter alia, an order directing plaintiff to pay defendant $1,231.52 pursuant to the property settlement agreement, and reserved decision of plaintiff's motion seeking, inter alia, an order directing defendant to pay to plaintiff certain amounts under the property settlement agreement.

It is hereby ORDERED that said appeal from the order insofar as it reserved decision on plaintiff's motion is unanimously dismissed, and the order is affirmed without costs.

Same memorandum as in *Forrestel v Jonkman* ([appeal No. 1] ___ AD3d ___ [Mar. 24, 2017]).

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

345
CA 16-01647
PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND NEMOYER, JJ.

RYAN M. FORRESTEL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARGUERITA M.C. JONKMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

MARGUERITA M.C. JONKMAN, DEFENDANT-APPELLANT PRO SE.

JOHN P. PIERI, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered December 21, 2015. The order denied the recusal motion of defendant.

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

Same memorandum as in *Forrestel v Jonkman* ([appeal No. 1] ___ AD3d ___ [Mar. 24, 2017]).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

356
KA 15-00319
PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

FRANKLIN G. WARNER, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANKLIN G. WARNER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered September 15, 2014. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the second degree and promoting an obscene sexual performance by a child.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

357

KA 15-02144

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN S. SMITH, DEFENDANT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, JR., SPECIAL PROSECUTOR, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Niagara County Court (Sara S. Farkas, J.), dated November 30, 2015. 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: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). The evidence presented at the SORA hearing established that the underlying crimes included a home invasion-style armed robbery in which defendant and several men entered the home of an adult female and her two male children, ages 9 and 14. Defendant and the men entered the children's bedroom, pointed a gun at them and ordered them to stay put, and then proceeded to ransack the house while asking the female for information on the whereabouts of another individual. After the female told them where the other individual could be found, defendant and the men brought the children to the basement, bound their hands, arms and eyes with duct tape, and left the children there alone while they drove with the female to another residence, found and shot the other individual, and then absconded with a safe. County Court granted defendant's request for a downward departure to a level two risk from the presumptive level three risk recommended by the Board of Examiners of Sex Offenders (Board), but the court declined to grant a further departure to a level one risk. We affirm.

Contrary to defendant's contention, the undisputed absence of a sexual component to his crime was already taken into account in defendant's risk assessment instrument in which the Board assessed zero points under risk factor 2, based on his lack of sexual contact with the victims (*see People v Howard*, 27 NY3d 337, 342). Even assuming, arguendo, that defendant proved the existence of other

mitigating factors, we conclude that the court did not abuse its discretion in determining that a further departure was not warranted under the totality of the circumstances, particularly considering the egregious nature of the underlying offense (*see e.g. id.* at 339, 342-343). Upon our review of the record, we conclude that " '[t]he departure to level two sufficiently addressed the mitigating factors cited by defendant' " (*People v Schwartz*, 145 AD3d 1548, 1549).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

360

KA 15-00958

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE F. LEESON, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), entered May 19, 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: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court properly assessed 20 points for risk factor 4, continuing course of sexual misconduct, and 15 points for risk factor 11, history of drug or alcohol abuse. In addition to the case summary, the People submitted as evidence the preplea investigation report, the victim impact statement and the presentence report. With respect to the court's determination to assess 20 points for risk factor 4, continuing course of sexual misconduct, the case summary states, inter alia, that "between August 2003 and October, 2003" defendant engaged in oral sexual conduct with the victim more than once, touched her vaginal area with his hand, placed his penis near her vaginal area and requested that the victim pose in a partially nude state. Those acts formed the basis of defendant's conviction of endangering the welfare of a child, and we reject defendant's contention that the People failed to prove risk factor 4 by clear and convincing evidence (*see People v Scott*, 71 AD3d 1417, 1417-1418, *lv denied* 14 NY3d 714; *People v Lewis*, 50 AD3d 1567, 1568-1569, *lv denied* 11 NY3d 702).

With respect to risk factor 11, the preplea investigation report contains defendant's admission that he has " 'an alcohol problem' " and the case summary states that defendant "has a documented history of alcohol abuse," that the New York State Department of Corrections

and Community Supervision (DOCCS) testing placed him in the " 'alcoholic range' " and that he successfully completed the DOCCS Substance Abuse Treatment Program (*see People v Glanowski*, 140 AD3d 1625, 1626, *lv denied* 28 NY3d 902). In addition, it is undisputed that defendant had driving while intoxicated convictions in 1987, 1989 and 1995, and we reject defendant's contention that the court erred in considering those convictions because they are too remote (*see People v Fredendall*, 83 AD3d 1545, 1546).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

361
CAF 14-02200
PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF MICHELE A. SLOMA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ERIC M. SLOMA, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

RICHARD L. WOLFE, UTICA, FOR RESPONDENT-APPELLANT.

JULIE GIRUZZI-MOSCA, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered February 6, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner primary physical custody of the parties' child.

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

Memorandum: In appeal No. 1, respondent father appeals from an order that, inter alia, modified a prior order by granting petitioner mother primary physical custody of the parties' child. In appeal No. 2, the father appeals from an order that dismissed his order to show cause pursuant to CPLR 4404 (b), thus in effect denying the father's motion to vacate the order that is the subject of appeal No. 1.

Contrary to the father's contention in appeal No. 1, Family Court properly determined that the mother established that there was a sufficient change in circumstances since the time of the prior order that warranted modification of that order (*see generally Matter of Guillermo v Agramonte*, 137 AD3d 1767, 1768; *Matter of McClinton v Kirkman*, 132 AD3d 1245, 1245-1246). Pursuant to their opting out agreement that was incorporated but not merged in the judgment of divorce, the parties agreed to joint custody with the mother having primary physical custody, and the parties would enroll the child "in the Whitesboro School District at Deerfield Elementary if possible." When the mother relocated and moved the child into a school in a different school district a year later, the father was granted primary physical custody after a trial based primarily on the change in the child's school. After obtaining custody, the father re-enrolled the child at Deerfield, but six months later he enrolled the child in a different school, albeit in the same school district. We conclude that the change in school, together with testimony from the mother

concerning the father's interference with her custodial rights, was sufficient to establish a change in circumstances (*see generally Matter of Mehta v Franklin*, 128 AD3d 1419, 1420).

Contrary to the father's further contention, the court's determination awarding the mother primary physical custody is in the child's best interests (*see id.*). "In making a determination regarding custody, 'numerous factors are to be considered, including the continuity and stability of the existing custodial arrangement, the quality of the child's home environment and that of the parent seeking custody, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, and the individual needs and expressed desires of the child' " (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450; *see Fox v Fox*, 177 AD2d 209, 210). Here, most of the factors did not favor one party over the other. We agree with the court, however, that the evidence established that the father failed to nurture or facilitate a relationship between the mother and the child. In addition, the father made decisions regarding the child that were beneficial to his new family, such as changing her school, pediatrician, and dentist, but the decisions were not always beneficial to the child. We conclude that granting the mother primary physical custody was in the best interests of the child inasmuch as the mother was better able to provide for the child's emotional and intellectual development (*see generally Bryan K.B.*, 43 AD3d at 1450-1451).

Also contrary to the father's contention, the court properly exercised its discretion in declining to conduct a *Lincoln* hearing (*see Matter of Charles M.O. v Heather S.O.*, 52 AD3d 1279, 1280; *see generally Matter of Yeager v Yeager*, 110 AD3d 1207, 1209). The conduct of the father's wife prevented the scheduled *Lincoln* hearing from occurring, and the court declined to schedule another one. In any event, considering the child's young age as well as the testimony that she was being coached on what to say to the court, an in camera hearing with the child would not be helpful in determining the child's preferences (*see Matter of Thillman v Mayer*, 85 AD3d 1624, 1625; *see generally Matter of Walters v Francisco*, 63 AD3d 1610, 1611).

With respect to appeal No. 2, we conclude that the court did not abuse its discretion in denying the motion, and we therefore affirm the order (*see Matter of Walker v Carroll*, 140 AD3d 1669, 1669).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

362
CAF 15-00350
PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF MICHELE A. SLOMA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ERIC M. SLOMA, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

RICHARD L. WOLFE, UTICA, FOR RESPONDENT-APPELLANT.

JULIE GIRUZZI-MOSCA, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered March 14, 2014 in a proceeding pursuant to Family Court Act article 6. The order denied the motion of respondent to vacate an order entered February 6, 2014.

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

Same memorandum as in *Matter of Sloma v Sloma* ([appeal No. 1] ___ AD3d ___ [Mar. 24, 2017]).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

366
CAF 16-00454
PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF JASON L. ROHR,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BARBARA L. YOUNG, RESPONDENT-APPELLANT,
AND AIMEE ROHR, RESPONDENT-RESPONDENT.

PALOMA A. CAPANNA, WEBSTER, FOR RESPONDENT-APPELLANT.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (MATTHEW J. PORTER OF COUNSEL), FOR PETITIONER-RESPONDENT.

LISA WELDON, ATTORNEY FOR THE CHILDREN, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered March 18, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, directed that respondent Barbara L. Young shall have supervised visitation with the subject children one Saturday per month for two hours.

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

Memorandum: Respondent-appellant grandmother appeals from an order that, inter alia, modified a prior order entered on consent by changing the grandmother's one-hour biweekly supervised therapeutic visitation with the two teenaged children to one supervised two-hour visit per month in a public place. Family Court denied petitioner father's petition insofar as it requested that the visitation be terminated. We reject the grandmother's contention that the father failed to establish that there was a sufficient change in circumstances to warrant consideration of the best interests of the children. The 15-year-old child testified that she did not wish to visit with her grandmother and, although " 'not dispositive, the express wishes of older and more mature children can support the finding of a change in circumstances' " (*Matter of Rulinsky v West*, 107 AD3d 1507, 1508). Furthermore, the Court Attorney Referee was entitled to credit the testimony of the father and the child that the children had difficulty completing homework on the days that both extracurricular activities and the therapeutic visits were scheduled (*see generally Matter of Jones v Laird*, 119 AD3d 1434, 1434-1435, *lv denied* 24 NY3d 908). Contrary to the grandmother's contention, the

determination of the court that it was in the best interests of the children to modify the visitation schedule has a sound and substantial basis in the record (*see Matter of Stilson v Stilson*, 93 AD3d 1222, 1223), and we note in any event that the "modified schedule has no meaningful adverse impact on the [grandmother's] interests" (*Gardner v Korthals*, 130 AD3d 1468, 1469).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

367
CAF 14-01629
PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF HAROLD C., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;   ORDER

ARIELLE B., RESPONDENT-APPELLANT.

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

NICHOLAS G. LOCICERO, BUFFALO, FOR PETITIONER-RESPONDENT.

AUDREY ROSE HERMAN, ATTORNEY FOR THE CHILD, KENMORE.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered August 22, 2014 in a proceeding pursuant to Family Court Act article 10. The order directed that respondent receive mental health treatment at Mid-Erie Treatment Services.

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

Entered: March 24, 2017   Frances E. Cafarell
Clerk of the Court

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

369
CA 16-01489
PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

JOHN PESTILLO, CLAIMANT-RESPONDENT,

V ORDER

COUNTY OF MONROE, RESPONDENT-APPELLANT,
ET AL., RESPONDENT.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MATTHEW D. BROWN OF COUNSEL), FOR RESPONDENT-APPELLANT.

WILLIAM MATTAR, P.C., WILLIAMSVILLE (JOHN ABEEL OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered December 8, 2015. The order, insofar as appealed from, granted the application of claimant for leave to serve a late notice of claim on respondent County of Monroe.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 13, 2017,

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

372

CA 15-01539

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF TYRONE DAVIS, CONSECUTIVE NO. 177513, 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.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered July 1, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, continued petitioner's commitment to a secure treatment facility.

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

Entered: March 24, 2017   Frances E. Cafarell
                                           Clerk of the Court

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

375
CA 16-01384
PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

LINDSAY A. HELENBROOK, PLAINTIFF-APPELLANT,

V ORDER

DENNIS J. HELENBROOK, DEFENDANT-RESPONDENT.

LINDSAY A. HELENBROOK, PLAINTIFF-APPELLANT PRO SE.

DENNIS J. HELENBROOK, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered December 17, 2015. The order denied the motion of plaintiff for summary judgment and dismissed the summons with notice.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

376
CA 16-01396
PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

DONALD GOOLEY, PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

BOARD OF EDUCATION AND TOWN OF WEBB UNION
FREE SCHOOL DISTRICT, DEFENDANTS-APPELLANTS.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (CHRISTOPHER M. MILITELLO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Norman I. Siegel, J.), entered April 29, 2016. The order denied defendants' motion for summary judgment.

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

Memorandum: Plaintiff, the former Superintendent of Schools of defendant Town of Webb Union Free School District (District), commenced this breach of contract action seeking damages for the alleged breach of an agreement whereby defendants agreed to pay him $22,000 "as compensation for making himself available 'to assist the new Superintendent in the development of the 2012-2013 school budget and such other duties as may be reasonably required to assist in the training and transition of the new Superintendent.' " It is undisputed that, prior to his retirement on January 31, 2012, plaintiff destroyed a large number of documents that were kept in the Superintendent's office. Defendant Board of Education (Board) advised plaintiff by letter that it determined that the removal of the documents constituted a breach of the agreement and canceled the District's obligation under the agreement to issue payments to plaintiff. Defendants moved for summary judgment dismissing the amended complaint and for judgment on their counterclaim, for conversion. We conclude that defendants failed to meet their initial burden (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), and thus Supreme Court properly denied the motion.

Defendants supported their motion with, inter alia, plaintiff's deposition testimony that he was at all times "ready, willing and able" to assist the District and the new Superintendent but was never called upon to do so. Plaintiff testified that "at least 50%" of the

documents destroyed were personal documents accumulated over his 52-year career and, otherwise, they were documents that he considered to be his copies of documents that existed in other parts of the District, either as hard copies or in electronic format. Defendants also submitted the deposition testimony of the newly-hired superintendent (new superintendent), who testified that he called plaintiff with respect to the discarded documents and that police officials and Board members were present during the call. The new superintendent interpreted plaintiff's responses to his inquiries regarding the discarded documents as a "threat," and he did not again contact plaintiff. Defendants also submitted the deposition testimony of a District employee who testified that he observed a personnel file in the documents removed from plaintiff's office.

Viewing defendants' submissions in the light most favorable to plaintiff, as we must, we conclude that defendants failed " 'to demonstrate the absence of any material issues of fact' " whether plaintiff's actions constituted a repudiation of the contract (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324), i.e., whether plaintiff's actions "constitute[d] an unequivocal and overt communication of intention not to perform agreed-upon obligations" (*Coniber v Center Point Transfer Sta., Inc.*, 137 AD3d 1604, 1605 [internal quotation marks omitted]). We likewise conclude that defendants failed to establish their entitlement to judgment on their counterclaim, alleging conversion (*see generally Vega*, 18 NY3d at 503). Defendants contend for the first time on appeal that plaintiff forfeited his claim under the agreement because he owed a duty of fidelity to defendants and was "faithless in the performance of his services" (*Feiger v Iral Jewelry*, 41 NY2d 928, 928), and thus that contention is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

377
TP 16-01408
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

IN THE MATTER OF GERMONE THREAT, 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 August 16, 2016) 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 petition is dismissed.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

378

TP 16-00337

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

IN THE MATTER OF RAMONN DRISCOLL, PETITIONER,

V ORDER

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

RAMONN DRISCOLL, PETITIONER PRO SE.

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, Oneida County [Bernadette T. Clark, J.], entered February 11, 2016) 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 petition is dismissed.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

381
KA 15-01254
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RODNEY HAWKINS, DEFENDANT-APPELLANT.

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

PATRICK E. SWANSON, ACTING DISTRICT ATTORNEY, MAYVILLE (ANDREW M. MOLITOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered January 26, 2015. 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.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

382
KA 15-01729
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PRESTON S. DAIGLER, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 14, 2015. 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 [2] [a]). At the time of the plea, defendant waived his right to appeal, and County Court indicated that it would consider whether to grant him youthful offender status after reviewing a presentence investigation. Prior to sentencing, defense counsel submitted a letter asking the court to adjudicate defendant a youthful offender. The court reviewed the presentence investigation report and adjourned sentencing to review other materials, including recordings of telephone calls that defendant made from the jail prior to pleading guilty, in which he discussed his intent not to abide by the conditions of probation or otherwise alter his ways in the future. The court thereafter declined to grant defendant youthful offender status.

Contrary to defendant's initial contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Bailey*, 137 AD3d 1620, 1621, *lv denied* 27 NY3d 1128). Furthermore, because the court discussed the possibility of adjudicating defendant a youthful offender when he waived the right to appeal, defendant's valid waiver encompasses his challenge to the court's denial of his request at the time of sentencing for such an adjudication (*cf. People v Weathington* [appeal No. 2], 141 AD3d 1173, 1174, *lv denied* 28 NY3d 975; *People v*

Gibson, 134 AD3d 1517, 1518, *lv denied* 27 NY3d 1069). We do not address defendant's contention that his waiver of the right to appeal is overbroad because that contention "is raised for the first time in defendant's reply brief and thus is not properly before us" (*People v Jones*, 300 AD2d 1119, 1120, *lv denied* 2 NY3d 801; *see People v Harris*, 129 AD3d 1522, 1525, *lv denied* 27 NY3d 998). We have considered defendant's remaining challenges to his waiver of the right to appeal and conclude that they are without merit. Consequently, defendant's "valid waiver of the right to appeal . . . forecloses appellate review of [the] sentencing court's discretionary decision to deny youthful offender status" to defendant inasmuch as the sentencing court considered such status (*People v Pacherille*, 25 NY3d 1021, 1024).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

391

CA 16-01605

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

TIMOTHY KOPASZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, LPCIMINELLI, INC.,
DEFENDANTS-APPELLANTS,
AND LPCIMINELLI CONSTRUCTION CORP.,
DEFENDANT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND DEFENDANT-RESPONDENT.

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

Appeal from an amended order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered August 29, 2016. The amended order, inter alia, granted that part of the motion of plaintiff for partial summary judgment with respect to the Labor Law § 240 (1) claim.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by denying that part of the motion seeking partial summary judgment on the Labor Law § 240 (1) claim and as modified the amended order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when, while stepping from a ladder onto a Baker scaffold, he struck his head on an overhead beam, thereby causing him to fall backwards to the floor. We agree with defendants that Supreme Court erred in granting that part of plaintiff's motion seeking partial summary judgment on his claim pursuant to Labor Law § 240 (1), and we therefore modify the amended order accordingly. We conclude that plaintiff failed to establish his entitlement to judgment as a matter of law under that statute. Specifically, we conclude that there is an issue of fact whether the scaffold failed to provide proper protection because it was not properly placed, thereby precipitating plaintiff's fall, or " 'whether plaintiff simply lost his balance and fell' " when his head struck the beam (*Davis v Brunswick*, 52 AD3d 1231, 1232; *see generally Holly v County of Chautauqua*, 13 NY3d 931, 932). Plaintiff likewise failed to establish as a matter of law that the lack of safety railings on the scaffold, as required by 12 NYCRR 23-5.18 (b) (*see Celaj v Cornell*, 144 AD3d 590, 591), is a sufficient basis for a determination of liability

under section 240 (1) that the scaffold failed to provide plaintiff proper protection. Rather, we conclude that there is an issue of fact whether the presence of rails would have prevented his fall (*cf. Vail v 1333 Broadway Assn. L.L.C.*, 105 AD3d 636, 636-637). Furthermore, plaintiff failed to establish as a matter of law that the alleged injuries to his neck and ears were caused by the accident, as required for a determination of liability under section 240 (1) (*see Gould v E.E. Austin & Son, Inc.*, 114 AD3d 1208, 1208).

We nevertheless conclude that the court properly denied defendants' cross motion seeking summary judgment dismissing the complaint on the ground that plaintiff's actions in using the scaffold at issue, rather than arranging for a different scaffold to be delivered to the job site, was the sole proximate cause of the accident. Defendants failed to eliminate any issue of fact that "plaintiff 'chose for no good reason' " to use the scaffold at issue when he knew that one of the wheels did not lock, rather than arrange for a different scaffold to be delivered (*Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1404). Indeed, contrary to the contention of defendants, their own expert opined that the failure of one of the four wheels to lock would not render the scaffold unstable. We have reviewed defendants' remaining contentions and conclude that they are without merit.

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

398
CA 16-00840
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

JOSEPH M. BRAINARD, INDIVIDUALLY AND ON BEHALF
OF BRAICO ENTERPRISES, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CINDY BARDEN, JOHN BARDEN, DOUBLE DOWN TRANSPORT
NY, INC., DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

ANTHONY J. CERVI, BUFFALO, FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, BUFFALO (WILLIAM F. SAVINO OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 7, 2016. The order and judgment, inter alia, granted the motion of defendants John Barden, Cindy Barden and Double Down Transport NY, Inc., for partial summary judgment on the third counterclaim in their amended answer.

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

Memorandum: Plaintiff, Joseph M. Brainard (Brainard), individually and on behalf of Braico Enterprises, LLC (Braico), commenced this action seeking damages arising from an asset purchase transaction. Brainard and/or Braico entered into an asset purchase agreement with defendant Cindy Barden, the sole shareholder of defendant Double Down Transport NY, Inc. (DDTNY), to purchase the assets of DDTNY. Supreme Court granted the second motion of John Barden, Cindy Barden and DDTNY (defendants) seeking partial summary judgment on the third counterclaim contained in their amended answer. We affirm.

The third counterclaim asserted a claim for conversion and sought payment of $56,292.82 based upon plaintiff’s alleged failure to reimburse DDTNY for Braico’s use of DDTNY’s fuel debit cards, in accordance with an oral agreement between Brainard and John Barden. In his reply to the counterclaims, plaintiff admitted the allegations contained in the third counterclaim for conversion.

Contrary to plaintiff’s contention, the court properly exercised its discretion to entertain defendants’ second motion for partial

summary judgment, where, as here, "it is substantively valid and [when] the granting of the motion will further the ends of justice while eliminating an unnecessary burden on the resources of the courts" (*Town of Angelica v Smith*, 89 AD3d 1547, 1549 [internal quotation marks omitted]). The admissions in plaintiff's reply to the allegations in the third counterclaim "constitute formal judicial admissions" and are conclusive with respect to the facts admitted (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 412). Thus, contrary to plaintiff's further contention, we conclude that defendants established their entitlement to judgment on their third counterclaim, and that plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

399
KA 15-02151

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

ERIC G. NILSEN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), entered November 24, 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 determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level (*see People v St. Jean*, 101 AD3d 1684, 1685; *People v Ratcliff*, 53 AD3d 1110, 1110, *lv denied* 11 NY3d 708). In any event, that contention lacks merit. " 'A defendant seeking a downward departure has the initial burden of . . . identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the risk assessment guidelines' " (*People v Collette*, 142 AD3d 1300, 1301, *lv denied* 28 NY3d 912). 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 a mitigating factor by the requisite preponderance of the evidence (*see People v Reber*, 145 AD3d 1627, 1628; *see generally People v Gillotti*, 23 NY3d 841, 861).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

400
KA 14-00856
PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ERICK GODLEY, 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 Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 21, 2014. 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.

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

406

KA 14-01535

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFERY MILLER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered November 29, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, assault in the second degree, 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 modified on the law by directing that all of the sentences imposed shall run concurrently and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and assault in the second degree (§ 120.05 [6]). Supreme Court directed that the sentences for murder in the second degree and assault in the second degree were to run consecutively to each other, and concurrently to the sentences for the other crimes of which defendant was convicted.

Defendant contends that the court erred in refusing to instruct the jury on the affirmative defense of extreme emotional disturbance (EED defense) (*see* Penal Law § 125.25 [1] [a]). We reject that contention. The EED defense "requires proof of a subjective element, that defendant acted under an extreme emotional disturbance, and an objective element, that there was a reasonable explanation or excuse for the emotional disturbance" (*People v Smith*, 1 NY3d 610, 612; *see People v Gonzalez*, 22 NY3d 539, 545; *People v Moye*, 66 NY2d 887, 890). Even assuming, arguendo, that defendant established the subjective element, we conclude that defendant failed to establish that there was a reasonable explanation or excuse for the emotional disturbance. The only explanation offered by defendant was that the victim, with whom

defendant had once been romantically involved, did not wish to reconcile or have any contact with defendant and had begun dating another individual. In our view, defendant's explanation was "patently insufficient" (*People v McKenzie*, 19 NY3d 463, 468-469), inasmuch as "anger and jealousy do not entitle a defendant to an extreme emotional disturbance charge" (*People v Ross*, 34 AD3d 1124, 1126, *lv denied* 8 NY3d 884). We thus conclude that the EED defense was properly excluded from consideration by the jury.

As the People correctly concede, the court erred in directing that the sentence for the count of assault in the second degree run consecutively to the sentence imposed on the count of murder in the second degree because the murder was the predicate felony for the felony assault (*see* Penal Law § 70.25 [2]; *People v Williams*, 275 AD2d 967, 967). We therefore modify the judgment by directing that all sentences shall run concurrently.

Entered: March 24, 2017 Frances E. Cafarell
Clerk of the Court

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

409
CAF 15-01927
PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF BRADY J.C. AND KENNEDY L.C.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT; — ORDER

DAMARIS F.R., RESPONDENT-APPELLANT.

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

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered November 4, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject children to petitioner.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

414
CA 16-01522
PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

SUE STOYELL, AS TRUSTEE OF STOYELL LIVING TRUST,
PETITIONER-RESPONDENT,

V ORDER

LISA F. BRESEE, RESPONDENT-APPELLANT.

LEGAL SERVICES OF CENTRAL NEW YORK, INC., SYRACUSE (TRISTA F. O'HARA OF COUNSEL), FOR RESPONDENT-APPELLANT.

BOYLE & ANDERSON, P.C., AUBURN (MICHAEL D. QUILL, JR., OF COUNSEL), AUBURN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered April 29, 2016. The order affirmed a judgment of the Town of Sempronius Justice Court entered on July 8, 2015.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

424
KAH 15-01739
PRESENT: WHALEN, P.J., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
VALARAE GREEN, PETITIONER-APPELLANT,

V   ORDER

THOMAS J. STICHT, SUPERINTENDENT, GOWANDA
CORRECTIONAL FACILITY, ET AL.,
RESPONDENTS-RESPONDENTS.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BENJAMIN L. NELSON OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (HEATHER MCKAY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Christopher J. Burns, J.), entered July 8, 2015. The judgment, among other things, dismissed the petitions.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court (*see also People ex rel. Green v Annucci*, 133 AD3d 1367, 1368).

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

427
CAF 16-00061
PRESENT: WHALEN, P.J., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF MARION F. NOREAULT AND
PAUL P. NOREAULT, SR., PETITIONERS-RESPONDENTS,

V ORDER

MARJORIE A. OLMSTEAD-GROGG, RESPONDENT-APPELLANT,
AND SCOTT A. HALSEY, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

PAUL L. CHAPMAN, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (William W. Rose, R.), entered December 14, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, directed that the parties shall have joint legal custody of the subject child, with residential custody with petitioners.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

431
CA 16-01606
PRESENT: WHALEN, P.J., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

MICHAEL AMALFI, SR., PLAINTIFF-APPELLANT,

V ORDER

KIMBERLY RAY, BARRY BECK, WAIO-FM/RADIO 95.1
AND IHEARTMEDIA, INC., DEFENDANTS-RESPONDENTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GREENBERG TRAURIG, LLP, ALBANY (MICHAEL J. GRYGIEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered January 29, 2016. The order granted the motion of defendants to dismiss the complaint.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

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

432
CA 16-01070
PRESENT: WHALEN, P.J., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

DARELYN CLAUSE, AS ADMINISTRATRIX OF THE
ESTATE OF KYLE C. ATKINS, DECEASED,
PLAINTIFF-APPELLANT,

V ORDER

ERIE COUNTY MEDICAL CENTER, ET AL., DEFENDANTS,
WILLIAM J. FLYNN, JR., M.D. AND JAMES K.
FARRY, M.D., DEFENDANTS-RESPONDENTS.

JARROD W. SMITH, P.L.L.C., JORDAN (JARROD W. SMITH OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 23, 2016. The order granted defendants-respondents’ motion to dismiss the complaint and all cross claims against them.

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

Entered: March 24, 2017

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1671/99) KA 99-00484. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN MOORE, ALSO KNOWN AS FRANKIE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (899/02) KA 01-01182. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TAJUAN PAUL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal, specifically, whether the *Antommarchi* waiver proffered by the attorney for defendant was valid. Upon our review of the motion papers, we conclude that the issue may have merit. The order of October 1, 2002 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046). Defendant is directed to file and serve his records and briefs with this Court on or before July 24, 2017. PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND SCUDDER, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (905/02) KA 01-01982. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHONDELL J. PAUL, DEFENDANT-APPELLANT. -- Motion for reargument granted and upon reargument, the order of this Court entered December 23, 2016 is vacated, and the motion of defendant for a writ of error coram nobis is granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal, specifically, whether the *Antommarchi*

waiver proffered by the attorney for defendant was valid. Upon our review of the motion papers, we conclude that the issue may have merit. The order of October 1, 2002 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046). Defendant is directed to file and serve his records and briefs with this Court on or before July 24, 2017. PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND SCUDDER, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (1060/04) KA 01-02425. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WALTER BALL, DEFENDANT-APPELLANT. -- Motion to recall and vacate an order of this Court denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (899/10) KA 09-00902. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V THOMAS B. SIMCOE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (59/11) KA 07-00754. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V CAL WILLIAMS, DEFENDANT-APPELLANT. -- Motion for reargument and other relief denied. PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (1312/14) KA 10-02076. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HARASHA L. PURYEAR, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND SCUDDER, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (967/15) KA 12-01595. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAKIM GRIMES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (420/16) KA 13-02099. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V THEODORE TYLER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (784/16) CA 15-02182. -- WILLIAM SCRUTON, PLAINTIFF-RESPONDENT, V ACRO-FAB, LTD., DEFENDANT-APPELLANT, ET AL., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (1060/16) CA 16-00502. -- ONE FLINT ST. LLC AND DHD VENTURES NEW YORK, LLC, PLAINTIFFS-RESPONDENTS-APPELLANTS, V EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, DEFENDANTS-APPELLANTS-RESPONDENTS, ET AL., DEFENDANTS. -- Motions for leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (1078/16) CA 16-00075. -- RAYMOND T. WEBBER AND DUANE WEBBER, PLAINTIFFS-APPELLANTS, V LEE WEBBER AND GERALD T. FILIPIAK, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (1119/16) KA 14-00873. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ELHAJJI ELSHABAZZ, DEFENDANT-APPELLANT. -- Motion for rehearing of the appeal and other relief denied. PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (1152/16) CA 16-00458. -- NICHOLAS KILMER, PLAINTIFF-APPELLANT, V DAVID MASTROPIETRO, INDIVIDUALLY AND/OR DOING BUSINESS AS FINGER LAKES TRANSPORT, AND DAVID BAKER, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ. (Filed Mar. 24,

2017.)

MOTION NO. (1206/16) KA 14-00754. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HORACE BETTS, III, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (1219/16) CA 15-01355. -- IN THE MATTER OF STATE OF NEW YORK, PETITIONER-RESPONDENT, V JOSEPH SCHOLTISEK, RESPONDENT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (1254/16) KA 14-00505. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BENNIE SMITH, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (1282/16) CA 16-00413. -- COUNTY OF ERIE, PLAINTIFF-APPELLANT, V FRANCIS B. VOLANTE, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (1286/16) CA 16-00664. -- NAKITA HARRIS, INDIVIDUALLY, AND AS PARENT AND NATURAL GUARDIAN OF MYRA HARRIS, PLAINTIFF-APPELLANT, V CITY OF

BUFFALO, BUFFALO BOARD OF EDUCATION, BUFFALO PUBLIC SCHOOL #53, THE AFTER SCHOOL PROGRAM AND THE DIRECTOR OF THE AFTER SCHOOL PROGRAM (JOINTLY AND SEVERALLY), DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (1306/16) CA 16-00038. -- IN THE MATTER OF THE ESTATE OF SHIRLEY A. KEHOE, DECEASED. JEFFREY KEHOE, PETITIONER-RESPONDENT; ROBERT L. EDICK, JR., BRITTNEY L. EDICK AND AMBER M. EDICK, OBJECTANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (94/17) KA 15-00332. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PEDRO ROMERO, DEFENDANT-APPELLANT. -- Motion for reargument is granted and, upon reargument, the memorandum and order entered February 10, 2017 (___ AD3d ___) is amended by adding the words "testimony regarding" between the words "evidence of" and "a purported threatening letter" in the first sentence of the third paragraph of the memorandum; and by deleting the words "the letter" from the second sentence of the third paragraph of the memorandum and substituting the words "that testimony." PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Mar. 24, 2017.)

MOTION NO. (110/17) KAH 16-00389. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. ANTONIO COLE, PETITIONER-APPELLANT, V HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND SCUDDER, JJ. (Filed Mar. 24, 2017.)

KA 14-01325. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDWIN C. LOPEZ, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38). (Appeal from a Judgment of Ontario County Court, Frederick G. Reed, J. - Criminal Sale of a Controlled Substance, 3rd Degree). PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND NEMOYER, JJ. (Filed Mar. 24, 2017.)