SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 5, 2018

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. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

877

KA 16-00063

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STORM U. LANG, ALSO KNOWN AS STORM U. J. LANG, ALSO KNOWN AS STORM LANG, 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 December 8, 2015. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree (two counts) and sexual abuse 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 two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]) and one count of sexual abuse in the second degree (§ 130.60 [2]). Contrary to defendant's contention, his waiver of the right to appeal is valid (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Defendant waived that right "both orally and in writing before pleading guilty, and [County Court] conducted an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v McGrew*, 118 AD3d 1490, 1490-1491 [4th Dept 2014], *lv denied* 23 NY3d 1065 [2014] [internal quotation marks omitted]). While we agree with defendant that the colloquy and written waiver contain improperly overbroad language concerning the rights waived by defendant, "[a]ny nonwaivable issues purportedly encompassed by the waiver are excluded from the scope of the waiver [and] the remainder of the waiver is valid and enforceable" (*People v Weatherbee*, 147 AD3d 1526, 1526 [4th Dept 2017], *lv denied* 29 NY3d 1038 [2017] [internal quotation marks omitted]). Defendant's valid waiver of the right to appeal "forecloses appellate review of [the] sentencing court's discretionary decision to deny youthful offender status" (*People v Pacherille*, 25 NY3d 1021, 1024 [2015]), even where, as here, there was no mention of youthful offender status during the plea colloquy. To the extent that we have held otherwise (*see People v Mills*, 151 AD3d 1744, 1745 [4th Dept 2017], *lv denied* 29

NY3d 1131 [2017]; *People v Anderson*, 90 AD3d 1475, 1476 [4th Dept 2011], *lv denied* 18 NY3d 991 [2012]), those cases should no longer be followed in light of *Pacherille*.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

880

KA 16-02330

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON MEDLEY, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI 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 (Deborah A. Haendiges, J.), rendered December 20, 2016. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, criminal contempt in the first degree and criminal contempt in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]), criminal contempt in the first degree (§ 215.51 [b] [v]), and three counts of criminal contempt in the second degree (§ 215.50 [3]). Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's further contention that Supreme Court erred in allowing the People to present evidence of three of his prior acts of domestic violence against the victim. The evidence was properly admitted because it was relevant to defendant's intent and to "provide background information concerning the context and history of defendant's relationship with the victim" (*People v Wolff*, 103 AD3d 1264, 1265 [4th Dept 2013], *lv denied* 21 NY3d 948 [2013]; *see People v Cung*, 112 AD3d 1307, 1309-1310 [4th Dept 2013], *lv denied* 23 NY3d 961 [2014]; *People v McCowan*, 45 AD3d 888, 890 [3d Dept 2007], *lv denied* 9 NY3d 1007 [2007]; *People v Wright*, 167 AD2d 959, 959-960 [4th Dept 1990], *lv denied* 77 NY2d 845 [1991]). Further, "the probative value of such testimony exceeded its potential for prejudice" (*People v Wertman*, 114 AD3d 1279, 1280 [4th Dept 2014], *lv denied* 23 NY3d 969

[2014]), "particularly considering the court's limiting instruction to the jury" (*People v Williams*, 160 AD3d 665, 666 [2d Dept 2018], *lv denied* 31 NY3d 1123 [2018]). Defendant failed to preserve for our review his contention that the limiting instruction was inadequate and confusing (*see People v Huck*, 1 AD3d 935, 936 [4th Dept 2003]), 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]).

Contrary to defendant's contention, the People laid a proper foundation for the admission in evidence of a recording of a jail telephone conversation between defendant and the victim. The victim testified that the recording was "a complete and accurate reproduction of the conversation and ha[d] not been altered" (*People v Ely*, 68 NY2d 520, 527 [1986]; *see People v Lugo*, 87 AD3d 1403, 1403 [4th Dept 2011], *lv denied* 18 NY3d 860 [2011]). We reject defendant's further contention that he was denied his constitutional right to a speedy trial and due process of law because of the delay between his arrest and trial (*see generally People v Taranovich*, 37 NY2d 442, 445 [1975]; *People v Hewitt*, 144 AD3d 1607, 1608 [4th Dept 2016], *lv denied* 28 NY3d 1185 [2017]; *People v Brooks*, 140 AD3d 1780, 1780-1781 [4th Dept 2016]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

887

CA 18-00340

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

DARLENE BIRJUKOW, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA COATING SERVICES, INC., ALLEN RICHARDS AND JAMES BIRJUKOW, DEFENDANTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (KENNETH A. MANNING OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLLIGAN LAW LLP, BUFFALO (A. NICHOLAS FALKIDES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered December 4, 2017. The order, insofar as appealed from, denied the motion of plaintiff for summary judgment in lieu of complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted, and the third through fifth ordering paragraphs are vacated.

Memorandum: In this action to recover on two promissory notes and guarantees executed by defendants, plaintiff contends on appeal that Supreme Court erred in denying her motion for summary judgment in lieu of complaint pursuant to CPLR 3213. We agree, and we therefore reverse the order insofar as appealed from, grant plaintiff's motion and vacate the third through fifth ordering paragraphs, which direct the parties to file certain pleadings.

Plaintiff met her initial burden of establishing entitlement to judgment as a matter of law "by submitting the notes and guarantees, together with an affidavit of nonpayment" (*I.P.L. Corp. v Industrial Power & Light. Corp.*, 202 AD2d 1029, 1029 [4th Dept 1994]; *see Rochester Community Sav. Bank v Smith*, 172 AD2d 1018, 1019 [4th Dept 1991], *lv dismissed* 78 NY2d 909 [1991], *rearg dismissed* 78 NY2d 1005 [1991], *rearg granted and lv denied* 79 NY2d 887 [1992]). In opposition, defendants failed " 'to establish, by admissible evidence, the existence of a triable issue [of fact] with respect to a bona fide defense' " (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]; *see Cutter Bayview Cleaners, Inc. v Spotless Shirts, Inc.*, 57 AD3d 708, 710 [2d Dept 2008]). Defendants contend that they are entitled to an offset because plaintiff allegedly breached a related stock purchase

agreement and, following the execution of the stock purchase agreement, coerced them into paying additional funds to which plaintiff was not entitled through economic duress. The evidence submitted by defendants in support of those contentions, however, is conclusory, unsubstantiated, and internally inconsistent in a manner that appears "designed to raise feigned factual issues in an effort to avoid the consequences" of plaintiff's otherwise valid motion for summary judgment on her claim to recover on the promissory notes and guarantees (*Buchinger v Jazz Leasing Corp.*, 95 AD3d 1053, 1053 [2d Dept 2012]). Among other things, the affidavit of defendants' expert public accountant is "speculative and conclusory inasmuch as the expert failed to submit the data upon which he based his opinions. The affidavit thus lacks an adequate factual foundation and is of no probative value" (*Costanzo v County of Chautauqua*, 108 AD3d 1133, 1134 [4th Dept 2013]). Finally, in addition to failing to raise a triable issue of fact with respect to economic duress, defendants waived any such claim "in light of the inordinate length of time which passed between the alleged duress and the assertion of the claim" (*Fruchthandler v Green*, 233 AD2d 214, 215 [1st Dept 1996]; *see Joseph F. Egan, Inc. v City of New York*, 17 NY2d 90, 98 [1966]; *Bethlehem Steel Corp. v Solow*, 63 AD2d 611, 612 [1st Dept 1978], *appeal dismissed* 45 NY2d 837 [1978]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

893

TP 18-00274

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

IN THE MATTER OF DARNELL BALLARD, PETITIONER,

V MEMORANDUM AND ORDER

SUSAN KICKBUSH, SUPERINTENDENT, GOWANDA CORRECTIONAL FACILITY, RESPONDENT.

DARNELL BALLARD, PETITIONER PRO SE.

BARBARA D. UNDERWOOD, 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, Erie County [Christopher J. Burns, J.], entered February 14, 2018) to review two determinations of respondent. The determinations found after separate tier II hearings that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determinations, following separate tier II disciplinary hearings, that he violated the inmate rules alleged in two unrelated misbehavior reports. Petitioner was charged in the first misbehavior report with violating inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing direct order]), 121.12 (7 NYCRR 270.2 [B] [22] [iii] [telephone program violation]), and 181.10 (7 NYCRR 270.2 [B] [27] [i] [noncompliance with hearing disposition]). Petitioner was thereafter charged in the second misbehavior report with violating inmate rules 100.13 (7 NYCRR 270.2 [B] [1] [iv] [fighting]) and 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]).

Contrary to petitioner's contention, a misbehavior report standing alone can constitute substantial evidence in support of the determination that he violated inmate rules, and we conclude that both misbehavior reports did so here (*see Matter of Perez v Wilmot*, 67 NY2d 615, 616-617 [1986]; *Matter of McMillian v Lempke*, 149 AD3d 1492, 1493 [4th Dept 2017], *appeal dismissed* 30 NY3d 930 [2017]). With respect to the first misbehavior report, any inconsistencies in the correction officer's description of the incident in that report presented a credibility issue for the Hearing Officer to resolve (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]). With respect to the

second misbehavior report, petitioner's claim that he was merely defending himself and never threw a closed fist punch also presented an issue of credibility for resolution by the Hearing Officer (*see id.*).

With respect to both misbehavior reports, the record does not establish " 'that the Hearing Officer was biased or that the determination[s] flowed from the alleged bias' " (*Matter of Colon v Fischer*, 83 AD3d 1500, 1501 [4th Dept 2011]; *see Matter of Rodriguez v Herbert*, 270 AD2d 889, 890 [4th Dept 2000]). "The mere fact that the Hearing Officer ruled against . . . petitioner is insufficient to establish bias" (*Matter of Edwards v Fischer*, 87 AD3d 1328, 1329 [4th Dept 2011] [internal quotation marks omitted]; *see Matter of Wade v Coombe*, 241 AD2d 977, 977 [4th Dept 1997]).

With respect to the first misbehavior report, the Hearing Officer properly denied petitioner's request to call as a witness a prison employee who could testify whether the telephone was actually being used during the time that the officer observed petitioner on the telephone inasmuch as such testimony is not relevant (*see Matter of Cunningham v Annucci*, 153 AD3d 1491, 1492 [3d Dept 2017]). Although an inmate has a "conditional right" to call witnesses (*Matter of Dawes v Selsky*, 265 AD2d 825, 825 [4th Dept 1999], *lv denied* 94 NY2d 756 [1999]), an inmate is not entitled to call witnesses whose testimony is immaterial or redundant (*see* 7 NYCRR 254.5 [a]). Here, the proposed witness testimony is not relevant because, even if petitioner was caught by the officer before he actually dialed a number, his attempt to use the telephone is a violation of the inmate rule (*see* 7 NYCRR 270.3 [b]; *see generally Matter of Melendez v Goord*, 242 AD2d 881, 881 [4th Dept 1997]).

Petitioner's remaining contentions are not preserved for our review because petitioner failed to raise them at his hearing (*see Matter of Allah v Fischer*, 118 AD3d 1507, 1507 [4th Dept 2014]), and he failed to exhaust his administrative remedies with respect to them because he did not raise them on his administrative appeal (*see Matter of Stewart v Fischer*, 109 AD3d 1122, 1123 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013]; *Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

894

KA 15-00618

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RALPH D. STRONG, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered September 2, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the first degree (two counts), attempted aggravated murder, aggravated assault upon a police officer or a peace officer, assault in the second degree and reckless endangerment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentences imposed on counts one and two shall run concurrently with respect to each other, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of, inter alia, two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]) and one count of assault in the second degree (§ 120.05 [2]). Contrary to defendant's contention, the conviction of assault in the second degree is supported by legally sufficient evidence (*see generally People v Hernandez*, 82 NY2d 309, 311-318 [1993]; *People v Jones*, 289 AD2d 163, 163 [1st Dept 2001], *lv denied* 97 NY2d 756 [2002]). Contrary to defendant's further contention, Supreme Court did not err in permitting the People to introduce evidence that he possessed a gun on a prior occasion because such evidence was "inextricably interwoven with the charged crimes, provided necessary background information, and completed the narrative of [a key prosecution] witness[]" (*People v Larkins*, 153 AD3d 1584, 1587 [4th Dept 2017], *lv denied* 30 NY3d 1061 [2017]).

Viewing defense counsel's representation in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Contrary to defendant's contention, defense counsel

" 'was not ineffective for failing to raise a justification defense that would have been weak, at best, and which might have undermined [the] stronger defense' " that counsel did pursue (*People v Perez*, 123 AD3d 592, 593 [1st Dept 2014], *lv denied* 25 NY3d 1169 [2015]). Defendant's reliance on *McCoy v Louisiana* (— US —, 138 S Ct 1500 [2018]) is misplaced because defense counsel did not concede defendant's guilt on the most serious charges.

As the People correctly concede, the sentences imposed on the convictions of murder in the first degree must run concurrently with each other (*see People v Rosas*, 8 NY3d 493, 495 [2007]). We therefore modify the judgment accordingly. We have considered defendant's remaining contentions and conclude that none warrant any further relief.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

896

CAF 17-00376

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

IN THE MATTER OF SARAH M. DRISCOLL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY J. MACK AND LISA L. DRISCOLL,
RESPONDENTS-RESPONDENTS.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-APPELLANT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered January 27, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded primary physical custody of the subject children to respondent Lisa L. Driscoll.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Cayuga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent Lisa L. Driscoll, the maternal grandmother (grandmother), filed a petition, dated April 11, 2016, seeking to modify a prior custody order, pursuant to which petitioner mother would have obtained primary physical custody of the subject children on July 1, 2016. In the petition, the grandmother essentially alleged that the mother suffered from mental health issues and was abusing drugs and alcohol. Family Court subsequently convened a hearing, which was held over two nonconsecutive days. At the hearing, the mother was the only witness to give testimony. The court granted the petition before the grandmother rested and awarded her primary physical custody of the children. On appeal, the mother contends that the court erred in granting the petition without completing the hearing. We agree.

"[A]s between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*Matter of Howard v McLoughlin*, 64 AD3d 1147, 1147 [4th Dept 2009] [internal quotation marks omitted]; *see Matter of Suarez v Williams*, 26 NY3d 440, 446 [2015]). "The nonparent

has the burden of establishing that extraordinary circumstances exist even where, as here, 'the prior order granting custody of the child to [the] nonparent[] was made upon consent of the parties' " (*Howard*, 64 AD3d at 1147; *see Matter of Katherine D. v Lawrence D.*, 32 AD3d 1350, 1351 [4th Dept 2006], *lv denied* 7 NY3d 717 [2006]).

Here, the court erred in granting the grandmother's petition prior to the completion of the hearing. The mother's testimony was not complete, the grandmother had not yet rested, and the mother had not been afforded the opportunity to call witnesses or present other evidence on her own behalf. In addition, there were controverted issues inasmuch as there is no evidence in the record of the mother's mental health other than her erratic in-court conduct, which she attributed to the trauma of being separated from her children, and there is no evidence whatsoever that the mother was abusing drugs or alcohol. Indeed, she denied abusing alcohol. We conclude that the court should have completed the hearing. We therefore reverse the order and remit the matter to Family Court for a full hearing on the grandmother's petition (*see generally Matter of Wolfford v Stephens*, 145 AD3d 1569, 1570 [4th Dept 2016])).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

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CAF 17-01608

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

IN THE MATTER OF TAHJA M. EASON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GERROD T. BOWICK, SR., RESPONDENT-RESPONDENT.

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

PAUL B. WATKINS, FAIRPORT, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Julie A. Gordon, R.), entered July 18, 2017 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, directed that if petitioner relocates outside of Monroe County, primary physical custody of the subject child shall immediately transfer to respondent.

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

Memorandum: Petitioner mother appeals from an order that, inter alia, denied the mother's relocation petition and directed that the mother not relocate with the subject child outside of Monroe County without court approval or express written consent from respondent father. We conclude that Family Court properly determined that the mother failed to establish by a preponderance of the evidence that it was in the best interests of the child to relocate to North Carolina (*see generally Matter of Tropea v Tropea*, 87 NY2d 727, 738-741 [1996]).

The mother testified at a hearing on the petition that she had already moved to North Carolina. Her primary motivation for moving was a new job that provided a better salary and benefits and more reasonable hours than her previous job, and provided tuition assistance that would allow her to finish her undergraduate degree in nursing and subsequently pursue a Master's degree. At the time of the trial, however, the mother had resigned from that position. She testified that she would be permitted to reapply for that position and that such application would be given priority, but she provided no additional evidence in support of that claim. Nor did the mother provide additional evidence in support of her claim that a comparable position could not be found within Monroe County (*see Matter of Yaddow*

v Bianco, 115 AD3d 1338, 1339 [4th Dept 2014]). The mother also "failed to establish that the child's life would be enhanced economically, emotionally and educationally by the proposed relocation" (*Matter of Shepherd v Stocker*, 159 AD3d 1441, 1442 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Hill v Flynn*, 125 AD3d 1433, 1434 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]). Moreover, the evidence presented at the hearing supports the court's determination that the proposed relocation would have a detrimental impact on the child's relationship with the father (*see Shepherd*, 159 AD3d at 1442). We therefore conclude that the court's determination to deny the mother's relocation petition has a sound and substantial basis in the record, and we see no reason to disturb it (*see Matter of Ramirez v Velazquez*, 91 AD3d 1346, 1347 [4th Dept 2012], *lv denied* 19 NY3d 802 [2012]).

We reject the mother's contention that the court was biased in favor of the father and improperly acted as his legal advisor. Here, the father appeared pro se throughout the proceedings and, at times, appeared confused with respect to whether he needed merely to oppose the mother's relocation petition, or whether he had the burden of establishing that he should continue to have physical custody of the child, which had been granted to the father pursuant to a temporary order. During the proceedings, the father made an oral request for custody of the child, and the court told the father that he needed to file a custody petition if he was in fact seeking custody. We conclude that, in so doing, the court did not "improperly assume[] the role of advocate for the [father]" (*Matter of Veronica P. v Radcliff A.*, 126 AD3d 492, 492 [1st Dept 2015], *lv denied* 25 NY3d 911 [2015]), but rather properly sought "to make reasonable efforts to facilitate the ability of [an] unrepresented litigant[] to have [his] matters fairly heard" (22 NYCRR 100.3 [B] [12]).

We agree with the mother, however, that court erred in including a provision in the order that transferred primary physical custody of the child from the mother to the father in the event that the mother relocates outside of Monroe County, and we therefore modify the order accordingly. Such a provision, "while possibly never taking effect, impermissibly purports to alter the parties' custodial arrangement automatically upon the happening of a specified future event without taking into account the child[']s best interests at that time" (*Grant v Grant*, 101 AD3d 1711, 1712 [4th Dept 2012] [internal quotation marks omitted]; *see Matter of Brzozowski v Brzozowski*, 30 AD3d 517, 518 [2d Dept 2006]). We reject the mother's further contention that the appropriate remedy for including that provision in an otherwise valid order is vacatur of the order in its entirety (*see generally Grant*, 101 AD3d at 1712).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

902

CAF 17-00779

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

IN THE MATTER OF CHANCE C. AND CRYSTAL C.

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

MEMORANDUM AND ORDER

JENNIFER S., RESPONDENT-APPELLANT,
AND PAUL C., RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered March 28, 2017 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, adjudged that the subject children were neglected by respondent Jennifer S. and placed respondent Jennifer S. under the supervision of petitioner for a period of 12 months.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law without costs and the petition against respondent Jennifer S. is dismissed.

Memorandum: In this child neglect proceeding, respondent mother appeals from an order that, inter alia, adjudged that she neglected the subject children and ordered that she have supervised visitation with them. We agree with the mother that Family Court's neglect adjudication with regard to her is not supported by a preponderance of the evidence. We therefore reverse the order insofar as appealed from and dismiss the petition against the mother.

A neglected child is defined as, among other things, "a child less than eighteen years of age . . . whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof" (Family Ct Act § 1012 [f] [i]

[B]). Thus, to establish neglect, the petitioner must establish that, as a result of the parent's failure to exercise a minimal degree of parental care, the children have been placed in "actual (or imminent danger of) physical, emotional or mental impairment" (*Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]). If the petitioner relies on an imminent danger of impairment, then such danger must be "near or impending, not merely possible" (*id*.).

Here, petitioner alleged that the danger was the result of the mother's mental illness. "[E]vidence of mental illness, alone, does not support a finding of neglect, [but] such evidence may be part of a neglect determination when the proof further demonstrates that a respondent's condition creates an imminent risk of physical, mental or emotional harm to a child" (*Matter of Sean P. [Brandy P.]*, 156 AD3d 1339, 1340 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018] [internal quotation marks omitted]). The court's "findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Kaleb U. [Heather V.—Ryan U.]*, 77 AD3d 1097, 1098 [3d Dept 2010]; *see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013]).

Here, the court determined that the mother neglected the children by forgetting to feed them, but the only evidence of such a danger is the uncorroborated out-of-court statement of one of the children. The mother failed to preserve for our review her contention that the court erred in relying on that child's uncorroborated statement (*see Matter of Katy Z.*, 265 AD2d 932, 933 [4th Dept 1999]). Nevertheless, we exercise our power to review that contention as a matter of discretion in the interest of justice. Although "[i]t is well settled that there is an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child . . . where . . . the statements are corroborated" (*Matter of Sutton v Sutton*, 74 AD3d 1838, 1840 [4th Dept 2010] [internal quotation marks omitted]; *see Matter of Hall v Hawthorne*, 99 AD3d 1237, 1238 [4th Dept 2012]; *Matter of Mateo v Tuttle*, 26 AD3d 731, 732 [4th Dept 2006]), "repetition of an accusation by a child does not corroborate the child's prior account of [neglect]" (*Matter of Nicole V.*, 71 NY2d 112, 124 [1987]; *see Matter of Brooke T. [Justin T.]*, 156 AD3d 1410, 1411 [4th Dept 2017]; *Matter of Heidi CC.*, 270 AD2d 528, 529 [3d Dept 2000]). Here, there was no corroboration of the one child's out-of-court statement, and thus the court erred in relying upon it to conclude that neglect occurred.

The court's further determination that the mother stopped taking her medication, and "that without . . . psychotropic medication [the] mother's mental health could rapidly deteriorate and she would endanger the safety and well-being of the children," is belied by the testimony of the mother's counselor, the only witness who testified on that issue. The mother's counselor testified that the mother had been properly weaned off of those medications because they were impeding her functionality, and that the mother's ability to parent the children had increased after she successfully stopped taking those medications.

Consequently, based on the lack of evidence establishing that the mother's actions created an "actual (or imminent danger of) physical, emotional or mental impairment to the child" (*Nicholson*, 3 NY3d at 369), we conclude that the court's finding of neglect with respect to the mother is not supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

912

CA 18-00321

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

AMY GOODWIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAWN WALTER, DEFENDANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (EDWARD J. SMITH, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF J. WILLIAM DEFIO, EAST SYRACUSE (KAREN VERONICA DEFIO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered October 3, 2017. The order granted defendant's motion for summary judgment and dismissed plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries that she sustained when a vehicle driven by defendant struck a vehicle driven by plaintiff. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury under the categories alleged by her, i.e., the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories (*see* Insurance Law § 5102 [d]). Supreme Court granted defendant's motion and dismissed the complaint. Plaintiff appeals, and we reverse.

We conclude that defendant failed to meet her initial burden of "presenting competent evidence establishing that the injuries do not meet the [serious injury] threshold" (*Linton v Nawaz*, 62 AD3d 434, 438 [1st Dept 2009], *affd* 14 NY3d 821 [2010]; *see generally McIntyre v Salluzzo*, 159 AD3d 1547, 1548 [4th Dept 2018]). Although the physician who examined plaintiff on behalf of defendant concluded that plaintiff had "full active range of motion of her cervical spine," "full active range of motion of all the joints of her upper and lower extremities," and "full mobility of all of the musculature of her upper and lower extremities," the physician failed to explain the basis for those conclusions, such as any objective tests that he performed that supported the conclusions (*see Monterro v Klein*, 160 AD3d 1459, 1460 [4th Dept 2018]; *McIntyre*, 159 AD3d at 1548). Thus,

defendant's "failure to make [a] prima facie showing requires denial of the motion" with respect to the permanent consequential limitation of use and significant limitation of use categories (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and the burden did not shift to plaintiff to raise an issue of fact with respect to those categories (*see generally id.*). We also conclude that defendant failed to meet her initial burden with respect to the 90/180-day category (*see Hedgecock v Pedro*, 93 AD3d 1143, 1143 [4th Dept 2012]) and that, in any event, there is a triable issue of fact with respect to that category (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We further conclude, however, that defendant submitted evidence establishing that plaintiff's injuries were caused by a preexisting condition, i.e., ankylosing spondylitis, a genetic condition. Thus, "plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation" (*Pommells v Perez*, 4 NY3d 566, 580 [2005]). Plaintiff raised a question of fact by submitting the affidavit of her treating chiropractor and the affirmation of her primary care physician. Plaintiff's primary care physician asserted that plaintiff's preexisting condition was "asymptomatic" prior to the accident, and both the primary care physician and the treating chiropractor asserted that, after the accident, plaintiff had a quantified limited range of motion in, inter alia, her neck (*see Terwilliger v Knickerbocker*, 81 AD3d 1350, 1351 [4th Dept 2011]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

920

KA 01-01201

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS TIMMONS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Stephen R. Sirkin, J.), entered April 3, 2001. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: On a prior appeal (*People v Timmons*, 299 AD2d 861 [4th Dept 2002]), we affirmed the judgment convicting defendant upon a jury verdict of murder in the second degree (Penal Law § 125.25 [2]). 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 on appeal that may have merit, i.e., whether County Court erred when it allegedly failed to comply with CPL 310.30 in regard to court exhibit 3, a note from the jury during its deliberations (*People v Timmons*, 142 AD3d 1400 [4th Dept 2016]), and we vacated our prior order. We now consider the appeal de novo.

CPL 310.30 requires that, in response to a jury request for additional information or instruction, including "with respect to the content or substance of any trial evidence," the trial 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 "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 [2016], *rearg denied* 28 NY3d 944 [2016]; *see People v Parker*, — NY3d —, —, 2018 NY Slip Op 04776, *1 [2018]; *People v O'Rama*, 78 NY2d 270, 276-277 [1991]). "[M]eaningful notice 'means notice of the actual specific content of the jurors' request' " (*Mack*, 27 NY3d at 538, quoting *O'Rama*, 78 NY2d

at 277). "When the trial court paraphrases or summarizes a jury note, thereby failing to provide counsel with meaningful notice of the specific content of the note, a mode of proceedings error occurs, 'because counsel cannot be expected to object to the court's response to the jury or to frame an intelligent suggested response if counsel lacks knowledge of the specific content of a substantive jury note' " (*id.* at 541, quoting *People v Nealon*, 26 NY3d 152, 157 [2015]; *see People v Morrison*, — NY3d —, —, 2018 NY Slip Op 04777, *1-2 [2018]). "In other words, a trial court's 'failure to read [a] note verbatim deprive[s] counsel of the opportunity to accurately analyze the jury's deliberations and frame intelligent suggestions for the court's response' " (*Nealon*, 26 NY3d at 157, quoting *People v Kisoon*, 8 NY3d 129, 135 [2007]).

Defendant contends that the court committed a mode of proceedings error by failing to provide counsel with meaningful notice of the specific content of the jury note requesting readbacks of the testimony of five witnesses, some of which the jury requested be provided in a particular order. Here, the trial transcript indicates that the court informed defense counsel of the existence of the note and most of its contents, but "there is no indication that the entire contents of the note were shared with counsel" (*People v Walston*, 23 NY3d 986, 990 [2014]; *see Morrison*, — NY3d at —, 2018 NY Slip Op 04777, *1). Rather, the transcript reflects that the court initially paraphrased the note outside the presence of the jury and then read part of the note verbatim in the jury's presence, but in each instance the court entirely omitted any reference to the jury's request for the testimony of the medical examiner and for that witness's testimony to be read first. The court's recitation of the jury note, as transcribed, was thus "hardly 'a fair substitute for defense counsel's own perusal of the communication' " (*Walston*, 23 NY3d at 990, quoting *O'Rama*, 78 NY2d at 277).

Nonetheless, the People contend that no mode of proceedings error actually occurred, and thus that defendant was required to preserve his contention, because the court reporter inadvertently omitted from the transcript the court's on-the-record, verbatim recitation of the note in open court prior to responding to the jury. In support of that contention, the People rely upon the affidavit of the court reporter that was submitted in opposition to defendant's motion for a writ of error coram nobis. Defendant asserts that we cannot consider the court reporter's affidavit because it is not part of the stipulated record on de novo appeal and is not a document that constituted a part of the underlying prosecution (*see* 22 NYCRR former 1000.4 [a] [1] [i], [iii]). Indeed, the People stipulated to the record without seeking to amend the transcript (*see* CPLR 5525 [c] [1]; *see also* 22 NYCRR former 1000.4 [a] [1] [ii]), rely upon an affidavit that does not constitute a part of the underlying prosecution (*see* 22 NYCRR former 1000.4 [a] [1] [iii]), and have not submitted a supplemental transcript certified by the court reporter that would fall within the parties' stipulation to submit the trial transcripts to this Court (*cf. People v Davis*, 106 AD3d 1510, 1511 [4th Dept 2013], *lv denied* 21 NY3d 1073 [2013]). It is well established, however, that "[p]arties to an appeal are entitled to have that record

show the facts as they really happened at trial, and should not be prejudiced by an error or omission of the stenographer" (*People v Bethune*, 29 NY3d 539, 541 [2017]; *see People v Marzug*, 280 AD2d 974, 974 [4th Dept 2001], *lv denied* 96 NY2d 904 [2001]; *People v Buccufurri*, 154 App Div 827, 828 [2d Dept 1913]). Thus, under the circumstances of this case, we take judicial notice of our own records, i.e., the court reporter's affidavit submitted in opposition to defendant's motion for a writ of error coram nobis (*see People v Comfort*, 278 AD2d 872, 873 [4th Dept 2000]; *People v Coppersmith*, 39 AD2d 947, 947 [2d Dept 1972])

In her affidavit, the court reporter averred that, although the transcript indicates that the court stated that the jury requested readbacks of the testimony of only four witnesses, the transcript inadvertently omits from the court's recitation of the note the jury's request for a readback of the testimony of a fifth witness—the medical examiner. The court reporter's affidavit thus indicates that a stenographic error may have resulted in a transcript that does not accurately reflect whether the court read the entire content of the note verbatim in open court prior to responding to the jury. We conclude that the alleged error in the transcript of the court's *on-the-record* reading of the note should be subject to a reconstruction hearing because "[t]he trial judge is the 'final arbiter of the record' certified to the appellate courts" (*Bethune*, 29 NY3d at 541, quoting *People v Alomar*, 93 NY2d 239, 247 [1999]; *see* Judiciary Law § 7-a; *Bethune*, 29 NY3d at 544 [Fahey, J., concurring]; *cf. Parker*, — NY3d at —, 2018 NY Slip Op 04776, *3-5; *Morrison*, — NY3d at —, 2018 NY Slip Op 04777, *1-2). We therefore hold the case, reserve decision, and remit the matter to County Court for that purpose.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

921

KA 14-01649

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT C. LEWIS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Steuben County Court (Peter C. Bradstreet, J.), dated March 17, 2014. The order, insofar as appealed from, did not grant that part of defendant's motion seeking forensic DNA testing of evidence pursuant to CPL 440.30 (1-a).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Steuben County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order insofar as it failed to grant that part of his pro se motion seeking DNA testing of a rape kit and the victim's shirt and pants. The order addressed defendant's motion to the extent it sought to vacate the judgment of conviction pursuant to CPL 440.10, but did not address the motion to the extent it sought DNA testing pursuant to CPL 440.30 (1-a). Inasmuch as County Court's failure to rule on that part of defendant's motion "cannot be deemed a denial thereof" (*People v Jones*, 114 AD3d 1272, 1272 [4th Dept 2014] [internal quotation marks omitted]; *see People v Stewart*, 111 AD3d 1395, 1396 [4th Dept 2013]; *see also People v Santana*, 101 AD3d 1664, 1664 [4th Dept 2012], *lv denied* 20 NY3d 1103 [2013]; *see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]), we hold the case, reserve decision, and remit the matter to County Court for a determination whether " 'there was a reasonable probability that, had th[e rape kit, shirt and pants] been tested and had the results been admitted at trial, the verdict would have been more favorable to defendant' " (*People v Swift*, 108 AD3d 1060, 1061 [4th Dept 2013], *lv denied* 21 NY3d 1077 [2013]; *see* CPL 440.30 [1-a] [a] [1]; *People v Pitts*, 4 NY3d 303, 310 [2005], *rearg denied* 5 NY3d 783 [2005]; *People v Milton*, 155 AD3d 1583, 1584 [4th Dept 2017], *lv denied* 30 NY3d 1117 [2018], *reconsideration denied* 31 NY3d 1085 [2018]; *People v Burr*, 17 AD3d 1131, 1132 [4th Dept 2005], *lv denied* 5 NY3d 760 [2005],

reconsideration denied 5 NY3d 804 [2005]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

943

KA 06-01424

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY N. OTT, DEFENDANT-APPELLANT.

THOMAS THEOPHILOS, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Stephen R. Sirkin, J.), rendered April 5, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and assault in the first degree.

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

Memorandum: On a prior appeal, we modified the judgment convicting defendant upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and assault in the first degree (§ 120.10 [1]) by vacating the sentence in part, and we remitted the matter to County Court for resentencing (*People v Ott*, 83 AD3d 1495 [4th Dept 2011], *lv denied* 17 NY3d 808 [2011]). Thereafter, we affirmed the resentence (*People v Ott*, 126 AD3d 1372 [4th Dept 2015], *lv denied* 26 NY3d 1148 [2016]). 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 on appeal that may have merit, i.e., whether the court erred when it failed to comply with CPL 310.30 in its handling of jury notes (*People v Ott*, 153 AD3d 1135 [4th Dept 2017]). Upon reviewing the appeal de novo, we agree with defendant that the judgment of conviction must be reversed and a new trial granted.

We agree with defendant that the court violated the core requirements 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 Silva*, 24 NY3d 294, 299-300 [2014], *rearg denied* 24 NY3d 1216 [2015]; *People v O'Rama*, 78 NY2d 270, 277-278 [1991]). The record establishes that, during its deliberations, the jury sent several notes, the first two of which are germane here. The first note requested that the jury be provided with a written copy of the court's legal instructions, and the second note

requested, inter alia, a rereading of all of the court's legal instructions. The record reflects that the court informed the parties that the jury had sent several notes and indicated that the jury requested a rereading of the instructions, but the court did not mention the contents of the first note. Although the record establishes that " 'defense counsel was made aware of the existence of the [first] note, there is no indication that the entire contents of the note were shared with counsel' " (*People v Morrison*, — NY3d —, —, 2018 NY Slip Op 04777, *1 [2018]). We therefore "reject the People's argument that defense counsel's awareness of the existence and the 'gist' of the note satisfied the court's meaningful notice obligation, or that preservation was required. 'Where the record fails to show that defense counsel was apprised of the specific, substantive contents of the note—as it is in this case—preservation is not required' . . . Moreover, . . . '[i]n the absence of record proof that the trial court complied with its [meaningful notice obligation] under CPL 310.30, a mode of proceedings error occurred requiring reversal' " (*id.*).

We therefore reverse the judgment of conviction and grant a new trial. We have considered defendant's further contentions and conclude that they do not require a different result.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

944

KA 17-02073

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAITLYN CONLEY, DEFENDANT.

GATEHOUSE MEDIA NEW YORK HOLDINGS, INC.,
AND JOLENE CLEAVER, INTERVENORS-APPELLANTS.
(APPEAL NO. 1.)

GREENBERG TRAURIG, LLP, ALBANY (MICHAEL J. GRYGIEL OF COUNSEL), FOR INTERVENORS-APPELLANTS.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Oneida County Court (Michael L. Dwyer, J.), entered November 9, 2017. The order, insofar as appealed from, denied the motion of GateHouse Media New York Holdings, Inc., and Jolene Cleaver for access to juror identifying information.

It is hereby ORDERED that said appeal is unanimously dismissed and the order is vacated.

Memorandum: In April and May 2017, defendant Kaitlyn Conley was tried for murder in the second degree (Penal Law § 125.25 [1]) in County Court arising out of the fatal poisoning of Mary Yoder, Conley's employer and the mother of her boyfriend. The trial resulted in a hung jury, and a second trial commenced in October 2017. On October 31, 2017, and before the jurors had begun deliberating, Jolene Cleaver, a reporter for a newspaper published by GateHouse Media New York Holdings, Inc. in the City of Utica (intervenors), left a telephone message with the court requesting the names and addresses of the jurors seated in the Conley trial. A formal written request for the information was not submitted, and the court denied the request.

Later on October 31, 2017, counsel for the intervenors submitted a letter motion to the court seeking, inter alia, the names and addresses of the empaneled jurors. Copies of the motion were sent to Conley's defense counsel and the Oneida County District Attorney. An oral argument on the motion was held on November 3, 2017, which was after the jury had begun deliberations. During oral argument, counsel for the intervenors amended his motion to include a request for the juror questionnaires that had been used during voir dire. At the

conclusion of oral argument, the court issued an oral decision denying the motion. On November 9, 2017, and after the jury had returned a verdict finding Conley guilty of manslaughter in the first degree (Penal Law § 125.20) and not guilty of murder in the second degree, the court's oral decision was reduced to an order.

Subsequently, the District Attorney requested further oral argument on the motion and the court granted that request. On December 19, 2017, and after the further oral argument, the court issued a written decision and order that set forth in detail the basis for the denial of the intervenors' motion. In appeal No. 1, the intervenors appeal from the order issued on November 9, 2017 and, in appeal No. 2, they appeal from the order issued on December 19, 2017.

Although it was not raised during proceedings on the intervenors' motion, it is well established that "[t]he Criminal Procedure Law provides no mechanism for a nonparty to intervene or be joined in a criminal case" (*People v Combest*, 4 NY3d 859, 860 [2005]). Moreover, even assuming, arguendo, that the mechanism for intervening in an action set forth in the Civil Practice Law and Rules authorizes such an intervention in a criminal case (*see* CPLR 1013), we note that there is a statutory requirement that "[a] motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought" (CPLR 1014), and thus the court here would have "had no power to grant . . . leave to intervene" without a proposed pleading from the intervenors (*Matter of Colonial Sand & Stone Co. v Flacke*, 75 AD2d 894, 895 [2d Dept 1980]; *see Matter of Zehnder v State of New York*, 266 AD2d 224, 224-225 [2d Dept 1999]; *Rozewicz v Ciminelli*, 116 AD2d 990, 990 [4th Dept 1986]). Consequently, in each appeal we must vacate the order and dismiss the appeal.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

945

KA 18-00249

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAITLYN CONLEY, DEFENDANT.

GATEHOUSE MEDIA NEW YORK HOLDINGS, INC.,
AND JOLENE CLEAVER, INTERVENORS-APPELLANTS.
(APPEAL NO. 2.)

GREENBERG TRAURIG, LLP, ALBANY (MICHAEL J. GRYGIEL OF COUNSEL), FOR INTERVENORS-APPELLANTS.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Oneida County Court (Michael L. Dwyer, J.), entered December 19, 2017. The order denied the motion of GateHouse Media New York Holdings, Inc., and Jolene Cleaver for access to juror identifying information.

It is hereby ORDERED that said appeal is unanimously dismissed and the order is vacated.

Same memorandum as in *People v Conley* ([appeal No. 1] — AD3d — [Oct. 5, 2018] [4th Dept 2018]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

961

CA 17-01988

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

AMERICAN RECYCLING & MANUFACTURING CO., INC., A NEW YORK CORPORATION, AMERICAN RECYCLING & MANUFACTURING CO., INC., A TENNESSEE CORPORATION, AND AMERICAN RECYCLING & MANUFACTURING CO. OF INDIANA, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SHARON KEMP, EXXON MOBIL CORPORATION, DOING BUSINESS AS EXXONMOBIL CHEMICAL COMPANY, AND EXXONMOBIL GLOBAL SERVICES COMPANY, DEFENDANTS-RESPONDENTS.

KNAUF SHAW LLP, ROCHESTER (AMY K. KENDALL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BROWN HUTCHINSON LLP, ROCHESTER (T. ANDREW BROWN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), dated December 19, 2016. The order and judgment, among other things, granted defendants' motion for summary judgment and denied plaintiffs' cross motion for partial summary judgment and spoliation sanctions.

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

Memorandum: American Recycling & Manufacturing Co., Inc., a New York Corporation (plaintiff) and two related corporations commenced this action seeking damages for, inter alia, breach of a confidentiality agreement arising from a prior business relationship with defendants. Defendants moved for summary judgment dismissing the complaint. Plaintiffs cross-moved for an order imposing sanctions on defendants for the alleged spoliation of evidence and for partial summary judgment on liability with respect to their first cause of action. Supreme Court, inter alia, granted defendants' motion, denied plaintiffs' cross motion, and dismissed the complaint. We affirm.

We reject plaintiffs' contention that the court abused its discretion in declining to impose sanctions on defendants. As the moving party, plaintiffs had the burden of establishing "that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was

destroyed with a 'culpable state of mind,' and 'that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense' " (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015]). We conclude that defendants' obligation to preserve electronically-stored information arose in June 2013, when they received a letter from plaintiffs' attorney, which, for the first time, put defendants "on notice that the evidence might be needed for future litigation" (*Mahiques v County of Niagara*, 137 AD3d 1649, 1650-1651 [4th Dept 2016] [internal quotation marks omitted]; *see Bill's Feed Serv., LLC v Adams*, 132 AD3d 1400, 1401 [4th Dept 2015]). Although plaintiffs submitted evidence that defendants destroyed emails that were sent between April 2011 and August 2011, plaintiffs failed to establish that those emails, or any other documents, were destroyed after the obligation to preserve arose.

We also reject plaintiffs' contention that the court erred in granting defendants' motion for summary judgment dismissing the complaint. With respect to the first cause of action, for breach of a confidentiality agreement, and the third and sixth causes of action, for misappropriation of confidential information or trade secrets, defendants established their entitlement to judgment as a matter of law by submitting a copy of the confidentiality agreement between plaintiff and defendant Sharon Kemp (Kemp agreement), as well as Kemp's deposition testimony (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The Kemp agreement prohibited Kemp from divulging confidential information, including trade secrets, to a third party, and Kemp testified that she did not divulge any confidential information. In opposition, plaintiffs failed to raise an issue of fact (*see generally id.*). We note that, for the same reasons, the court properly denied that part of plaintiffs' cross motion seeking partial summary judgment on liability with respect to the first cause of action.

With respect to that part of the second cause of action alleging tortious interference with business relations, defendants established their entitlement to judgment as a matter of law by submitting the deposition testimony of two of plaintiffs' shareholders. To establish that cause of action, plaintiffs were required to demonstrate, inter alia, that defendants " 'acted with the sole purpose of harming the plaintiff[s] or by using unlawful means' " (*Zetes v Stephens*, 108 AD3d 1014, 1020 [4th Dept 2013]; *see Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009], *lv dismissed in part and denied in part* 14 NY3d 736 [2010]). In the complaint, plaintiffs alleged that Kemp interfered with plaintiffs' business relationships with third parties by making defamatory statements that plaintiffs were not making rebate payments as promised. Those statements were not defamatory because, as the testimony of the shareholders established, the statements were substantially true (*see Cooper v Hodge*, 28 AD3d 1149, 1150 [4th Dept 2006]; *Smith v United Church Ministry, Inc.*, 212 AD2d 1038, 1039 [4th Dept 1995], *lv denied* 85 NY2d 806 [1995]). Plaintiffs failed to raise an issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562).

With respect to that part of the second cause of action alleging tortious interference with contract, defendants established their entitlement to judgment as a matter of law by submitting the two contracts at issue and certain deposition testimony. The first contract, which was between plaintiff and a third-party contractor, was terminable at will, and thus it cannot give rise to a cause of action for tortious interference with contract (*see Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191-192 [1980]; *Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299 [1st Dept 1999]; *cf. Lowenbraun v Garvey*, 60 AD3d 916, 917 [2d Dept 2009]). The second contract is a confidentiality agreement between plaintiff and a self-described "representative" of the third-party contractor, who had performed work for plaintiffs. The representative testified, however, that he stopped performing work for plaintiffs because of disagreements over the manner in which plaintiffs conducted their business, not because of any conduct by Kemp. In opposition, plaintiffs failed to raise an issue of fact with respect to Kemp's alleged "intentional procurement" of the representative's breach (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]; *see generally Zuckerman*, 49 NY2d at 562). For the same reasons, we also conclude that defendants are entitled to summary judgment dismissing the fourth and fifth causes of action, for procurement of breach of contract in violation of Tennessee Code § 47-50-109.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

965

KA 17-00763

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HAITHEM HASAN, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered February 7, 2017. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, menacing in the second degree and harassment 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 first degree (Penal Law § 120.10 [1]), menacing in the second degree (§ 120.14 [1]), and harassment in the second degree (§ 240.26 [1]). Defendant failed to preserve for our review his contention that the prosecutor improperly interfered with "a defense witness' free and unhampered choice to testify" (*People v Shapiro*, 50 NY2d 747, 761 [1980]; *see* CPL 470.05 [2]; *People v Allen*, 88 NY2d 831, 833 [1996]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant correctly concedes that his contention that the jury improperly engaged in public deliberation in violation of CPL 310.10 is also unpreserved for our review. That alleged error is not one that falls within the "very narrow category of so-called 'mode of proceedings' errors" that are reviewable even in the absence of a timely objection (*People v Agramonte*, 87 NY2d 765, 770 [1996]*; see People v Peck*, 96 AD3d 1468, 1469 [4th Dept 2012], *lv denied* 21 NY3d 1008 [2013]), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further failed to preserve for our review his contention that the evidence is legally insufficient to support the jury's findings that the victim suffered a serious physical injury as

defined by the Penal Law or that defendant intended to inflict such injury (Penal Law §§ 10.00 [10]; 120.10 [1]) and, in any event, that contention is without merit. Additionally, viewing the evidence in light of the elements of assault in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that he was denied effective assistance of counsel. Defendant failed to establish "the absence of strategic or other legitimate explanations" for counsel's decision to consent to an instruction that the jury should not draw an unfavorable inference from the fact that defendant was in custody (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Kurkowski*, 117 AD3d 1442, 1443-1444 [4th Dept 2014]). With respect to defendant's additional allegations regarding counsel's performance, an attorney's "failure to 'make a motion or argument that has little or no chance of success' " does not amount to ineffective assistance (*People v Caban*, 5 NY3d 143, 152 [2005]). Finally, the sentence is not unduly harsh or severe.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

967

KA 12-02377

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES E. COMFORT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Donald E. Todd, A.J.), dated November 16, 2012. The order, insofar as appealed from, denied that part of defendant's motion pursuant to CPL 440.10 seeking to vacate the judgment convicting defendant of rape in the first degree, rape in the third degree, attempted sodomy in the first degree, attempted sodomy in the third degree, assault in the second degree, endangering the welfare of a child and sexual abuse in the third degree (three counts).

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

Memorandum: In appeal No. 1, defendant appeals by permission of this Court from that part of an order that denied his motion pursuant to CPL 440.10 seeking to vacate the judgment convicting him upon a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [1]; *see* CPL 450.15 [1]). In appeal No. 2, defendant appeals as of right from that part of the same order that denied his motion to have forensic DNA testing performed on specified evidence (*see* CPL 440.30 [1-a] [a] [1]; 450.10 [5]). Contrary to defendant's contentions, we conclude that County Court properly denied both parts of the motion without a hearing.

Addressing first the contentions in appeal No. 1, we reject defendant's contention that he was denied effective assistance of counsel during the plea negotiation process. Defendant rejected a plea offer before trial, but now contends that defense counsel never informed him of the possibility that he could receive the 40-year term of incarceration that was ultimately imposed. Contrary to defendant's

contention, "[t]he submissions on the motion failed to demonstrate that, but for counsel's [failure to advise of the maximum potential sentence], there was a reasonable probability that defendant would have accepted the People's plea offer" (*People v Ross*, 123 AD3d 454, 454 [1st Dept 2014], *lv denied* 26 NY3d 934 [2015]), i.e., "that the outcome of the plea process would have been different with different advice from counsel" (*People v Quinones*, 139 AD3d 408, 409 [1st Dept 2016], *lv denied* 28 NY3d 935 [2016]; *see People v Banks*, 28 NY3d 131, 137-138 [2016]).

We note that, after the prosecutor at sentencing requested a 40-year aggregate sentence, defendant stated that, even in hindsight, he would not have accepted the People's plea offer. Specifically, defendant said: "[Y]ou know what, if I had to do it again, I would not accept the deal. I have a thing called dignity. I would not plea to a crime I did not do." Defendant went on to say that he knew that the court was going to sentence him to "the full 40 years to run consecutive," but that it did not matter to him because he was certain that the conviction would be overturned on appeal. He guaranteed that he would eventually be "vindicated of this crime." Thus, defendant's own words belie his current claim that he would have pleaded guilty if defense counsel had advised him prior to trial that he could be sentenced to 40 years in prison.

Defendant further contends in appeal No. 1 that he was punished for exercising his right to trial because he received a sentence after trial that was significantly greater than that offered to him before trial. Inasmuch as the record was sufficient to permit review of that contention and defendant unjustifiably failed to raise it on his direct appeal, the court properly denied that part of the motion (*see* CPL 440.10 [2] [c]).

Contrary to defendant's contention in appeal No. 2, we conclude that the court properly denied that part of his motion seeking forensic DNA testing inasmuch as defendant "failed to show that 'there exists a reasonable probability that the verdict would have been more favorable to defendant' if the requested testing had been carried out and the results admitted at trial" (*People v Sposito*, 30 NY3d 1110, 1111 [2018], quoting CPL 440.30 [1-a] [a] [1]; *see People v Letizia*, 141 AD3d 1129, 1130 [4th Dept 2016], *lv denied* 28 NY3d 1073 [2016], *reconsideration denied* 28 NY3d 1186 [2017]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

968

KA 13-00237

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES E. COMFORT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (Donald E. Todd, A.J.), dated November 16, 2012. The order, insofar as appealed from, denied that part of defendant's motion seeking forensic DNA testing of evidence, pursuant to CPL 440.30 (1-a).

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

Same memorandum as in *People v Comfort* ([appeal No. 1] — AD3d — [Oct. 5, 2018] [4th Dept 2018]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

969

KA 16-00617

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH FEHER, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (James H. Cecile, A.J.), rendered November 10, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree and grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed on count one of the indictment to an indeterminate term of imprisonment of 2 to 4 years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the third degree (Penal Law § 140.20) and grand larceny in the fourth degree (§ 155.30 [1]). We conclude that defendant validly waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]; *People v James*, 155 AD3d 1094, 1095 [3d Dept 2017], *lv denied* 30 NY3d 1116 [2018]; *People v Gibson*, 147 AD3d 1507, 1507-1508 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]). Defendant's valid waiver of the right to appeal forecloses his contention that County Court abused its discretion in terminating him from the drug court program (*see People v McKay*, 106 AD3d 837, 838 [2d Dept 2013], *lv denied* 21 NY3d 1006 [2013]; *People v Schwandner*, 67 AD3d 1481, 1481 [4th Dept 2009], *lv denied* 14 NY3d 805 [2010]; *People v Ephram*, 47 AD3d 497, 497 [1st Dept 2008], *lv denied* 10 NY3d 810 [2008]; *cf. People v Peck*, 90 AD3d 1500, 1501 [4th Dept 2011]; *see generally People v Dillon*, 61 AD3d 1221, 1221-1222 [3d Dept 2009], *lv denied* 14 NY3d 840 [2010]).

Defendant's waiver of the right to appeal does not, however, foreclose his further contention that the sentence imposed on count one of the indictment violated the terms of the plea bargain (*see People v Copes*, 145 AD3d 1639, 1639 [4th Dept 2016], *lv denied* 28 NY3d

1182 [2017]; *People v Harris*, 142 AD3d 557, 557 [2d Dept 2016]; *People v Jones*, 77 AD3d 1178, 1178 [3d Dept 2010], *lv denied* 16 NY3d 832 [2011]), and the People correctly concede that the sentence on that count did, in fact, exceed the sentence promised in the plea bargain (*see generally People v Selikoff*, 35 NY2d 227, 241 [1974], *cert denied* 419 US 1122 [1975]). Although defendant failed to preserve that contention for appellate review (*see People v Williams*, 27 NY3d 212, 219-225 [2016]), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see People v Smith*, 160 AD3d 1475, 1475 [4th Dept 2018]). In light of the parties' joint request for specific performance of the plea bargain rather than vacatur of the guilty plea, we modify the judgment by reducing the sentence imposed on count one to an indeterminate term of imprisonment of 2 to 4 years as contemplated by the plea bargain (*see People v Marrero*, 250 AD2d 624, 625 [2d Dept 1998]; *People v Annunziata*, 105 AD2d 709, 709 [2d Dept 1984]).

Defendant's challenge to the severity of his sentence as modified is foreclosed by his valid waiver of the right to appeal (*see Lopez*, 6 NY3d at 255-256). Defendant's reliance on *People v Boyzuck* (72 AD3d 1530 [4th Dept 2010]) is misplaced. In *Boyzuck*, we held that the defendant's valid appeal waiver did "not preclude her from challenging the severity of the sentence inasmuch as the court's statements concerning the maximum sentence . . . were inconsistent, confusing and misleading" (*id.* at 1530). Here, in contrast, the court's evolving statements regarding defendant's maximum exposure on count one simply tracked the ongoing plea negotiations and were not misleading, inconsistent, or confusing.

Finally, we note that the certificate of conviction contains incorrect dates for the underlying offenses, and it must therefore be amended to reflect the correct dates recited in the uniform sentence and commitment sheet (*see People v Curtis*, 162 AD3d 1758, 1758 [4th Dept 2018]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

974

KA 15-01425

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IAN GULBIN, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, 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 October 30, 2014. The judgment convicted defendant, upon his plea of guilty, of murder 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 murder in the second degree (Penal Law § 125.25 [4]). The conviction arises from defendant's brutal and unconscionable conduct in beating to death a 13-month-old infant entrusted to his care. We affirm.

We conclude that defendant validly waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]). Defendant's valid waiver of the right to appeal forecloses his statutory and constitutional challenges to the severity of his sentence (*see People v Marshall*, 144 AD3d 1544, 1545 [4th Dept 2016]). Even assuming, arguendo, that defendant's waiver of his right to appeal does not foreclose his further contention that County Court should have recused itself at sentencing (*see People v Walker*, 100 AD3d 1522, 1523 [4th Dept 2012], *lv denied* 20 NY3d 1104 [2013]), that contention is nevertheless unpreserved for our review (*see People v Sparks*, 160 AD3d 1279, 1280 [3d Dept 2018]), and we decline to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Defendant's further contention that the court impermissibly enhanced his sentence in retaliation for his motion to withdraw the plea survives his appeal waiver (*see People v Weinstock*, 129 AD3d 1663, 1664 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]), but that contention is also unpreserved for our review (*see People v Womack*, 151 AD3d 1754, 1754 [4th Dept 2017], *lv denied* 29 NY3d 1136 [2017]), and we likewise decline to address it as a matter of discretion in the interest of justice. Defendant's remaining contention, i.e., that his

allocution failed to affirmatively establish each element of the crime, is not a recognized ground for vacating a guilty plea (*see People v Goldstein*, 12 NY3d 295, 300-301 [2009]; *People v Madden*, 148 AD3d 1576, 1578 [4th Dept 2017], *lv denied* 29 NY3d 1034 [2017]).

Finally, we note that the certificate of conviction incorrectly states that defendant was sentenced on October 30, 2015, and it must therefore be amended to reflect the correct sentencing date of October 30, 2014 (*see generally People v Young*, 74 AD3d 1864, 1865 [4th Dept 2010], *lv denied* 15 NY3d 811 [2010]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

977

CA 17-00168

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

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

V MEMORANDUM AND ORDER

JAMES R.C., AN INMATE IN THE CUSTODY OF NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-APPELLANT.

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (JANINE E. RELLA OF COUNSEL), FOR RESPONDENT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered August 19, 2016 in a proceeding pursuant to Mental Hygiene Law article 10. The amended order, among other things, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an amended order pursuant to Mental Hygiene Law article 10 determining, following a jury trial, that he is a detained sex offender who has a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i) and determining, following a dispositional hearing, that he is a dangerous sex offender requiring confinement in a secure treatment facility.

We reject respondent's contention that the evidence is not legally sufficient to establish that he has a mental abnormality. Petitioner's expert witnesses testified that respondent suffers from pedophilic disorder and antisocial personality disorder, that his diagnosis predisposes him to commit sex offenses, and that his entrenched behavior, conduct while incarcerated, and lack of treatment demonstrates that he has serious difficulty controlling his sex-offending behavior. We therefore conclude that petitioner met its burden of establishing by clear and convincing evidence that respondent has "a congenital or acquired condition, disease or disorder that affects [his] emotional, cognitive, or volitional capacity . . . in a manner that predisposes him . . . to the commission of conduct constituting a sex offense and that results in

[respondent] having serious difficulty in controlling such conduct" (Mental Hygiene Law § 10.03 [i]; *see Matter of State of New York v Scholtisek*, 145 AD3d 1603, 1604 [4th Dept 2016]; *Matter of State of New York v Peters*, 144 AD3d 1654, 1654-1655 [4th Dept 2016]; *see generally Matter of State of New York v Dennis K.*, 27 NY3d 718, 726 [2016], *cert denied* — US —, 137 S Ct 579 [2016]).

We further conclude that the verdict finding that respondent has a mental abnormality is not against the weight of the evidence (*see Scholtisek*, 145 AD3d at 1604; *Peters*, 144 AD3d at 1655). Although respondent's expert testified that respondent did not have a mental abnormality,
" '[t]he jury verdict is entitled to great deference based on the jury's opportunity to evaluate the weight and credibility of conflicting expert testimony' " (*Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1474 [4th Dept 2011], *lv denied* 17 NY3d 702 [2011]; *see also Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]). Upon our review of the record, we conclude that "the evidence does not preponderate[] so greatly in [respondent's] favor that the jury could not have reached its conclusion on any fair interpretation of the evidence" (*Gierszewski*, 81 AD3d at 1474 [internal quotation marks omitted]).

Respondent next contends that Supreme Court erred in its rulings with respect to two prospective jurors. CPL 270.20 applies to this Mental Hygiene Law article 10 proceeding (*see* Mental Hygiene Law § 10.07 [b]), and "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 [2012], quoting CPL 270.20 [1] [b]). 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' " (*Harris*, 19 NY3d at 685, quoting *People v Chambers*, 97 NY2d 417, 419 [2002]). Respondent's contention that the court erred in denying his challenge for cause with respect to one prospective juror is not a basis for reversal inasmuch as he did not exhaust all of his peremptory challenges (*see* CPL 270.20 [2]; *People v Brown*, 101 AD3d 1627, 1628 [4th Dept 2012]; *see generally People v Lynch*, 95 NY2d 243, 248 [2000]). In any event, that contention lacks merit inasmuch as that prospective juror said nothing that would call into question her ability to be fair and impartial (*see People v Brooks*, 159 AD3d 1576, 1576 [4th Dept 2018], *lv denied*
— NY3d — [Aug. 3, 2018]; *see generally People v Arnold*, 96 NY2d 358, 363 [2001]). The court also did not err in sua sponte excusing another prospective juror for cause over respondent's objection. That prospective juror indicated on the juror questionnaire that she believed that she could not be fair and impartial. Upon questioning by the court, the prospective juror was unable to give an unequivocal statement that she could be fair and impartial, and she was therefore properly excused (*see People v McKnight*, 284 AD2d 955, 955-956 [4th Dept 2001], *lv denied* 96 NY2d 941 [2001]; *see generally People v*

Johnson, 94 NY2d 600, 614 [2000]).

Contrary to respondent's contention, the court properly allowed certain records to be admitted in evidence because they satisfied the two-part test set forth in *Matter of State of New York v Floyd Y.* (22 NY3d 95, 109 [2013]) for the admission of hearsay basis evidence. Respondent's contention that the records from his prison disciplinary proceeding were not reliable is without merit. At the relevant disciplinary proceeding, respondent was found guilty of an infraction that was sexual in nature, and "[h]earsay about sex offenses that are supported by adjudications of guilt, such as convictions or guilty pleas, is inherently reliable and may be admitted through expert testimony without offending due process" (*Matter of State of New York v John S.*, 23 NY3d 326, 343 [2014], *rearg denied* 24 NY3d 933 [2014] [internal quotation marks omitted]).

We reject respondent's contention that the evidence is not legally sufficient to establish that he requires confinement. Petitioner's expert opined that respondent has an obsession with young boys and needs intensive treatment, which he had not received, and a relapse prevention plan, which he did not have. We conclude that petitioner met its burden of establishing by clear and convincing evidence that respondent "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 Peters*, 144 AD3d at 1655-1656; *see generally Matter of State of New York v Michael M.*, 24 NY3d 649, 658-659 [2014]). We further conclude that the court's determination that respondent is a dangerous sex offender requiring confinement is not against the weight of the evidence (*see Peters*, 144 AD3d at 1656).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

989

TP 17-02185

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

IN THE MATTER OF CHARLES CALDARA, PETITIONER,

V MEMORANDUM AND ORDER

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

CHARLES CALDARA, PETITIONER PRO SE.

BARBARA D. UNDERWOOD, 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, Cayuga County [Thomas G. Leone, A.J.], entered December 12, 2017) 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.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination, following a tier III disciplinary hearing, that he violated two inmate rules. Contrary to petitioner's contention, the determination that he violated inmate rules 107.20 (7 NYCRR 270.2 [B] [8] [iii] [lying]) and 119.10 (7 NYCRR 270.2 [B] [20] [i] [false alarm]) is supported by substantial evidence (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *People ex rel. Vega v Smith*, 66 NY2d 130, 140 [1985]). "No expert witness testimony was required [with respect to the handwriting in the bomb threat letter inasmuch] as hearing officers are permitted to independently assess handwriting samples" (*Matter of Hood v Goord*, 36 AD3d 1064, 1065 [3d Dept 2007]).

Contrary to petitioner's further contention, the record "does not establish 'that the Hearing Officer was biased or that the determination flowed from the alleged bias' " (*Matter of Colon v Fischer*, 83 AD3d 1500, 1501 [4th Dept 2011]). Additionally, petitioner contends that he was improperly placed in the special housing unit prior to the hearing. We reject that contention inasmuch as petitioner's bomb threat letter posed an immediate threat to the safety and security of the prison (*see* 7 NYCRR 251-1.6 [a]; *see*

generally Matter of Kalonji v Fischer, 102 AD3d 1041, 1042 [3d Dept 2013]).

We also reject the contention that the hearing was untimely. The 14-day time limit to complete the hearing is "directory only" (*Matter of Comfort v Irvin*, 197 AD2d 907, 908 [4th Dept 1993], *lv denied* 82 NY2d 662 [1993]) and, "absent a showing of substantial prejudice to petitioner, the failure to complete the hearing in a timely manner does not warrant annulment of the determination" (*Matter of Dash v Goord*, 255 AD2d 978, 978 [4th Dept 1998]; *see Matter of Lugo v Coughlin*, 182 AD2d 920, 921 [3d Dept 1992]). Finally, petitioner was not improperly denied the right to call witnesses at the hearing (*see Matter of Ramos v Venettozzi*, 153 AD3d 1075, 1076 [3d Dept 2017], *lv denied* 31 NY3d 906 [2018]; *Matter of Moore v New York State Dept. of Correctional Servs.*, 50 AD3d 1350, 1351 [3d Dept 2008]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

994

KA 15-01452

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK LEE, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 25, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal solicitation in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal solicitation in the fourth degree (Penal Law § 100.05). As the People correctly concede, defendant's waiver of the right to appeal is invalid. County Court failed to conduct an adequate colloquy " ' to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]), and "there is no basis upon which to conclude that the court ensured 'that . . . defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Jones*, 107 AD3d 1589, 1590 [4th Dept 2013], *lv denied* 21 NY3d 1075 [2013], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]).

We reject defendant's contention that the court erred in refusing to suppress statements that he made to the police. The court credited the testimony of the police officer and determined that, after validly waiving his *Miranda* rights, defendant voluntarily made statements to the police. "[T]he court's determination to credit the testimony of the police officer at the suppression hearing is entitled to great deference, and we perceive no reason to disturb that credibility determination" (*People v Woods*, 303 AD2d 1031, 1031 [4th Dept 2003]; *see also People v Clark*, 136 AD3d 1367, 1368 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]).

Contrary to defendant's related contention, it is well settled that the failure to record his interrogation electronically does not constitute a denial of due process, and he therefore was not entitled to suppression of his statements on that ground (*see People v Kunz*, 31 AD3d 1191, 1191 [4th Dept 2006], *lv denied* 7 NY3d 868 [2006]; *see generally People v McMillon*, 77 AD3d 1375, 1375 [4th Dept 2010], *lv denied* 16 NY3d 897 [2011]; *People v Jarvis*, 60 AD3d 1478, 1479 [4th Dept 2009], *lv denied* 12 NY3d 916 [2009]).

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

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

997

CAF 16-02089

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

IN THE MATTER OF JENNA D.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES CHILD PROTECTIVE UNIT, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

PAULA D., RESPONDENT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT.

GARY L. CURTISS, COUNTY ATTORNEY, CANANDAIGUA (HOLLY A. ADAMS OF COUNSEL), FOR PETITIONER-RESPONDENT.

VICTORIA L. KING, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), dated October 12, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: Respondent mother appeals from an order that, inter alia, revoked a suspended judgment and terminated her parental rights with respect to the subject child. Family Court (Doran, J.) had previously granted a suspended judgment for a period of six months upon the consent of the parties and the mother's admission of permanent neglect. Less than a month after the suspended judgment was in effect, petitioner moved to revoke it because the mother allegedly violated several of its terms. Following a fact-finding hearing, the court (Kocher, J.) determined that the mother failed to comply with several terms of the suspended judgment and that termination of her parental rights was in the best interests of the child.

The mother contends that the court prematurely revoked the suspended judgment because a copy of the suspended judgment was not furnished to her before petitioner filed its motion. Inasmuch as the mother raises that issue for the first time on appeal, it is not properly before us (*see Matter of Dutchess County Dept. of Social Servs. v Judy M.*, 227 AD2d 478, 479 [2d Dept 1996]; *see also Matter of Kim Shantae M.*, 221 AD2d 199, 199 [1st Dept 1995]). In any event, the mother's testimony at the hearing established that she understood and agreed to the terms of the suspended judgment on the date that the

suspended judgment was granted (*see Kim Shantae M.*, 221 AD2d at 199). Petitioner, moreover, was not obligated to wait six months until the suspended judgment expired before filing its motion (*see Matter of Dah'Marii G. [Cassandra G.]*, 156 AD3d 1479, 1480 [4th Dept 2017]; *Matter of Emily A. [Gina A.]*, 129 AD3d 1473, 1474 [4th Dept 2015]).

Contrary to the mother's further contention, a preponderance of the evidence at the hearing establishes that she violated several terms of the suspended judgment (*see Matter of Michael HH. [Michael II.*], 124 AD3d 944, 944 [3d Dept 2015]; *Matter of Ronald O.*, 43 AD3d 1351, 1352 [4th Dept 2007]), and the record does not support the mother's characterization of those violations as inconsequential, isolated or inadvertent (*see Michael HH.*, 124 AD3d at 945).

We reject the mother's contention that the court erred in failing to conduct a separate dispositional hearing to address the child's best interests. "It is well established that a hearing on a [motion] alleging that the terms of a suspended judgment have been violated is part of the dispositional phase of the permanent neglect proceeding, and that the disposition shall be based on the best interests of the child" (*Matter of Alisa E. [Wendy F.]*, 114 AD3d 1175, 1176 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]). Here, the court conducted a lengthy hearing that addressed both the alleged violations of the suspended judgment and the child's best interests, and there was no need for an additional hearing (*see Matter of Jeremiah J.W. [Tionna W.]*, 134 AD3d 848, 849 [2d Dept 2015], *lv dismissed* 27 NY3d 1061 [2016]; *see also Kim Shantae M.*, 221 AD2d at 200).

Finally, a preponderance of the evidence supports the court's determination that it was in the child's best interests to terminate the mother's parental rights (*see Matter of Mikel B. [Carlos B.]*, 115 AD3d 1348, 1349 [4th Dept 2014]). "Although [the mother's] breach of the express conditions of the suspended judgment does not compel the termination of [her] parental rights, [it] is strong evidence that termination is, in fact, in the best interests of the child[ ]" (*Michael HH.*, 124 AD3d at 945-946 [internal quotation marks omitted]). "The court's determination that [the mother] was not likely to change sufficiently to enable her to parent the child[] is entitled to great deference[,]" and we thus conclude that "any progress that [the mother] made was not sufficient to warrant any further prolongation of the child[]'s unsettled familial status" (*Matter of Brendan S.*, 39 AD3d 1189, 1190 [4th Dept 2007] [internal quotation marks omitted]), and termination of the mother's parental rights was therefore proper (*see Matter of Douglas H. [Catherine H.]*, 1 AD3d 824, 825-826 [3d Dept 2003], *lv denied* 2 NY3d 701 [2004]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

999

CA 18-00559

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

ARLISA MAYS, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

TYLER LEE GREEN, POWER & CONSTRUCTION GROUP, INC., AND LIVINGSTON ASSOCIATES, LLC, DEFENDANTS-APPELLANTS-RESPONDENTS.

LAW OFFICES OF JOHN WALLACE, ROCHESTER (VALERIE L. BARBIC OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

THE WRIGHT FIRM, LLC, ROCHESTER (RON F. WRIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 26, 2017. The order denied the motion of defendants for summary judgment dismissing the complaint and denied in part the cross motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle that she was driving was rear-ended by a vehicle driven by defendant Tyler Lee Green and owned by defendant Power & Construction Group, Inc. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident, and plaintiff cross-moved for partial summary judgment on the issues of negligence, proximate cause and serious injury. Defendants appeal and plaintiff cross-appeals from an order that denied defendants' motion and granted only those parts of plaintiff's cross motion with respect to the issues of negligence and proximate cause. We affirm.

We note at the outset that defendants do not contend on appeal that Supreme Court erred in granting those parts of plaintiff's cross motion on the issues of negligence and proximate cause, and thus they have abandoned any such contention (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Defendants instead contend that the court erred in denying their motion with respect to the issue of serious injury because they established as a matter of law that plaintiff's injuries were not causally related to the

accident but, rather, resulted from a preexisting condition. We reject that contention. In support of the motion, defendants submitted medical records of plaintiff demonstrating that she complained of back pain seven months before the accident. At that time, a CT scan was performed and showed that plaintiff had a "mild broad-based posterior disc bulge" at L2-3. A post-accident CT scan, however, showed a disc extrusion at L2-3. Consequently, defendants failed to meet their initial burden inasmuch as their own submissions raised a triable issue of fact whether plaintiff's injury was exacerbated by the accident in question (*see Durante v Hogan*, 137 AD3d 1677, 1678 [4th Dept 2016]).

Even assuming, arguendo, that defendants satisfied their initial burden, we conclude that plaintiff raised a triable issue of fact by submitting medical evidence establishing that the subject accident caused a worsening of plaintiff's preexisting disc bulge. Furthermore, plaintiff's chiropractor, who had treated plaintiff from the time of the subject accident until her later surgery, concluded in his affidavit that the accident aggravated a previously asymptomatic condition, resulting in permanent injuries (*see Grier v Mosey*, 148 AD3d 1818, 1820 [4th Dept 2017]; *Croisdale v Weed*, 139 AD3d 1363, 1364 [4th Dept 2016]; *Fanti v McLaren*, 110 AD3d 1493, 1494 [4th Dept 2013]). We reject defendants' related contention that a chiropractor is not competent to render an opinion based on CT or MRI film studies (*see generally* Education Law § 6551 [2] [a]; *Rodriguez v First Student, Inc.*, 163 AD3d 1425, 1426 [4th Dept 2018]; *Carpenter v Steadman*, 149 AD3d 1599, 1600 [4th Dept 2017]; *Howard v Robb*, 78 AD3d 1589, 1589-1590 [4th Dept 2010]).

On plaintiff's cross appeal, we conclude that, just as there are issues of fact precluding summary judgment in defendants' favor, those same issues of fact require denial of that part of plaintiff's cross motion on the issue of serious injury. "On this record, it is not possible to determine as a matter of law whether the injuries of plaintiff that were objectively ascertained after the accident were the same injuries that were objectively ascertained before the accident. To the contrary, the conflicting opinions of the parties' respective experts warrant a trial on the issue of serious injury" (*Cicco v Durolek*, 147 AD3d 1487, 1488 [4th Dept 2017]).

Finally, assuming, arguendo, that plaintiff sought summary judgment on the issue whether her economic losses exceed the basic economic loss threshold, we conclude that there are triable issues of fact whether plaintiff's alleged economic losses were caused by the accident (*see id.*; *see also Colvin v Slawoniewski*, 15 AD3d 900, 900 [4th Dept 2005]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1002

CA 16-01853

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

NICK'S GARAGE, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GEICO INDEMNITY COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, GEICO GENERAL INSURANCE COMPANY, AND GEICO CASUALTY INSURANCE COMPANY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

BOUSQUET HOLSTEIN PLLC, SYRACUSE (CECELIA R.S. CANNON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (JONATHAN SCHAPP OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 11, 2016. The order and judgment granted the motion of defendants for summary judgment dismissing plaintiff's amended complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion in part and reinstating the first cause of action, and the third cause of action to the extent that it is asserted on behalf of plaintiff itself, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs in these consolidated appeals operate automobile repair shops, and they commenced these actions to recover payment for repairs performed on behalf of various assignors, including first-party assignors, i.e., defendants' insureds, and third-party assignors, i.e., persons involved in accidents with defendants' insureds (*see generally* 11 NYCRR 216.7 [a] [2]). Plaintiffs each appeal from an order and judgment granting defendants' motion for summary judgment dismissing their respective amended complaints on the basis of collateral estoppel. As plaintiffs correctly contend and defendants correctly concede, the orders and judgments cannot be affirmed on the ground of collateral estoppel because the judgments in the cases on which Supreme Court relied for the application of collateral estoppel have since been vacated in relevant part (*see generally Church v New York State Thruway Auth.*, 16 AD3d 808, 810 [3d Dept 2005]).

With respect to defendants' alternative bases for affirmance of

the orders and judgments in both appeals (*see Cleary v Walden Galleria LLC*, 145 AD3d 1524, 1526 [4th Dept 2016]), we reject defendants' contention that they established their entitlement to summary judgment dismissing the respective breach of contract causes of action on the merits. In their motion papers, defendants relied on the purported absence of evidence of plaintiffs' damages. "[I]t is well settled[, however,] that a party moving for summary judgment must affirmatively establish the merits of its cause of action or defense 'and does not meet its burden by noting gaps in its opponent's proof' " (*Great Lakes Motor Corp. v Johnson*, 132 AD3d 1390, 1391 [4th Dept 2015]; *see Atkins v United Ref. Holdings, Inc.*, 71 AD3d 1459, 1459-1460 [4th Dept 2010]). Moreover, defendants' submissions raise an issue of fact whether defendants breached the relevant insurance policies by paying labor rates during the relevant time period that fell below a reasonable market rate.

That same issue of fact precludes defendants from establishing their entitlement to summary judgment dismissing plaintiffs' respective General Business Law § 349 causes of action insofar as those causes of action are asserted on their own behalf based on damages plaintiffs allegedly suffered, and we therefore modify the orders and judgments accordingly. We agree with defendants, however, that the limited assignments of insurance and property damage claims did not grant plaintiffs the right to bring a consumer protection claim in place of the assignors. Thus, the court properly granted defendants' motions with respect to the General Business Law § 349 causes of action to the extent that they are based on the assignors' alleged damages (*see generally State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 435-436 [2000]; *Banque Arabe et Internationale D'Investissement v Maryland Natl. Bank*, 57 F3d 146, 151-152 [2d Cir 1995]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1003

CA 16-01854

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

JEFFREY'S AUTO BODY, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GEICO INDEMNITY COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, GEICO GENERAL INSURANCE COMPANY, AND GEICO CASUALTY INSURANCE COMPANY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

BOUSQUET HOLSTEIN PLLC, SYRACUSE (CECELIA R.S. CANNON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (JONATHAN SCHAPP OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 11, 2016. The order and judgment granted the motion of defendants for summary judgment dismissing plaintiff's amended complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion in part and reinstating the first cause of action, and the third cause of action to the extent that it is asserted on behalf of plaintiff itself, and as modified the order and judgment is affirmed without costs.

Same memorandum as in *Nick's Garage, Inc. v Geico Indemnity Co.* ([appeal No. 1] — AD3d — [Oct. 5, 2018] [4th Dept 2018]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1018

KA 16-00436

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEAN SANCHEZ, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered December 10, 2015. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the surcharge, DNA databank fee, and crime victim assistance fee and as modified the judgment is 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]). We reject defendant's contention that New York's statutory scheme (*see* Penal Law §§ 10.00 [18]; 30.00 [2]; CPL 1.20 [42]; 180.75, 210.43), which permits, as relevant here, 13-year-old persons to be criminally responsible for acts constituting murder in the second degree (Penal Law § 125.25 [1], [2]), violates the Due Process or Equal Protection Clauses of the Federal and State Constitutions (*see People v Mayfield*, 208 AD2d 391, 392 [1st Dept 1994]; *People v Killeen*, 198 AD2d 233, 233 [2d Dept 1993], *lv denied* 82 NY2d 926 [1994]; *see generally People v Drayton*, 39 NY2d 580, 585-586 [1976], *rearg denied* 39 NY2d 1058 [1976]).

We agree with defendant that his waiver of the right to appeal is invalid (*see People v Gramza*, 140 AD3d 1643, 1644 [4th Dept 2016], *lv denied* 28 NY3d 930 [2016]; *People v Collins*, 129 AD3d 1676, 1676 [4th Dept 2015], *lv denied* 26 NY3d 1038 [2015]; *People v Nicelli*, 74 AD3d 1235, 1236-1237 [2d Dept 2010]), but we nevertheless reject his challenge to the severity of the sentence. As the People correctly concede, however, the surcharge, DNA databank fee, and crime victim assistance fee must be vacated because defendant is a juvenile offender (*see* Penal Law §§ 60.00 [2]; 60.10; *People v Dennis R.*, 159 AD3d 1444, 1444 [4th Dept 2018], *lv denied* 31 NY3d 1080 [2018]; *People*

v Stump, 100 AD3d 1457, 1458 [4th Dept 2012], *lv denied* 20 NY3d 1104 [2013]). We therefore modify the judgment accordingly.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1028

KA 16-01718

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY W. BENNETT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (James M. Metcalf, A.J.), rendered July 17, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted kidnapping in the second 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 Oswego County Court for proceedings pursuant to CPL 470.45.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted kidnapping in the second degree (Penal Law §§ 110.00, 135.20) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of aggravated family offense (§ 240.75 [1]). Defendant contends, and the People concede, that the superior court information in appeal No. 1 was jurisdictionally defective. We agree. A defendant may waive indictment and consent to be prosecuted by a superior court information (*see* CPL 195.20; *People v D'Amico*, 76 NY2d 877, 879 [1990]). As relevant here, "[t]he offenses named [in a superior court information] may include any offense for which the defendant was held for action of a grand jury" (CPL 195.20), i.e., "the same crime as [charged in] the felony complaint or a lesser included offense of that crime" (*People v Pierce*, 14 NY3d 564, 571 [2010]; *see People v Zanghi*, 79 NY2d 815, 817 [1991]). Inasmuch as attempted kidnapping in the second degree is not a crime charged in the felony complaint or a lesser included offense, the superior court information is jurisdictionally defective. "That defect does not require preservation, and it survives defendant's waiver of the right to appeal and his guilty plea" (*People v Tun Aung*, 117 AD3d 1492, 1493 [4th Dept 2014]). Thus, the judgment in appeal No. 1 must be

reversed, the plea vacated, and the superior court information dismissed (*see id.* at 1492-1493; *People v Goforth*, 36 AD3d 1202, 1203 [4th Dept 2007], *lv denied* 8 NY3d 946 [2007]). In light of our determination, we do not review defendant's remaining contentions raised in appeal No. 1 (*see Goforth*, 36 AD3d at 1204).

With respect to appeal No. 2, defendant contends that reversal is required because County Court violated Judiciary Law § 295 when it had the proceedings electronically recorded without having a stenographer present. Even assuming, arguendo, that defendant's contention survives his guilty plea, we conclude that it is not preserved for our review (*see People v Rogers*, 159 AD3d 1558, 1559 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]). In any event, reversal is not required because defendant failed to demonstrate that he was prejudiced by the use of the recording that was later transcribed (*see id.*; *see generally People v Harrison*, 85 NY2d 794, 796 [1995]). Although there were some instances where recorded responses or remarks were "inaudible," we conclude that a reconstruction hearing is not required in this case for effective appellate review of defendant's contentions (*cf. People v Henderson*, 140 AD3d 1761, 1761 [4th Dept 2016]).

Defendant's challenge to the factual sufficiency of the plea allocution is not preserved for our review because he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Pryce*, 148 AD3d 1625, 1625-1626 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *People v Saddler*, 144 AD3d 1520, 1520-1521 [4th Dept 2016], *lv denied* 28 NY3d 1188 [2017]). This case does not fall within the rare exception to the preservation rule (*see People v Lopez*, 71 NY2d 662, 666 [1988]). In any event, defendant's contention is without merit inasmuch as his " 'yes' and 'no' answers during the plea colloqu[y] [did] not invalidate his guilty plea[]" (*People v Russell*, 133 AD3d 1199, 1199 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]). To the extent that defendant's contention that he was denied effective assistance of counsel survives his plea (*see generally People v Abdulla*, 98 AD3d 1253, 1254 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012]), we conclude that it is without merit (*see People v Watkins*, 77 AD3d 1403, 1404-1405 [4th Dept 2010], *lv denied* 15 NY3d 956 [2010]).

Defendant failed to preserve for our review his contention that the court violated CPL 380.50 (1) by not asking him or his counsel if they wanted to make statements at sentencing (*see People v Green*, 54 NY2d 878, 880 [1981]; *People v Sharp*, 56 AD3d 1230, 1231 [4th Dept 2008], *lv denied* 11 NY3d 900 [2008]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Finally, the sentence is not unduly harsh or severe.

Mark W. Bennett

Entered: October 5, 2018

Clerk of the Court

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

1029

KA 16-01719

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY W. BENNETT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (James M. Metcalf, A.J.), rendered July 17, 2015. The judgment convicted defendant, upon his plea of guilty, of aggravated family offense.

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

Same memorandum as in *People v Bennett* ([appeal No. 1] — AD3d — [Oct. 5, 2018] [4th Dept 2018]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1030

KA 15-00599

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DRON LUNDY, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered November 21, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Contrary to defendant's contention, we conclude that he received effective assistance of counsel. Defendant failed to " 'demonstrate the absence of strategic or other legitimate explanations' for defense counsel's allegedly deficient conduct" (*People v Bank*, 129 AD3d 1445, 1447 [4th Dept 2015], *affd* 28 NY3d 131 [2016], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Benevento*, 91 NY2d 708, 712 [1998]).

Defendant failed to preserve for our review his contention that the photo array from which a witness identified the codefendant, defendant's brother, was unduly suggestive, thereby tainting the witness's subsequent identification of defendant (*see People v Evans*, 137 AD3d 1683, 1683 [4th Dept 2016], *lv denied* 27 NY3d 1131 [2016]; *People v Carson*, 126 AD3d 1537, 1538 [4th Dept 2015], *lv denied* 26 NY3d 927 [2015]; *People v Bakerx*, 114 AD3d 1244, 1247-1248 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]). In any event, the contention is without merit. The record is devoid of evidence that any alleged suggestiveness in the photo array containing codefendant's photograph rendered the subsequent identification procedure in which the witness identified defendant unduly suggestive. Moreover, although codefendant was the only person depicted in a red shirt in the photo array, it was "not so distinctive as to be conspicuous, particularly

since the other individuals [in the photo array] were dressed in varying, nondescript apparel" (*People v Sullivan*, 300 AD2d 689, 690 [3d Dept 2002], *lv denied* 100 NY2d 587 [2003]; *see also People v Mead*, 41 AD3d 1306, 1307 [4th Dept 2007], *lv denied* 9 NY3d 963 [2007]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). "[R]esolution of issues of credibility and the weight to be accorded to the evidence are primarily questions to be determined by the jury" (*People v Reed*, 163 AD3d 1446, 1448-1449 [4th Dept 2018]), and we perceive no basis for disturbing the jury's determinations in this case, particularly with respect to the eyewitness testimony about the shooting as well as the testimony regarding defendant's subsequent statements about the incident.

Defendant did not object to any of the alleged instances of prosecutorial misconduct during the prosecutor's opening statement or summation, and he therefore failed to preserve for our review his contention that he was thereby deprived of a fair trial (*see People v Lane*, 106 AD3d 1478, 1480 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013]; *People v Rumph*, 93 AD3d 1346, 1347 [4th Dept 2012], *lv denied* 19 NY3d 967 [2012]). In any event, that contention lacks merit. "[T]he prosecutor's closing statement must be evaluated in light of the defense summation, which put into issue the [witnesses'] character and credibility and justified the People's response" (*People v Halm*, 81 NY2d 819, 821 [1993]). Even assuming, arguendo, that any of the prosecutor's comments during the opening or closing statements exceeded the bounds of propriety, we conclude that they were "not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Jackson*, 108 AD3d 1079, 1080 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013] [internal quotation marks omitted]; *see People v Miller*, 104 AD3d 1223, 1223-1224 [4th Dept 2013], *lv denied* 21 NY3d 1017 [2013]). Finally, the sentence imposed is not unduly harsh or severe.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1031

KA 17-01202

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERNESTO PEREZ, 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 (Judith A. Sinclair, J.), entered May 3, 2017. 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 modified on the law by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order classifying him as a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We agree with defendant that Supreme Court erred in assessing him 20 points under risk factor 7, which applies when, insofar as relevant here, the offender's conduct " 'was directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization' " (*People v Cook*, 29 NY3d 121, 125 [2017], quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 12 [2006]). The 24-year-old defendant and the 16-year-old victim met while working at a local Red Cross; the two exchanged contact information and, months later, communicated through social media and by telephone before any sexual contact occurred. Under these circumstances, the People failed to establish by clear and convincing evidence that defendant and the victim were strangers at the time of the crime (*see People v Birch*, 114 AD3d 1117, 1118 [3d Dept 2014]; *People v Johnson*, 93 AD3d 1323, 1324 [4th Dept 2012]; *cf. People v Mabee*, 69 AD3d 820, 820 [2d Dept 2010], *lv denied* 15 NY3d 703 [2010]; *People v Serrano*, 61 AD3d 946, 947 [2d Dept 2009], *lv denied* 13 NY3d 704 [2009]; *see also People v Graves*, 162 AD3d 1659, 1660-1661 [4th Dept 2018]; *see generally People v Helmer*, 65 AD3d 68, 70 [4th Dept

2009]). Moreover, the People "presented no evidence that defendant . . . targeted the victim for the primary purpose of victimizing her" (*People v Johnson*, 104 AD3d 1321, 1321-1322 [4th Dept 2013]; *see People v Green*, 112 AD3d 801, 802 [2d Dept 2013]).

Without the 20 points assessed under risk factor 7, defendant is a presumptive level one sex offender (*see Helmer*, 65 AD3d at 69). We therefore modify the order accordingly. Defendant's request for a downward departure is academic in light of our determination.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1034

CAF 17-00049

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF BENTLEY C.

YATES COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ZACHARY D., RESPONDENT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT.

JESSICA L. BRYANT, PENN YAN, FOR PETITIONER-RESPONDENT.

SUSAN ELIZABETH GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered November 10, 2016 in a proceeding pursuant to Family Court Act article 10. The order directed respondent to comply with the terms and conditions specified in the order of protection.

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

Memorandum: Respondent father appeals from an order of disposition, which brings up for review the order of fact-finding wherein Family Court found that he neglected the subject child (*see Matter of Anthony L. [Lisa P.]*, 144 AD3d 1690, 1691 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]). We agree with the father that the court's finding of neglect is not supported by the requisite preponderance of the evidence (*see generally* Family Ct Act § 1046 [b] [i]). "[P]roof that a person repeatedly misuses . . . drugs . . . to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug . . . misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program" (§ 1046 [a] [iii]; *see Matter of Kenneth C. [Terri C.]*, 145 AD3d 1612, 1613 [4th Dept 2016], *lv denied* 29 NY3d 905 [2017]). Here, petitioner submitted evidence that the father tested positive for THC, oxycodone, and opioids on one occasion, which is insufficient to establish that

the father repeatedly misused drugs (*see Matter of Anna F.*, 56 AD3d 1197, 1198 [4th Dept 2008]; *cf. Matter of Darrell W. [Tenika C.]*, 110 AD3d 1088, 1089 [2d Dept 2013], *lv denied* 23 NY3d 904 [2014]). The father's admission to using marihuana was also insufficient to meet petitioner's burden without further evidence as to the "duration, frequency, or repetitiveness of his drug use, or whether [the father] was ever under the influence of drugs while in the presence of the subject child" (*Matter of Anastasia G.*, 52 AD3d 830, 832 [2d Dept 2008]; *see Matter of Rebecca W.*, 122 AD2d 582, 583 [4th Dept 1986]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1035

CAF 16-01940

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF JOHN HEIDRICK, III,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANGELA SHERMAN, RESPONDENT-RESPONDENT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-APPELLANT.

JOAN MERRY, HORNELL, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered September 27, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: We affirm the order. We write only to note that the children's positions with respect to custody were clarified during oral argument of this appeal, and we conclude that the Attorney for the Children has fulfilled her responsibilities as set forth in 22 NYCRR 7.2 (d) (*cf. Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1147 [4th Dept 2016]; *Matter of Mark T. v Joyanna U.*, 64 AD3d 1092, 1095 [3d Dept 2009], *lv denied* 15 NY3d 715 [2010]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1040

CA 18-00334

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

SOUTH TOWNS SURGICAL ASSOCIATES, P.C., DANIEL J. PATTERSON, D.O., F.A.C.O.S., AND KENNETH H. ECKHERT, III, M.D., F.A.C.S., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JEFFREY P. STEINIG, M.D., F.A.C.S., DEFENDANT-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (FRANK J. JACOBSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (AMBER E. STORR OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered September 19, 2017. The order, among other things, granted plaintiffs' motion and defendant's cross motion for leave to reargue and, upon reargument, denied defendant's motion for partial summary judgment in its entirety.

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

Memorandum: On appeal from an order that, inter alia, granted plaintiffs' motion for leave to reargue their opposition to defendant's motion for partial summary judgment and, upon reargument, denied defendant's motion in its entirety, we reject defendant's contention that Supreme Court erred in granting the motion for leave to reargue. The court properly granted leave to reargue on the ground that it misapprehended the facts and law in determining defendant's motion for partial summary judgment (*see Smith v City of Buffalo*, 122 AD3d 1419, 1420 [4th Dept 2014]; *Luppino v Mosey*, 103 AD3d 1117, 1118 [4th Dept 2013]; *see generally* CPLR 2221 [d] [2]). With respect to the merits of defendant's motion, we affirm the order for reasons stated in the court's decision.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1045

CA 18-00118

PRESENT: CENTRA, J.P., NEMOYER, TROUTMAN, AND WINSLOW, JJ.

PATRICIA M. PARKHURST, AS EXECUTRIX OF THE ESTATE OF MICHAEL W. PARKHURST, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SYRACUSE REGIONAL AIRPORT AUTHORITY, CITY OF SYRACUSE AND HUEBER-BREUER CONSTRUCTION CO., INC., DEFENDANTS-RESPONDENTS.

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

BARCLAY DAMON LLP, SYRACUSE (JULIE M. CAHILL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered April 5, 2017. The order, insofar as appealed from, granted those parts of the motion of defendants seeking summary judgment dismissing the Labor Law § 200 claim and common-law negligence cause of action against defendants City of Syracuse and Hueber-Breuer Construction Co., Inc.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, and the Labor Law § 200 claim and common-law negligence cause of action against defendants City of Syracuse and Hueber-Breuer Construction Co., Inc. are reinstated.

Memorandum: This Labor Law and common-law negligence action arises from injuries sustained by Michael W. Parkhurst (decedent) when he slipped and fell on plastic sheeting covering newly-laid carpet after descending a ladder while performing drywall finishing work. Defendants moved for summary judgment dismissing the complaint, and Supreme Court granted that motion. As limited by her brief, plaintiff contends that the court erred in granting those parts of the motion with respect to the Labor Law § 200 claim and common-law negligence cause of action against the City of Syracuse, which owned the building on which the work was being performed, and Hueber-Breuer Construction Co., Inc. (Hueber), which was the general contractor (collectively, defendants). We agree with plaintiff and therefore reverse the order insofar as appealed from.

Where, as here, “the worker’s injuries result from a dangerous

condition at the work site rather than from the manner in which the work is performed, the general contractor or owner may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and [has created or has] actual or constructive notice of the dangerous condition" (*Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1248 [4th Dept 2013] [internal quotation marks omitted]). "Thus, [d]efendants, as the parties seeking summary judgment dismissing those claims, were required to establish as a matter of law that they did not exercise any supervisory control over the general condition of the premises or that they neither created nor had actual or constructive notice of the dangerous condition on the premises" (*id.* [internal quotation marks omitted]), and defendants failed to meet that burden here.

We reject defendants' contention that decedent's injuries resulted from his own methods of work rather than a dangerous condition at the work site (*cf. McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582 [4th Dept 2010]). The evidence submitted by defendants in support of their motion established that the plastic sheeting was not placed there by decedent or his employer, and the deposition testimony of various witnesses supported the inference that it was placed there by Hueber. Thus, while the placement of the plastic sheeting may have been part of Hueber's method of work, it was not a part of decedent's method of work. We reject defendants' further contention that the plastic sheeting constituted an open and obvious hazard inherent in decedent's work, which cannot serve as a basis for liability. " 'The issue whether a condition was readily observable impacts on [decedent's] comparative negligence and does not negate . . . defendant[s'] duty to keep the premises reasonably safe' " (*Landahl v City of Buffalo*, 103 AD3d 1129, 1130 [4th Dept 2013]). Defendants' reliance on *Gasper v Ford Motor Co.* (13 NY2d 104, 110-111 [1963], *mot to amend remittitur granted* 13 NY2d 893 [1963]) is misplaced because "[t]hat case stands for the proposition that an open and obvious hazard *inherent in the injury-producing work* is not actionable, but here the defect complained of lies in the condition of the [floor] in question, not in the [drywall finishing] work [decedent] was assigned to perform" (*Landahl*, 103 AD3d at 1131).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1049.1

CAF 16-01625

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF MICHAEL S., JR., AND AVA W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

REBECCA S., RESPONDENT-APPELLANT.

IN THE MATTER OF LLOYD S., PETITIONER-RESPONDENT,

V

REBECCA S., RESPONDENT-APPELLANT,
AND ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT.

ROSEMARY L. BAPST, BUFFALO, FOR PETITIONER-RESPONDENT.

CHERYL A. ALOI, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered August 9, 2016. The order, among other things, dismissed the petitions of Lloyd S. seeking custody of the subject children.

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

Memorandum: In appeal Nos. 2 and 3, respondent mother appeals from orders that, inter alia, terminated her parental rights with respect to the subject children on the ground of mental illness. We affirm.

Contrary to the mother's contention, we conclude that petitioner "met its burden of demonstrating by clear and convincing evidence that the mother is presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [the] child[ren]" (*Matter of Vincent E.D.G. [Rozzie M.G.]*, 81 AD3d 1285, 1285 [4th Dept 2011], *lv denied* 17 NY3d 703 [2011] [internal quotation marks omitted]; *see generally* Social Services Law § 384-b [4] [c]; *Matter of Joyce T.*, 65 NY2d 39, 48 [1985]). Indeed, at trial, petitioner presented evidence establishing that the mother

suffers from antisocial personality disorder, which is characterized by a lack of empathy, the failure to adhere to social norms, aggression, impulsiveness, and a failure to plan (*see Matter of Neveah G. [Jahkeya A.]*, 156 AD3d 1340, 1341 [4th Dept 2017], *lv denied* 31 NY3d 907 [2018]; *Matter of Ayden W. [John W.]*, 156 AD3d 1389, 1389 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]; *Matter of Summer SS. [Thomas SS.]*, 139 AD3d 1118, 1120-1121 [3d Dept 2016]), and that "the children would be in danger of being neglected if they were returned to her care at the present time or in the foreseeable future" (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* — NY3d — [Sept. 6, 2018]).

We also reject the mother's contention that Family Court abused its discretion by failing to hold a dispositional hearing. As the mother correctly concedes, "a separate dispositional hearing is not required following the determination that [a parent] is unable to care for [a] child because of mental illness" (*Matter of Jason B. [Gerald B.]*, 155 AD3d 1575, 1576 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018] [internal quotation marks omitted]; *see generally Joyce T.*, 65 NY2d at 49-50). Instead, the decision whether to conduct a dispositional hearing is left to the sound discretion of the court (*see generally Joyce T.*, 65 NY2d at 46; *Matter of Jimmy Jeremie R.*, 29 AD3d 913, 914 [2d Dept 2006]). The court's failure to conduct a separate dispositional hearing was not an abuse of discretion inasmuch as the evidence at trial established that, under the circumstances of this case, termination of the mother's parental rights and freeing the children for adoption was in the best interests of the children (*see generally Joyce T*, 65 NY2d at 46, 49-50; *Matter of Henry W.*, 31 AD3d 940, 943 [3d Dept 2006], *lv denied* 7 NY3d 711 [2006], *lv denied* 8 NY3d 816 [2007]).

Finally, we note that the mother does not raise any issues with respect to the court's order in appeal No. 1, and the mother has therefore abandoned any contentions with respect thereto (*see Matter of Jones v Jamieson*, 162 AD3d 1720, 1721 [4th Dept 2018]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We therefore dismiss the appeal from the order in appeal No. 1 (*see Matter of Trombley v Payne* [appeal No. 2], 144 AD3d 1551, 1552 [4th Dept 2016]; *Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011].

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1049.2

CAF 16-02108

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF AVA W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

REBECCA S., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT.

ROSEMARY L. BAPST, BUFFALO, FOR PETITIONER-RESPONDENT.

CHERYL A. ALOI, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 14, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

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

Same memorandum as in *Matter of Michael S.* ([appeal No. 1] — AD3d — [Oct. 5, 2018] [4th Dept 2018]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1049.3

CAF 16-02110

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF MICHAEL S., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

REBECCA S., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT.

ROSEMARY L. BAPST, BUFFALO, FOR PETITIONER-RESPONDENT.

CHERYL A. ALOI, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 14, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

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

Same memorandum as in *Matter of Michael S.* ([appeal No. 1] — AD3d — [Oct. 5, 2018] [4th Dept 2018]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1051

KA 16-01113

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH TETA, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP, NEW YORK CITY (HARRY M. JACOBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (James H. Cecile, A.J.), rendered October 27, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (three counts), criminal possession of a controlled substance in the third degree (three counts) and criminal possession of a controlled substance in the seventh degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and criminal possession of a controlled substance in the seventh degree (§ 220.03). We agree with defendant that his purported waiver of the right to appeal is invalid. "County Court failed to obtain a knowing and voluntary waiver of the right to appeal at the time of the plea" (*People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). Moreover, "the written waiver of the right to appeal that [defendant] signed as part of the 'treatment court contract,' [a day] after he pleaded guilty, does not constitute a valid waiver of the right to appeal" (*People v Brown*, 140 AD3d 1682, 1683 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016]).

Furthermore, we agree with defendant that the court failed to fulfill its obligation to advise him, at the time of the plea, that the sentences imposed upon his conviction of criminal sale of a

controlled substance in the third degree and criminal possession of a controlled substance in the third degree would include periods of postrelease supervision (*see People v Catu*, 4 NY3d 242, 244-245 [2005]). We therefore reverse the judgment and vacate defendant's plea (*see People v Cornell*, 16 NY3d 801, 802 [2011]). In light of our determination, we do not address defendant's remaining contention.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1052

KA 15-00006

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. THOMAS, JR., ALSO KNOWN AS WAYNE THOMAS,
DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 15, 2014. 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: 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]), arising from a vehicle stop during which the police discovered a firearm on the floorboard of the front passenger seat where defendant had been sitting. We reject defendant's contention that the conviction is not supported by legally sufficient evidence. Viewing the evidence in the light most favorable to the People, we conclude that "the evidence is legally sufficient to establish that defendant constructively possessed the firearm, i.e., that he exercised dominion and control over the area in which [the firearm was] found" (*People v Boyd*, 153 AD3d 1608, 1608 [4th Dept 2017], *lv denied* 30 NY3d 1103 [2018] [internal quotation marks omitted]). "Based on the location and position of the firearm, which was visible [on the floorboard] of the passenger seat . . . , and the fact that defendant was seated in that passenger seat, . . . 'the jury was . . . entitled to accept or reject the permissible inference that defendant possessed the weapon' " (*id.* at 1609). In addition, there was sufficient evidence that defendant's possession of the firearm was knowing (*see People v Muhammad*, 16 NY3d 184, 188 [2011]; *see generally People v Diaz*, 24 NY3d 1187, 1190 [2015]; *People v Lawrence*, 141 AD3d 1079, 1082 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]).

We also reject defendant's contention that the verdict is against

the weight of the evidence. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see People v Bleakley*, 69 NY2d 490, 495 [1987]; *Boyd*, 153 AD3d at 1610).

Defendant further contends that he was denied a fair trial by prosecutorial misconduct on summation. Even assuming, arguendo, that defendant's contention is preserved for our review with respect to all of the instances of alleged misconduct, we nevertheless conclude that it is without merit. Contrary to defendant's contention, "[t]he majority of the comments in question were within the broad bounds of rhetorical comment permissible during summations . . . , and they were either a fair response to defense counsel's summation or fair comment on the evidence . . . Even assuming, arguendo, that some of the prosecutor's comments were beyond those bounds, we conclude that they were not so egregious as to deprive defendant of a fair trial" (*People v McEathron*, 86 AD3d 915, 916 [4th Dept 2011], *lv denied* 19 NY3d 975 [2012] [internal quotation marks omitted]).

We also reject defendant's contention that Supreme Court's *Sandoval* ruling constituted an abuse of discretion (*see People v Sandoval*, 34 NY2d 371, 374 [1974]). Contrary to defendant's contention, the prior charges against him for forgery in the second degree and criminal impersonation in the second degree, and his conviction upon a guilty plea of attempted burglary in the second degree in satisfaction of those charges, " 'involved acts of dishonesty and thus were probative with respect to the issue of defendant's credibility' " (*People v Bynum*, 125 AD3d 1278, 1279 [4th Dept 2015], *lv denied* 26 NY3d 927 [2015]; *see People v Walker*, 83 NY2d 455, 461-462 [1994]; *People v Taylor*, 11 AD3d 930, 930-931 [4th Dept 2004], *lv denied* 4 NY3d 749 [2004]). Contrary to defendant's related contention, the other prior charge against him for leaving the scene of a personal injury incident without reporting, and his conviction upon a guilty plea of unlawfully fleeing a police officer in a motor vehicle in the third degree in satisfaction of that charge, were probative of defendant's credibility inasmuch as such acts showed the "willingness . . . [of defendant] to place the advancement of his individual self-interest ahead of principle or of the interests of society" (*Sandoval*, 34 NY2d at 377; *see People v Salsbery*, 78 AD3d 1624, 1626 [4th Dept 2010], *lv denied* 16 NY3d 836 [2011]). To the extent that defendant contends otherwise, we conclude that the court did not err in permitting inquiry into the prior charges satisfied by defendant's guilty pleas (*see People v Walker*, 66 AD3d 1331, 1332 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010]). " 'A dismissal in satisfaction of a plea is not an acquittal which would preclude a prosecutor from inquiring about the underlying acts of the crime[s] because it is not a dismissal on the merits' " (*id.*; *see People v Flowers*, 273 AD2d 938, 938-939 [4th Dept 2000], *lv denied* 95 NY2d 905 [2000]). We conclude on this record that defendant failed to meet his burden "of demonstrating that the prejudicial effect of the admission of evidence [of the prior convictions and charges] for impeachment

purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion" (*Sandoval*, 34 NY2d at 378).

Finally, the sentence is not unduly harsh or severe.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1054

KA 16-00677

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARYL RUCKER, DEFENDANT-APPELLANT.

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

DARYL RUCKER, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered January 5, 2016. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that County Court erred in refusing to suppress tangible evidence and statements obtained as a result of the warrantless entry of the police into his residence. We reject that contention. The police were justified in entering the residence based on exigent circumstances, i.e., the statements of defendant's fiancée that she needed help and that defendant, who was inside the residence, had her infant child (*see Georgia v Randolph*, 547 US 103, 118-119 [2006]; *People v Molnar*, 98 NY2d 328, 332-333 [2002]; *People v Parker*, 299 AD2d 859, 860 [4th Dept 2002]).

We reject defendant's further contention that the testimony of a police officer at the suppression hearing was tailored to nullify constitutional objections and was incredible as a matter of law (*see People v Knighton*, 144 AD3d 1594, 1594 [4th Dept 2016], *lv denied* 28 NY3d 1147 [2017]; *People v Holley*, 126 AD3d 1468, 1469 [4th Dept 2015], *lv denied* 27 NY3d 965 [2016]). "Nothing about the officer[']s] testimony was unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self-contradictory," and we therefore discern no basis in the record to disturb the suppression court's decision to credit the officer's testimony (*Knighton*, 144 AD3d at 1594-1595 [internal quotation marks omitted];

see People v Wilmet, 161 AD3d 1587, 1587-1588 [4th Dept 2018], *lv denied* — NY3d — [Aug. 9, 2018]; *People v Walters*, 52 AD3d 1273, 1274 [4th Dept 2008], *lv denied* 11 NY3d 795 [2008]).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1055

CAF 17-00298

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

IN THE MATTER OF DELANIE S. AND
ALEXANDRIA B.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JEREMY S. AND MICHELLE M.,
RESPONDENTS-APPELLANTS.

DAVID J. PAJAK, ALDEN, FOR RESPONDENTS-APPELLANTS.

WENDY G. PETERSON, OLEAN, FOR PETITIONER-RESPONDENT.

MARY S. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered November 10, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject children were neglected by respondents.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the petitions and amended petitions are dismissed.

Memorandum: Respondents Jeremy S. and Michelle M. appeal from an order of Family Court that, inter alia, adjudicated the subject children to be neglected. We agree with respondents that petitioner failed to establish by a preponderance of the evidence "that [the children's] physical, mental or emotional condition[s have] been impaired or [are] in imminent danger of becoming impaired" (*Matter of Anna F.*, 56 AD3d 1197, 1198 [4th Dept 2008]; *see* Family Ct Act § 1012 [f] [i]). Although the evidence adduced at the fact-finding hearing established that respondents used illicit drugs, the mere use of illicit drugs is insufficient to support a finding of neglect (*see generally Anna F.*, 56 AD3d at 1198), and we conclude that petitioner failed to establish the requisite causal nexus between respondents' illicit drug use and the alleged impairment or imminent danger of impairment of the children's physical, mental, or emotional condition (*see* § 1012 [f] [i]; *Anna F.*, 56 AD3d at 1198). Petitioner produced no evidence that respondents ever used drugs in the presence of the children (*cf. Matter of Hailey W.*, 42 AD3d 943, 944 [4th Dept 2007], *lv denied* 9 NY3d 812 [2007]). Moreover, although the younger child suffered two accidents, each of which resulted in a fractured wrist,

petitioner offered no evidence that respondents were using drugs or under the influence of drugs at the time the accidents occurred, respondents' innocent explanations for the accidents were uncontroverted at the fact-finding hearing, and there was no evidence of any impairment or imminent danger of impairment to the older child arising from respondents' alleged drug use. We further conclude that petitioner failed to establish a prima facie case of neglect by submitting evidence that respondents used drugs "to the extent that [such use] has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality" (§ 1046 [a] [iii]). Absent from the record was any evidence as to the duration or frequency of respondents' drug use (*see Anna F.*, 56 AD3d at 1198; *Matter of Anastasia G.*, 52 AD3d 830, 832 [2d Dept 2008]). We therefore reverse the order and dismiss the petitions and amended petitions.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1056

CAF 16-01852

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

IN THE MATTER OF DARCY W. NOBLE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MABELENE E. GIGON, RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT J. GALLAMORE, OSWEGO, FOR PETITIONER-RESPONDENT.

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered July 12, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner primary physical custody of the subject children.

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

Memorandum: Petitioner father commenced this proceeding pursuant to Family Court Act article 6 seeking, inter alia, to modify a prior custody order by granting him sole custody of the subject children and reducing the visitation afforded to respondent mother. The mother appeals from an order that, inter alia, reduced her visitation and awarded the father primary physical custody of the subject children.

Contrary to the mother's contention, it is well settled that "the continued deterioration of the parties' relationship is a significant change in circumstances justifying a change in custody" and visitation (*Matter of Gaudette v Gaudette*, 262 AD2d 804, 805 [3d Dept 1999], *lv denied* 94 NY2d 790 [1999]; *see Werner v Kenney*, 142 AD3d 1351, 1351 [4th Dept 2016]), and we agree with Family Court's determination that such a further deterioration occurred here after the entry of the prior order. Contrary to the mother's next contention, there is a sound and substantial basis in the record to support the court's determination that it was in the children's best interests to award primary physical custody to the father and to reduce the mother's visitation (*see Matter of Brewer v Soles*, 111 AD3d 1403, 1404 [4th Dept 2013]; *see generally Matter of Macri v Brown*, 133 AD3d 1333, 1334 [4th Dept 2015]). In determining whether modification of a custody arrangement is in the children's best interests, a court must consider

all the "factors that could impact the best interests of the child[ren], including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of each parent to provide for the child[ren]'s emotional and intellectual development and the wishes of the child[ren]" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]). Furthermore, "a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Marino*, 90 AD3d at 1695 [internal quotation marks omitted]). Here, upon reviewing the relevant factors, we perceive no basis upon which to set aside the court's award of primary physical custody of the children to the father or its reduction in the general award of parenting time to the mother. We have considered the mother's remaining contention and conclude that it does not require a different result.

Finally, we note that the Attorney for the Children did not appeal from the order and thus, to the extent that her brief raises contentions not raised by the mother, those contentions have not been considered (*see Matter of Jayden B. [Erica R.]*, 91 AD3d 1344, 1345 [4th Dept 2012]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1057

CAF 17-00125

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

IN THE MATTER OF BRIDGETTE WHITE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARK STONE, RESPONDENT-RESPONDENT.

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

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

SARA E. ROOK, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered July 26, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied the petition for modification of custody.

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

Memorandum: Petitioner mother appeals from an order that, among other things, denied her petition seeking modification of a judgment of divorce, which incorporated but did not merge the parties' separation agreement providing for joint legal custody of the subject child with primary physical custody to respondent father and visitation to the mother. "Where an order of custody and visitation is entered on stipulation, a court cannot modify that order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the children" (*Matter of Hight v Hight*, 19 AD3d 1159, 1160 [4th Dept 2005] [internal quotation marks omitted]; *see Matter of Maracle v Deschamps*, 124 AD3d 1392, 1392 [4th Dept 2015]). Although we agree with the mother that Family Court erred in determining that she failed to establish that there was a sufficient change in circumstances after the time of the stipulation (*see Matter of Frisbie v Stone*, 118 AD3d 1471, 1472 [4th Dept 2014]; *Matter of Knight v Knight*, 92 AD3d 1090, 1092 [3d Dept 2012]), we conclude that the court's further determination that it was in the child's best interests to remain in the primary physical custody of the father is supported by a sound and substantial basis in the record (*see Melissa C.D. v Rene I.D.*, 117 AD3d 407, 408-411 [1st Dept 2014];

Matter of Schick v Schick, 72 AD3d 1100, 1100-1101 [2d Dept 2010]; *Matter of Charpentier v Rossman*, 264 AD2d 393, 393 [2d Dept 1999]).

We reject the mother's contention that the court abused its discretion in refusing to find the father in civil contempt of court for disobeying prior court orders inasmuch as the mother failed to establish by clear and convincing evidence the elements necessary to support such a finding (*see generally El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]).

Even assuming, arguendo, that the mother preserved for our review her further contention that the court erred in refusing to recuse itself, we conclude that her contention lacks merit. "[T]he record establishes that the court treated the parties fairly, made appropriate evidentiary rulings, and did not have a predetermined outcome of the case in mind during the proceedings" (*Matter of Biancoviso v Barona*, 150 AD3d 990, 991 [2d Dept 2017]; *see Matter of Roseman v Sierant*, 142 AD3d 1323, 1325 [4th Dept 2016]).

Finally, under the circumstances of this case, we reject the mother's contention that the court abused its discretion in conducting an in camera interview with the child before commencement of the fact-finding hearing (*see Matter of Christine TT. v Dino UU.*, 143 AD3d 1065, 1068 [3d Dept 2016]; *see generally Matter of Lincoln v Lincoln*, 24 NY2d 270, 272 [1969]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1059

CAF 17-01440

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

IN THE MATTER OF JOSE M. VALENTIN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEYDA R. MENDEZ, RESPONDENT-RESPONDENT.

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

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

CHRISTINE F. REDFIELD, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Thomas Polito, R.), entered July 10, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent sole custody of the subject child and directed that petitioner's visitation with the child be supervised.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: Petitioner father appeals from an order modifying the parties' existing custody arrangement by awarding sole legal custody of the subject child to respondent mother and directing that the father's visitation with the child be supervised.

We reject the father's contention that Family Court erred in permitting the testimony of a nurse with respect to the cause of the child's injuries. "It is well established that [t]he determination whether to permit expert testimony is a mixed question of law and fact addressed primarily to the discretion of the trial court" (*Likos v Niagara Frontier Tr. Metro Sys., Inc.*, 149 AD3d 1474, 1475 [4th Dept 2017] [internal quotation marks omitted]). Here, the nurse testified that she was licensed as a registered nurse and was certified as a sexual assault nurse examiner. She further testified that she had performed between 30 and 40 sexual assault examinations on children since receiving her certification and had also been training other nurses to be sexual assault nurse examiners. Consequently, we conclude that the court did not abuse its discretion in determining that the nurse was qualified to render a medical opinion (*see Matter of Deseante L.R. [Femi R.]*, 159 AD3d 1534, 1535 [4th Dept 2018];

People v Johnson, 153 AD3d 1606, 1606 [4th Dept 2017], *lv denied* 30 NY3d 1020 [2017]; *Matter of April WW. [Kimberly WW.]*, 133 AD3d 1113, 1116 [3d Dept 2015]). To the extent that the father contends that the methods used to identify the causes of the child's injuries are not generally accepted within the scientific community, we conclude that his contention is not preserved for our review (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

With respect to the court's award of sole legal custody to the mother, we conclude that the court failed to set forth " 'those facts upon which the rights and liabilities of the parties depend' " (*Matter of Russell v Banfield*, 12 AD3d 1081, 1081 [4th Dept 2004]), specifically its "analysis of those factors that traditionally affect the best interests of a child" (*Matter of Graci v Graci*, 187 AD2d 970, 971 [4th Dept 1992]). "[E]ffective appellate review . . . requires that appropriate factual findings be made by the trial court—the court best able to measure the credibility of the witnesses" (*Matter of Langdon v Langdon*, 137 AD3d 1580, 1581 [4th Dept 2016] [internal quotation marks omitted]; *see Russell*, 12 AD3d at 1081; *Graci*, 187 AD2d at 971-972). We therefore hold the case, reserve decision and remit the matter to Family Court to set forth its factual findings.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1060

CAF 16-02125

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

IN THE MATTER OF NORAH T. AND NORMAN T.

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

NORMAN T., RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR PETITIONER-RESPONDENT.

ARDETH L. HOUDE, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered November 7, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing the petition insofar as it alleges that respondent permanently neglected the subject children and as modified the order is affirmed without costs.

Memorandum: Petitioner commenced this proceeding seeking to terminate the parental rights of respondent father with respect to the subject children on the grounds of mental illness and permanent neglect. Following a fact-finding hearing, Family Court found both that the father was mentally ill and that he had permanently neglected the subject children by failing to plan for their future, although physically and financially able to do so. Based on that determination, the court, inter alia, terminated the father's parental rights. The father appeals.

Contrary to the father's contention, we conclude that petitioner established "by clear and convincing evidence that [the father], by reason of mental illness, is presently and for the foreseeable future unable to provide proper and adequate care for [his] children" (*Matter of Jarred R.*, 236 AD2d 888, 888 [4th Dept 1997]; *see* Social Services Law § 384-b [3] [g] [i]; [4] [c]). Petitioner presented the testimony of two psychologists who examined the father and testified that he suffered from multiple mental illnesses, including antisocial personality disorder and narcissistic personality disorder. One psychologist testified that, as a result of the father's mental

illness, the children would be placed in immediate jeopardy of neglect or harm if they were returned to the father's care (*see Matter of Jason B. [Gerald B.]*, 155 AD3d 1575, 1575 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]). We conclude that, "[g]iving due deference to [the court's] factual determinations, based upon its observations of witnesses and review of exhibits, coupled with the absence of contradictory expert evidence, petitioner's proof was sufficient to sustain the finding made" (*Matter of Ashley L.*, 22 AD3d 915, 916 [3d Dept 2005]).

The father further contends that the court erred in admitting in evidence the testimony and reports of one of the examining psychologists inasmuch as that psychologist relied on inadmissible hearsay. The father failed to object to the admission of the evidence on that basis and thus his contention is unpreserved for our review (*see Matter of Isobella A. [Anna W.],* 136 AD3d 1317, 1319 [4th Dept 2016]). The father also contends that certain reports generated by the Madison County Department of Social Services were improperly admitted in evidence. Although that contention is preserved for our review, we conclude that, even assuming, arguendo, that the court improperly admitted in evidence portions of the reports that contained hearsay, the error is harmless because " 'the result reached herein would have been the same even had such record[s], or portions thereof, been excluded' " (*Matter of Alyshia M.R.*, 53 AD3d 1060, 1061 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]; *see Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]).

Given the court's finding that the father was incapable of caring for the children based on his mental illness, however, the court erred in terminating his parental rights on the additional ground of permanent neglect. The father "could not be found to be mentally ill to a degree warranting termination of his parental rights and at the same time be found to have failed to plan for the future of the children although physically and financially able to do so" (*Matter of Kyle K.*, 49 AD3d 1333, 1334 [4th Dept 2008], *lv denied* 10 NY3d 715 [2008]). We therefore modify the order by dismissing the petition insofar as it alleges that the father permanently neglected the subject children.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

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

1067

CA 18-00332

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

PIONEER CENTRAL SCHOOL DISTRICT AND PIONEER MIDDLE SCHOOL, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PREFERRED MUTUAL INSURANCE COMPANY, J&K KLEANERZ OF WNY, LLC, AND J AND P KLEANERZ OF WNY, INC., DEFENDANTS-APPELLANTS.

SCHNITTER CICCARELLI MILLS PLLC, WILLIAMSVILLE (MARY C. FITZGERALD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (MEGAN K. THOMAS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Cattaragus County (Jeremiah J. Moriarty, III, J.), entered May 8, 2017. The judgment, among other things, granted plaintiffs' motion for summary judgment and denied defendants' cross motion for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the declaration is vacated, the cross motion is granted, and judgment is granted in favor of defendants as follows:

> It is ADJUDGED AND DECLARED that defendant Preferred Mutual Insurance Company is not obligated to defend or indemnify plaintiffs in the underlying action.

Memorandum: Plaintiffs Pioneer Central School District and Pioneer Middle School (collectively, Pioneer) commenced this action against defendant Preferred Mutual Insurance Company (Preferred Mutual) and defendants J&K Kleanerz of WNY, LLC, and J and P Kleanerz of WNY, Inc. (collectively, Kleanerz) seeking a declaration that Preferred Mutual is obligated to defend and indemnify Pioneer in an underlying personal injury action.

Kleanerz provided janitorial services to Pioneer pursuant to a contract containing an indemnification provision through which Kleanerz agreed to indemnify Pioneer in actions for bodily injury "arising or resulting from any act, omission, neglect or misconduct of [Kleanerz]." Kleanerz was insured by Preferred Mutual under a policy

containing an additional insured endorsement listing Pioneer as an additional insured for bodily injury "caused, in whole or in part, by" the "acts or omissions" of Kleanerz or of those acting on Kleanerz's behalf.

Dawn Ayers, a Kleanerz employee, commenced the underlying personal injury action against Pioneer, alleging that she was injured when she slipped on snow or ice in the parking lot of Pioneer Middle School after completing her shift. Pioneer filed a third-party summons and complaint against Kleanerz and thereafter commenced this action against defendants, seeking a declaration that Preferred Mutual is obligated to indemnify Pioneer either as an additional insured under Kleanerz's policy with Preferred Mutual or pursuant to the indemnification provision in the janitorial services contract between Pioneer and Kleanerz. Pioneer moved for summary judgment on its complaint in this declaratory judgment action. Defendants cross-moved for summary judgment declaring that Preferred Mutual had no obligation to defend or indemnify Pioneer, contending that Pioneer does not qualify as an additional insured under the policy and that the indemnification provision in the janitorial services contract did not create coverage for Pioneer. Supreme Court granted Pioneer's motion and denied defendants' cross motion. Defendants appeal. We reverse the judgment, deny Pioneer's motion, and grant defendants' cross motion.

We conclude that Pioneer is not an additional insured under the policy inasmuch as Ayers's injuries were not proximately caused by Kleanerz. The policy's additional insured endorsement provides that the injury must have been "caused, in whole or in part, by" Kleanerz's conduct, and thus it requires that the insured must have been a proximate cause of the injury, not merely a "but for" cause (*see Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 321 [2017]). Here, it is undisputed that Kleanerz was not responsible for clearing ice and snow from the parking lot and that Ayers's fall resulted from her slipping on the ice or snow. Although Pioneer contends that Kleanerz caused the accident by instructing Ayers to exit Pioneer Middle School through a door located near the area where Ayers subsequently slipped, Kleanerz's instructions to Ayers "merely furnished the occasion for the injury" by "fortuitously plac[ing Ayers] in a location or position in which . . . [an alleged] separate instance of negligence acted independently upon [her] to produce harm" (*Hain v Jamison*, 28 NY3d 524, 531, 532 [2016]; *see Ventricelli v Kinney Sys. Rent A Car*, 45 NY2d 950, 952 [1978], *mot to amend remittitur granted* 46 NY2d 770 [1978]; *Duggal v St. Regis Hotel*, 264 AD2d 805, 805 [2d Dept 1999]), and were not a cause of the accident triggering the additional insured clause of the policy.

We further conclude that the indemnification provision in the janitorial services contract did not create coverage under the insurance policy. The insurance policy covers liability assumed in an "insured contract" between Kleanerz and a third party. An "insured contract" is defined in the policy as "[t]hat part of any other contract or agreement pertaining to [Kleanerz's] business . . . under which [Kleanerz] assume[s] the tort liability of another party to pay

for 'bodily injury' . . . to a third person or organization, provided the 'bodily injury' . . . is caused, in whole or in part, by [Kleanerz] or by those acting on [Kleanerz's] behalf." Here, the injuries were not "caused, in whole or in part, by" Kleanerz's acts, and thus the indemnification provision of the janitorial services contract does not fall within the "insured contract" coverage provided by the insurance policy.

Because neither the additional insured clause in the insurance policy nor the indemnification provision in the janitorial services contract triggered coverage by Preferred Mutual, defendants are entitled to summary judgment declaring that Preferred Mutual has no duty to indemnify Pioneer "and consequently no duty to defend [Pioneer] in the pending [Ayers] action" (*Allstate Ins. Co. v Zuk,* 78 NY2d 41, 45 [1991]; *see Total Concept Carpentry, Inc. v Tower Ins. Co. of N.Y.*, 95 AD3d 411, 411 [1st Dept 2012]). Moreover, because the policy does not provide coverage to Pioneer, Preferred Mutual was not required to timely disclaim coverage (*see Progressive Cas. Ins. Co. v HARCO Natl. Ins. Co.*, 70 AD3d 1495, 1497 [4th Dept 2010]).

Defendants failed to preserve for our review their contention that the court erred in deciding the motions before discovery was complete.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court