SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 9, 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

725

CA 17-02021

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

IN THE MATTER OF NATIONAL FUEL GAS SUPPLY CORPORATION, PETITIONER-RESPONDENT,

V OPINION AND ORDER

JOSEPH A. SCHUECKLER, THERESA F. SCHUECKLER, RESPONDENTS-APPELLANTS, ET AL., RESPONDENTS.

LAW OFFICE OF GARY A. ABRAHAM, GREAT VALLEY (GARY A. ABRAHAM OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG A. LESLIE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered June 28, 2017. The order, inter alia, granted the petition for the acquisition of easements.

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

Opinion by NEMOYER, J.:

Petitioner National Fuel Gas Supply Corporation wants to build an interstate gas pipeline that would run, in part, across the land of Joseph A. Schueckler and Theresa F. Schueckler (respondents). The State of New York, however, has blocked the entire pipeline project by denying petitioner the necessary environmental permits. Notwithstanding the barrier posed by the State's regulatory action, petitioner still seeks to acquire easements over respondents' land by eminent domain. This appeal therefore presents a novel question of condemnation law: can a corporation involuntarily expropriate privately-owned land when the underlying public project cannot be lawfully constructed? We answer that question firmly in the negative.

I

This case lies at the intersection of federal law governing interstate pipeline construction and state law governing eminent domain procedure. In order to properly contextualize the underlying facts and the parties' arguments, we will first sketch out the applicable statutory framework.

A. Federal Interstate Pipeline Construction Law

The regulatory process for constructing a natural gas pipeline across state lines is spelled out in the federal Natural Gas Act (NGA) (15 USC § 717 *et seq.*). Under the NGA, a company wishing to construct such a pipeline must apply for a "certificate of public convenience and necessity" (certificate) from the Federal Energy Regulatory Commission (FERC) (15 USC § 717f [c], [d]). Following the necessary review and public hearing, "the application shall be decided in accordance with the procedure provided in subsection (e) of [section 717f] and such certificate shall be issued or denied accordingly" (§ 717f [c] [1] [B]).

Subsection (e) of section 717f, in turn, says as follows:

> "a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the . . . construction . . . covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the NGA] and the requirements, rules, and regulations of the [FERC] thereunder, and that the proposed . . . construction . . . , to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The [FERC] shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

The import of a valid and effective certificate cannot be overstated in this context, for the NGA explicitly provides that "[n]o natural-gas company . . . shall . . . undertake the construction or extension of any [pipeline] facilities . . . unless there is *in force* . . . a certificate of public convenience and necessity issued by the [FERC] authorizing such acts" (15 USC § 717f [c] [1] [A] [emphasis added]).

In exercising its power conferred by section 717f (e) to condition a certificate "[i]n conjunction with the . . . review of a natural gas project application, [the FERC] must ensure that the project complies with the requirements of all relevant federal laws, including . . . the Clean Water Act (CWA) [33 USC § 1251 *et seq.*]" (*Islander E. Pipeline Co., LLC v Connecticut Dept. of Envtl. Protection*, 482 F3d 79, 84 [2d Cir 2006]). Insofar as relevant here, the CWA obligates "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters" – such as the construction of an interstate natural gas pipeline – to obtain a water quality certification (WQC) from each affected State (33 USC § 1341 [a] [1]). If a WQC is granted, the affected State certifies that the pipeline will be built and operated

in a manner that complies with the CWA's "effluent limitations and other pollutant control requirements, including state-administered water quality standards" (*Delaware Riverkeeper Network v Federal Energy Regulatory Commn.*, 857 F3d 388, 393 [DC Cir 2017]).

Critically, however, the CWA provides that "[n]o license or permit shall be granted if [a WQC] has been denied by the State" (33 USC § 1341 [a] [1]). It therefore follows that, given the requirements of both the NGA (15 USC § 717f [e]) and the CWA (33 USC § 1341 [a] [1]), the FERC must condition the construction of an interstate natural gas pipeline upon the issuance of a WQC by each affected State (*see Delaware Riverkeeper Network*, 857 F3d at 397-399; *see generally Islander E. Pipeline Co., LLC*, 482 F3d at 84). Indeed, the DC Circuit has strongly implied that the FERC's failure to impose such a condition would effectively render the certificate void (*see Delaware Riverkeeper Network*, 857 F3d at 399).

B. State Eminent Domain Law

When a "corporation is unable to agree for the purchase of any real property required for the [construction of a pipeline], it shall have the right to acquire title thereto by condemnation" (Transportation Corporations Law § 83; *see generally Iroquois Gas Corp. v Jurek*, 30 AD2d 83, 84-89 [4th Dept 1968]).[1] A "two-step process" for any such condemnation is set out in the Eminent Domain Procedure Law (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 543 [2006]). "First, under EDPL article 2, the condemnor must make a determination to condemn the property either by using the hearing and findings procedures of EDPL 203 and 204 or by following an alternative procedure permitted by EDPL 206" (*id.*). "Second, pursuant to EDPL article 4, the condemnor must seek the transfer of title to the property by commencing a judicial proceeding known as a vesting proceeding" (*id.*). When a condemnor invokes an alternative procedure authorized by EDPL 206 (i.e., an exemption from the standard condemnation procedure of EDPL 203 and 204), the

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[1] Contrary to the dissent's intimations, federal law confers no broader right to eminent domain than does state law. In fact, the relevant federal eminent domain statute explicitly provides that "any action or proceeding for [eminent domain to build a pipeline] in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated" (15 USC § 717f [h]). "[State] law, therefore, controls the issues in this case" regarding petitioner's entitlement to eminent domain (*Tennessee Gas Pipeline Co. v 104 Acres of Land More or Less, in Providence County of State of R.I.*, 780 F Supp 82, 85 [D RI 1991] [applying Rhode Island law in federal condemnation proceeding under section 717f (h)], citing, inter alia, *Mississippi River Transmission Corp. v Tabor*, 757 F2d 662, 665 n 3 [5th Cir 1985] [applying Louisiana law in federal condemnation proceeding under section 717f (h)]).

condemnee may obtain judicial review of the condemnor's entitlement to an EDPL 206 exemption by raising the issue in its answer to the condemnor's EDPL article 4 vesting petition (*see Matter of Rockland County Sewer Dist. No. 1 v J. & J. Dodge*, 213 AD2d 409, 410 [2d Dept 1995]; *Matter of Town of Coxsackie v Dernier*, 105 AD2d 966, 966-967 [3d Dept 1984]; *see e.g. Matter of Eagle Cr. Land Resources, LLC v Woodstone Lake Dev., LLC*, 108 AD3d 71, 74-78 [3d Dept 2013]; *Matter of Sanitation Garage Brooklyn Dists. 3 & 3A*, 32 AD3d 1031, 1034-1035 [2d Dept 2006], *lv denied* 7 NY3d 921 [2006]).

"The main purpose of article 2 of the EDPL" – the first step of the eminent domain process – "is to ensure that an appropriate public purpose underlies any condemnation" (*City of New York*, 6 NY3d at 546; *see* EDPL 204 [B] [enumerating factors relevant to the public purpose inquiry]). The alternative procedures permitted by EDPL 206 are not designed to obviate the condemnor's obligation to demonstrate that the condemned land will be put to public use. Nor could they, for the existence of a "public use" for condemned property is indispensable to any constitutional exercise of the eminent domain power (NY Const, art I, § 7 [a]; *see generally Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 546-552 [2009, Smith, J., dissenting] [discussing background and history of the "public use" requirement in the State Constitution's eminent domain clause]). Rather, the alternative procedures permitted by EDPL 206 simply allow the condemnor to make its public purpose showing in a different forum.

The alternative procedure relevant to this case is set forth in EDPL 206 (A). Under that provision, a condemnor is deemed "exempt from compliance from the provisions of [EDPL article 2]" when "pursuant to . . . federal . . . law or regulation it considers and submits factors similar to those enumerated in [EDPL 204 (B)] to a . . . federal agency, board or commission . . . and obtains a license, a permit, a certificate of public convenience or necessity or other similar approval from such agency, board or commission" (EDPL 206 [A]). By virtue of this exemption, the condemnor can bypass the procedural requirements of EDPL article 2 – including the paramount obligation to show a public purpose for the condemnation under EDPL 204 (B) – by obtaining a certificate of public necessity from a federal commission that weighed the risks and benefits of a project and concluded that it served a public purpose. EDPL 206 (A), in short, protects the condemnor from duplicative public purpose inquiries; it does not eliminate the condemnor's obligation to show a public purpose in the first place.

II

With the statutory background in mind, we turn now to the specifics of this case.

In February 2017, the FERC granted petitioner's application for a certificate of public convenience and necessity to construct and operate a 97-mile natural gas pipeline from Pennsylvania into western New York. The pipeline's proposed route travels directly across respondents' land in the Town of Clarksville, Allegany County. Within

the voluminous certificate, the FERC found that petitioner's "proposed [pipeline] project is consistent with the Certificate Policy Statement," i.e., the public interest. "Based on this finding and the environmental review for the proposed project," the FERC further found "that the public convenience and necessity require approval and certification of the project."

The certificate, however, was not unconditional. Throughout the certificate, the FERC emphasized that the authorization conferred thereby was "subject to the conditions described [t]herein," and that the finding of public necessity was "subject to the environmental and other conditions in this order." Insofar as relevant here, the "certificate . . . authorizing [petitioner] to construct and operate the [pipeline]" was "conditioned on [petitioner's] compliance with the environmental conditions in Appendix B."

For its part, Appendix B required petitioner, before beginning construction, to "file . . . documentation that it has received all applicable authorizations required under federal law." One of the "authorizations required under federal law" is, of course, a WQC from any affected State. In short, as required by federal law (*see* 33 USC § 1341 [a] [1]), the FERC's authorization to build the pipeline was explicitly conditioned on, inter alia, petitioner's acquisition of a WQC from the State of New York. Petitioner filed the necessary WQC application accordingly.

In March 2017, while its WQC application was still pending in Albany, petitioner commenced the instant vesting proceeding pursuant to EDPL article 4 to acquire, by eminent domain, the easements over respondents' land necessary to construct and operate the pipeline. The petition alleges that the "public use, benefit, or purpose for which the Easements are required is to construct, install, own, operate, and maintain [the pipeline]." According to petitioner, it was "exempt from the requirements of Article 2 of the [EDPL] because [it] previously applied to the [FERC] for a Certificate of Public Convenience and Necessity for the [pipeline] Project, . . . and was granted such a certificate." Specifically, petitioner explained, "the fact that FERC granted the FERC Certificate fulfills the requirements of EDPL 206 (A), and exempts [petitioner] from the hearing requirements of EDPL Article 2." Accordingly, petitioner asked Supreme Court to authorize the involuntary taking of the necessary easements.

Shortly after petitioner commenced the vesting proceeding, however, the New York State Department of Environmental Conservation (DEC) denied petitioner's application for a WQC. The WQC application, held the DEC, "fails to demonstrate compliance with New York State water quality standards." Petitioner has taken various steps to challenge the WQC denial, including the filing of a petition for judicial review in the Second Circuit pursuant to 15 USC § 717r (d). It appears that those challenges have not yet been finally resolved. It is undisputed, however, that if the WQC denial is ultimately upheld, the pipeline cannot be built (*see* § 717f [c] [1] [A]; 33 USC

§ 1341 [a] [1]).[2]

Respondents answered the vesting petition several days after the DEC's ruling. Insofar as relevant here, respondents denied that petitioner's FERC certificate was currently effective or that such certificate satisfied "the requirements for an exemption under . . . EDPL 206." In respondents' third affirmative defense, which was structured to "further explain" their challenge to petitioner's reliance on the section 206 (A) exemption, respondents argued that petitioner's FERC certificate "has been invalidated by [DEC's] denial

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[2] After this appeal was orally argued, the FERC apparently issued a new ruling that calls into question the timeliness of the State's WQC denial. That ruling is not final, however, and it is subject to administrative rehearing as well as to judicial review in either the Second Circuit or the DC Circuit (*see* 15 USC § 717r [a], [b]). Given its non-finality and the consequent "uncertainty as to [federal] law on this point," we decline to take judicial notice of the new FERC ruling (*Babcock v Jackson*, 17 AD2d 694, 701 [4th Dept 1962, Halpern, J., dissenting], *revd* 12 NY2d 473 [1963]; *see Majestic Co. v Wender*, 24 Misc 2d 1018, 1018-1019 [Sup Ct, Nassau County 1960, Meyer, J.]; *see also Matter of Bach*, 81 Misc 2d 479, 486-487 [Sur Ct, Dutchess County 1975], *affd* 53 AD2d 612 [2d Dept 1976]; *Berger v Dynamic Imports*, 51 Misc 2d 988, 989 [Civ Ct, NY County 1966]; *see generally* CPLR 4511; *Matter of Warren v Miller*, 132 AD3d 1352, 1354 [4th Dept 2015]).

The dissent faults us for disregarding the new FERC ruling because it is "no less final than the DEC's denial of the WQC." But the dissent overlooks a crucial distinction between the WQC denial and the new FERC ruling: the former is part of the appellate record and was before Supreme Court at the time of its determination; the latter is dehors the appellate record and did not exist when Supreme Court rendered its determination. It thus makes perfect sense to consider the WQC denial, but not the new FERC ruling, when reviewing the particular determination now before us. After all, our function is to decide whether Supreme Court properly granted the instant petition *based on the record before it*, not whether its determination could or should have been different had it been made under different circumstances with a different record. The dissent's ad hoc approach to intervening developments on appeal would effect a marked departure from longstanding norms of orderly procedure (*see generally Rives v Bartlett*, 215 NY 33, 39 [1915], *rearg denied* 215 NY 697 [1915]). Those norms carry particular weight here, where petitioner filed a vesting petition before it even knew whether it could actually build the underlying pipeline project. Flouting norms of orderly procedure by giving effect to the new FERC ruling in this appeal would effectively reward petitioner for its premature filing, and that we decline to do. If petitioner wants to argue that the new FERC ruling has revived the pipeline project, it is free to do so – in a new EDPL article 4 petition in Supreme Court.

of a [WQC]." "Because the [WQC] has been denied, FERC's . . . Certificate must be deemed revoked by action of law," respondents continued. In short, respondents argued that petitioner was not entitled to a section 206 exemption from the general EDPL article 2 eminent domain framework because, following the DEC's denial of a WQC, petitioner no longer held a valid and operative FERC certificate.

Supreme Court ultimately granted the petition in its entirety and authorized the acquisition of the easements necessary for the construction and operation of the pipeline. In its written decision, the court first held that petitioner "has shown that FERC has issued it an order granting a certificate of public convenience for its pipeline project, exempting it from the requirements of Article 2 of the EDPL." Supreme Court also found that respondents' third affirmative defense was "without merit" because "the [WQC] condition applied to the construction of the pipeline and not to the initiation of eminent domain proceedings." The court did not elaborate on that conclusion, nor did it explain how petitioner's legal entitlement to initiate condemnation proceedings could be divorced from petitioner's legal entitlement to build the pipeline that, by its own characterization, constituted the very "public use, benefit, or purpose" for which respondents' land was ostensibly needed.

Respondents appeal, and we now reverse.

III

The main thrust of respondents' appellate arguments can be distilled to a single central point: petitioner is not exempt from EDPL article 2 because, following the State's WQC denial, petitioner no longer holds a qualifying federal certificate for purposes of the EDPL 206 (A) exemption. As respondents put it, petitioner no longer has a valid and operative "FERC Certificate that exempts the company from the burden of demonstrating [the] project's public purpose" under article 2. We agree.

Petitioner obviously did not conduct a hearing under EDPL 203 or make findings pursuant to EDPL 204. Petitioner therefore looks – as it must – to the alternative procedure permitted by EDPL 206 (A). That reliance, however, is misplaced. Although it is true that a federal commission issued a certificate of public necessity approving petitioner's pipeline project, the certificate nevertheless authorized construction of the pipeline "subject to" various conditions, including, as discussed above, the State's issuance of a WQC. " '[S]ubject to' . . . language means what is says: no vested rights are created . . . prior to" the occurrence of the condition to which the instrument is subject (*Moran v Erk*, 11 NY3d 452, 456 [2008]). Thus, when the State denied the very permit upon which petitioner's authority to construct the pipeline was conditioned, petitioner – by definition – lost its contingent right to construct the public project that undergirds its demand for eminent domain in this proceeding (*see Islander E. Pipeline Co., LLC*, 482 F3d at 91 [recognizing that Connecticut's WQC denial "continues to prevent Islander East from proceeding with its FERC-approved natural gas pipeline project"]).

Accordingly, as a result of the State's WQC denial, petitioner does not currently hold a qualifying federal permit for purposes of EDPL 206 (A), i.e., a federal permit that (at a minimum) authorizes construction of the public project for which the condemnor seeks to exercise its power of eminent domain (*compare e.g. Matter of County of Tompkins [Perkins]*, 237 AD2d 667, 668-669 [3d Dept 1997]). Without a qualifying federal permit under EDPL 206 (A), petitioner is not entitled to bypass the standard hearing and findings procedure of EDPL article 2. And because there is no dispute that petitioner did not comply with the standard procedure set forth in EDPL article 2, it has no right to proceed directly to an EDPL article 4 vesting proceeding. The article 4 vesting petition must therefore be dismissed.

Our conclusion is consistent with the WQC's key role in the federal regulatory scheme. As the United States Supreme Court wrote in *S.D. Warren Co. v Maine Bd. of Envtl. Protection*, the CWA "recast pre-existing law and was meant to continue the authority of the State to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State" (547 US 370, 380 [2006] [internal quotation marks, ellipsis, and brackets omitted]). Consequently, as the DC Circuit elaborated, the CWA "gives a primary role to states to block [construction] projects by imposing and enforcing water quality standards that are more stringent than applicable federal standards. . . . FERC's role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state's power to block the project would be meaningless" (*City of Tacoma, Wash. v FERC*, 460 F3d 53, 67 [DC Cir 2006] [internal quotation marks omitted]). So too here; if petitioner is allowed to continue its pursuit of eminent domain in furtherance of a project that has been lawfully blocked by the State, then "the state's power to block the project would be meaningless" (*id.*).

Petitioner's contrary arguments are meritless. Initially, petitioner argues throughout its brief that the WQC requirement is only a condition precedent for the construction of the pipeline, not a condition precedent of the certificate itself. And because the certificate itself does not condition petitioner's eminent domain power on the issuance of a WQC, petitioner continues, respondents cannot defend this vesting proceeding in reliance on the State's denial of the WQC. But this entire line of argument is a non sequitur. Of course the pipeline's *construction* is conditioned on the issuance of a WQC – that is the entire point of the certificate. The certificate has no purpose except to authorize construction of the pipeline and to set the conditions precedent for such construction, and petitioner's effort to erect a distinction between a condition precedent of the certificate and a condition precedent for construction is a semantical game with no relevance to its entitlement to an EDPL 206 (A) exemption, not to mention the property rights of respondents.

Petitioner's further attempt to cleave a distinction between a condition of the certificate's authorization of construction and a condition of its purported authorization of eminent domain is also wholly unavailing. The certificate itself is not the source of

petitioner's authority to condemn, and it thus can neither authorize nor prohibit the acquisition of property by eminent domain. Rather, the lodestar of petitioner's eminent domain power is the *public project* authorized by the certificate (*see* Transportation Corporations Law § 83). The certificate, in other words, simply authorizes the public project, and the power of eminent domain stands or falls with that project as a necessary ancillary to its implementation (*see generally* NY Const, art 1, § 7 [a]). Thus, when the public project cannot be legally completed, any eminent domain power in connection with that project is necessarily extinguished.[3] To say otherwise would effectively give a condemnor the power to condemn land in the absence of a public project, and that would violate the plain text of the State Constitution.

Finally, the fact that respondents might be adequately compensated for their forced sale is entirely beside the point. As the owners of the land at issue, it is up to respondents – and respondents alone – whether or not to convey an interest in their property to petitioner. In a constitutional order such as ours, jealous as it is of the right to own property and do with it as one pleases, only a viable public project can force respondents to surrender their rights in their land. Here, given the State's WQC denial, there simply is no viable public project. Consequently, petitioner has no right to force respondents to sell something that is not for sale.

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[3] We are not bound by the unpublished case upon which petitioner and the dissent primarily rely, *Constitution Pipeline Co., LLC v A Permanent Easement for 0.42 Acres and Temporary Easements for 0.46 Acres, in Schoharie County, New York* (2015 WL 12556145 [ND NY, Apr. 17, 2015]). In any event, that case does not consider the dispositive issue of *state law* in this case, namely, whether a FERC certificate authorizing the construction of a pipeline "subject to" a particular condition constitutes a qualifying federal permit under EDPL 206 (A) upon the failure of that condition. Indeed, the District Court's analysis in *Constitution Pipeline Co., LLC* is not even grounded in the two-step process for condemnation set forth in the EDPL, and the dissent's insistence on deciding this state-law case by reference to inapplicable principles of federal law undercuts a key pillar of our system of cooperative federalism – the notion that state courts adjudicating proceedings under state law are bound "not by federal . . . requirements for an action brought under a federal statute . . . , but by this state's own requirements [and] controlling state cases" (*Hammer v American Kennel Club*, 304 AD2d 74, 80 [1st Dept 2003], *affd* 1 NY3d 294 [2003]; *see Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 81-82, 87 [2018, Rivera, J., concurring]). Tellingly, the dissent does not even engage with the dispositive issue of *state law* implicated by this appeal, i.e., whether petitioner qualified for an exemption under EDPL 206 (A) based on the record before Supreme Court.

IV

At the end of the day, this seemingly complicated case can be explained in these straightforward terms: petitioner is trying to expropriate respondents' land in furtherance of a pipeline project that, as things currently stand, cannot legally be built. Such an effort turns the entire concept of eminent domain on its head. If the State's WQC denial is finally annulled or withdrawn, then petitioner can file a new vesting petition. But until that time, petitioner cannot commence a vesting proceeding to force a sale without going through the entire EDPL article 2 process. Accordingly, the order appealed from should be reversed and the petition dismissed. Respondents' remaining contentions are academic in light of our determination.

CURRAN and WINSLOW, JJ., concur with NEMOYER, J.;

LINDLEY, J., dissents and votes to affirm in the following opinion in which CARNI, J.P., concurs: We respectfully dissent and would affirm. The majority concludes that the petition in this eminent domain proceeding should be dismissed because, "as things currently stand," the underlying public project, a natural gas pipeline, "cannot be lawfully constructed." The pipeline cannot lawfully be constructed, the reasoning goes, because the New York State Department of Environmental Conservation (DEC) has denied petitioner's application for a water quality certificate (WQC), the issuance of which is one of the many conditions that must be satisfied before petitioner can build the pipeline.

It is undisputed, however, that the Federal Energy Regulatory Commission (FERC) has determined, in an order issued August 6, 2018, that the DEC waived its WQC certification authority under section 401 of the Clean Water Act. Thus, as things now stand, the DEC's denial of the WQC is no longer an impediment to construction of the pipeline. Indeed, respondents-appellants (respondents) do not challenge petitioner's assertion in a post-argument submission that the project is "very much alive." Yet the majority concludes that petitioner cannot obtain an easement over respondents' property because the project is dead.

The majority's determination that the project is dead is based on its refusal to take judicial notice of the August FERC order on grounds that it is not final inasmuch as it is subject to a rehearing and appeal to federal court. But the August FERC order is binding unless and until it is vacated or overturned on appeal (*see* 15 USC § 3416 [a] [4]), and it is no less final than the DEC's denial of the WQC, which has been appealed by petitioner to the Second Circuit Court of Appeals. As noted, the majority relies on the DEC's denial of the WQC to conclude that the pipeline will not be built and that petitioner therefore no longer has "a valid and operative" certificate of public convenience and necessity from the FERC.

Even if we were to ignore the most recent FERC order, the DEC's denial of the WQC does necessarily not mean that petitioner cannot

build the pipeline. As respondents recognize in their post-argument submission, petitioner could obtain the WQC by mitigating environmental concerns expressed by the DEC. For instance, petitioner could use horizontal directional drilling (HDD) to cross various streams, as proposed by the DEC, or it could alter the path of the pipeline to avoid the streams. Although petitioner has stated that using HDD technology is too expensive for its liking, the seminal point here is that the DEC's decision does not vitiate the certificate of public convenience and necessity issued by the FERC, nor does it sound the death knell of the pipeline project.

In any event, although the issuance of a WQC by the DEC is a condition that must be met prior to construction of the pipeline, it is not, in our view, a condition precedent to the commencement of this eminent domain proceeding (*see Constitution Pipeline Co., LLC v A Permanent Easement for 0.42 Acres and Temporary Easements for 0.46 Acres, in Schoharie County, New York*, 2015 WL 12556145, *2 [ND NY, Apr. 17, 2015]). The Natural Gas Act (NGA) grants private natural-gas companies the power to acquire property by eminent domain. A natural gas company may build and operate a new pipeline if it obtains a certificate of public convenience and necessity from the FERC. Here, petitioner's proposed pipeline is authorized by a FERC order issued on February 3, 2017, which includes a certificate of public convenience and necessity for the pipeline. As the majority points out, the FERC order is subject to various conditions, one of which requires petitioner to obtain "all applicable authorizations required under federal law." That condition has reasonably been construed as obligating petitioner to obtain a WQC from the DEC prior to building the pipeline.

There are, however, various other conditions in the authorizing FERC order, many of which cannot be met until *after* petitioner has obtained possession of the rights of way for the pipeline. If petitioner is prohibited from exercising its eminent domain authority until it satisfies all of the conditions of the FERC order, as the majority holds, the pipeline can never be built (*see Constitution Pipeline Co., LLC*, 2015 WL 12556145, *2).

Finally, we note that the FERC has clearly and unambiguously stated that the conditions in its initial order need not be satisfied prior to petitioner commencing a taking proceeding under the eminent domain law. Paragraph 22 of the recent FERC order states that "it is Congress, speaking directly in NGA section 7 (h), that authorized a certificate-holder to exercise eminent domain authority to acquire land or other property necessary to construct or operate the approved facilities if the certificate-holder cannot acquire such property by agreement with the owner. *Congress did not establish any prerequisite for eminent domain authority beyond the Commission's decision to issue the certificate*" (emphasis added).

The FERC's interpretation of its own order is consistent with federal case law. As the Fourth Circuit Court of Appeals has explained, "[o]nce FERC has issued a certificate, the NGA empowers the certificate holder to exercise 'the right of eminent domain' over any

lands needed for the project" (*East Tenn. Nat. Gas Co. v Sage*, 361 F3d 808, 818 [4th Cir 2004], quoting 15 USC § 717f [h]). Respondents and the majority cite no authority for the proposition that the conditions in the FERC order are conditions precedent to petitioner's exercise of its eminent domain authority, and we could find none. We thus conclude that there is no basis to reverse Supreme Court's order, which grants petitioner easements over respondents' land.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

876

KA 16-01319

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNIE SMALL, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered July 19, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, loitering and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), loitering (§ 240.35 [2]), and unlawful possession of marihuana (§ 221.05). Contrary to defendant's contention, County Court did not abuse its discretion in denying, on the ground that the People established exceptional circumstances to warrant an adjournment (*see* CPL 30.30 [4] [g] [i]), defendant's renewed motion to dismiss pursuant to CPL 30.30 (*see generally People v LaBounty*, 104 AD2d 202, 204 [4th Dept 1984]). We reject defendant's contention that the evidence is legally insufficient to support his conviction of criminal possession of a weapon in the second degree (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]). Additionally, viewing the evidence in light of the elements of that crime as charged to the jury (*see id.*), we conclude that the verdict is not against the weight of the evidence with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's contention that the court erred in denying his second request for new counsel, the court made more than the requisite minimal inquiry into defendant's objections before determining that there was no good cause for the substitution of counsel (*see People v Jones*, 114 AD3d 1239, 1240 [4th Dept 2014], *lv denied* 23 NY3d 1038 [2014], *lv denied* 25 NY3d 1166 [2015]), and even adjourned proceedings for a week to facilitate further communication

between defense counsel and defendant. We note that the court granted defendant's first request to replace trial counsel before argument of his posttrial motion, and it is well settled that "[t]he right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option" (*People v Sides*, 75 NY2d 822, 824 [1990]; *see People v Ward*, 27 AD3d 1119, 1120 [4th Dept 2006], *lv denied* 7 NY3d 819 [2006], *reconsideration denied* 7 NY3d 871 [2006]). The sentence is not unduly harsh or severe. We have examined defendant's remaining contention and conclude that it is without merit.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

878

KA 18-00610

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

LIMMIA PAGE, DEFENDANT-RESPONDENT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (M. William Boller, A.J.), dated January 22, 2018. The order granted that part of defendant's omnibus motion seeking to suppress the evidence seized as the result of a traffic stop.

It is hereby ORDERED that the order so appealed from is unanimously affirmed and the indictment against defendant is dismissed.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to suppress physical evidence seized as the result of a traffic stop. The evidence at the suppression hearing established that a marine interdiction agent with the U.S. Customs and Border Protection Air and Marine Operations, who was also a deputized task force officer with the Niagara County Sheriff's Department, was traveling on a highway in Erie County in an unmarked truck when he observed a vehicle engaging in dangerous maneuvers and allegedly committing several violations of the Vehicle and Traffic Law. After the agent unsuccessfully attempted to contact the state police via the radio in his truck, he called 911. While the agent's call was being transferred to the Buffalo Police Department (BPD), the vehicle exited the highway. As he followed the vehicle, the agent described his location and the unfolding events to the BPD dispatch and requested that a police unit be sent. Given his prior observations and his concern about the increased risk to public safety if the vehicle continued to drive in the same manner in the city, the agent activated his truck's emergency lights in order to stop the vehicle. The vehicle pulled over, and the agent reported the vehicle's license plate and location to the BPD dispatch. An officer with the BPD arrived shortly thereafter, and the officer and the agent approached the vehicle together for officer safety reasons. The officer spoke to the occupants of the vehicle, which included

defendant. After additional BPD officers arrived at the scene, the agent was told that he was no longer needed, and he departed.

A firearm was seized as a result of the traffic stop, and defendant, along with two codefendants, was subsequently indicted for criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Following the suppression hearing, Supreme Court granted that part of defendant's omnibus motion seeking to suppress physical evidence seized as the result of the traffic stop on the ground that the traffic stop was unlawful. In concluding that the agent unlawfully stopped the vehicle, the court determined that the agent had the powers of a peace officer, but that the traffic stop could not be justified on that basis because the agent was not acting pursuant to his special duties or within his geographical area of employment. The court also determined that the traffic stop could not be justified as a valid citizen's arrest because the agent, who had the powers of a peace officer, activated the emergency lights and approached the stopped vehicle with the BPD officer and therefore acted under color of law and with the accouterments of official authority rather than as a private citizen.

The Criminal Procedure Law provides that "any person may arrest another person . . . for any offense when the latter has in fact committed such offense in his [or her] presence" (CPL 140.30 [1] [b]). As the Court of Appeals has explained, the Criminal Procedure Law "differentiates between the respective powers of arrest possessed by peace officers and private citizens (*compare* CPL 140.25 and 140.27, *with* CPL 140.30, 140.35, and 140.40)" (*People v Williams*, 4 NY3d 535, 538 [2005]). "In fact, the Legislature has specified that the authority to make a citizen's arrest extends only to a 'person acting *other than as a police officer or peace officer*' (CPL 140.35, 140.40 [emphasis added])" (*id.*). Thus, the Court of Appeals has held that "a peace officer who acts under color of law and with all the accouterments of official authority" cannot effect a valid citizen's arrest (*id.* at 539).

The People contend that the agent is not a peace officer and does not possess the powers thereof and, therefore, the court erred in determining that the traffic stop could not be justified as a valid citizen's arrest. Even assuming, arguendo, that the agent, as a marine interdiction agent with the U.S. Customs and Border Protection Air and Marine Operations and a deputized task force officer with the Niagara County Sheriff's Office, is not a peace officer and does not possess the powers thereof (*see* CPL 1.20 [33]; 2.10; 2.15, as amended by L 2014, ch 262, § 1; 2.20; *see also* CPL 140.25, 140.27), we conclude that the court properly determined that the agent did not effect a valid citizen's arrest. The agent, while contemporaneously reporting the incident to the police over the telephone and requesting the presence of a police unit, activated red and blue emergency lights in the grille of his truck and a light bar inside the windshield for the purpose of stopping the vehicle. A private person, however, is not authorized to display such emergency lights from his or her private vehicle (*see* Vehicle and Traffic Law § 375 [41]; *People v*

Hesselink, 76 Misc 2d 418, 418-419 [Town of Brighton Just Ct 1973]). Moreover, a private person may not falsely express by words or actions that he or she is acting with approval or authority of a public agency or department with the intent to induce another to submit to such pretended official authority or to otherwise cause another to act in reliance upon that pretense (*see* Penal Law § 190.25 [3]; *see generally People v LaFontaine*, 235 AD2d 93, 106 [1st Dept 1997, Tom, J., dissenting], *revd on other grounds* 92 NY2d 470 [1998]). Thus, the agent was not lawfully acting merely as a private person effectuating a citizen's arrest when he activated emergency lights that were affixed to his truck by virtue of his position in law enforcement. Additionally, the agent was not acting merely as a private person when he approached the seized vehicle as backup in cooperation with the officer for safety purposes. Rather, the agent "act[ed] under color of law and with all the accouterments of official authority" (*Williams*, 4 NY3d at 539), causing the driver of the subject vehicle to submit to the agent's apparent official authority and ultimately resulting in the discovery of the evidence forming the basis for the charge against defendant (*see People v Graham*, 192 Misc 2d 528, 531 [Sup Ct, Erie County 2002], *affd* 1 AD3d 1066 [4th Dept 2003], *lv denied* 2 NY3d 762 [2004]). We therefore conclude that, even if the agent is not afforded the status of a peace officer or the powers thereof under state law (*see* CPL 2.10; 2.15 [7]), the traffic stop of the vehicle cannot be validated as a citizen's arrest under these circumstances (*see generally* CPL 140.30, 140.35, 140.40; *Williams*, 4 NY3d at 539).

The People further contend that, even if the seizure of defendant was not lawful under the citizen's arrest statute, suppression of the resulting physical evidence is not warranted because that statute does not implicate a constitutional right. We reject that contention. "[T]he violation of a statute may warrant imposing the sanction of suppression [but] . . . only where a constitutionally protected right [is] implicated" (*People v Patterson*, 78 NY2d 711, 717 [1991]). Even if a violation of the citizen's arrest statute is not necessarily a violation of a constitutional right, we conclude that adherence to the requirements of the statute implicates the constitutional right to be free from unreasonable searches and seizures (*see* US Const 4th Amend; NY Const, art I, § 12) by precluding a person who "act[ed] under color of law and with all the accouterments of official authority" from justifying an unlawful search or seizure as a citizen's arrest (*Williams*, 4 NY3d at 539; *see* CPL 140.30, 140.35, 140.40; *cf. People v Sampson*, 73 NY2d 908, 909-910 [1989]; *People v Walls*, 35 NY2d 419, 424 [1974], *cert denied sub nom. Junco v New York*, 421 US 951 [1975]; *see also LaFontaine*, 235 AD2d at 107-109 [Tom, J., dissenting]; *see generally People v Greene*, 9 NY3d 277, 280-281 [2007]), and that suppression is warranted where, as here, the purported private person is cloaked with official authority and acts with the participation and knowledge of the police in furtherance of a law enforcement objective (*see generally People v Ray*, 65 NY2d 282, 286-287 [1985]; *People v Jones*, 47 NY2d 528, 533-534 [1979]).

In light of our determination, the indictment against defendant

must be dismissed inasmuch as "the unsuccessful appeal by the People precludes all further prosecution of defendant for the charge[] contained in the accusatory instrument" (*People v Rodas*, 145 AD3d 1452, 1454 [4th Dept 2016] [internal quotation marks omitted]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

898

CAF 18-00514

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

IN THE MATTER OF TYMOTHY M. PARMENTER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JULIE E. NASH, RESPONDENT-RESPONDENT.

LEGAL AID SOCIETY OF MID-NEW YORK, INC., SYRACUSE (JOSEPH V. MASLAK OF COUNSEL), FOR PETITIONER-APPELLANT.

ROBERT P. COLEMAN, III, WASHINGTON, D.C., FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered June 1, 2017 in a proceeding pursuant to Family Court Act article 4. The order denied the objection of petitioner to the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the objection is granted, the petition is reinstated, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: From 2013 to 2015, the parties resided together with their son in northern Virginia. In 2015, respondent mother relocated with the child to central New York. Approximately six months later, petitioner father quit his job in Virginia and moved to New York in order to be closer to the child. The father thereafter petitioned to downwardly modify his child support obligation on the ground that his new job in Onondaga County was less remunerative than his old job in Virginia. The Support Magistrate dismissed the petition, holding that, although the father had made good faith efforts to obtain more lucrative employment in New York, he had not demonstrated the requisite change in circumstances to warrant such a modification because he had voluntarily left his higher-paying job in Virginia. Family Court subsequently denied the father's objection to the Support Magistrate's order. The father now appeals, and we reverse.

"It is well settled that a loss of employment may constitute a change in circumstances justifying a downward modification of [child support] obligations where [such loss] occurred through no fault of the [party seeking modification] and the [party] has diligently sought re-employment" (*Jelfo v Jelfo*, 81 AD3d 1255, 1257 [4th Dept 2011] [internal quotation marks omitted]). As a general rule, a parent who voluntarily quits a job will not be deemed without fault in losing

such employment (*see Matter of Lindsay v Lindsay-Lewis*, 156 AD3d 642, 643 [2d Dept 2017]; *Matter of Vasquez v Powell*, 111 AD3d 754, 754 [2d Dept 2013]; *Matter of Rosalind EE. v William EE.*, 4 AD3d 629, 630 [3d Dept 2004], *lv denied* 3 NY3d 606 [2004]; *Matter of Ludwig v Reyome*, 195 AD2d 1020, 1020 [4th Dept 1993]). Nevertheless, that general rule should not be inflexibly applied where a parent quits a job for a sufficiently compelling reason, such as the need to live closer to a child (*see Matter of Dupree v Dupree*, 62 NY2d 1009, 1010-1012 [1984]; *Matter of Smith v McCarthy*, 143 AD3d 726, 727-728 [2d Dept 2016]; *see also Spencer v Spencer*, 298 AD2d 680, 680-681 [3d Dept 2002]). As one court has explained, a "parent who chooses to leave his [or her] employment rather than [live] hundreds of miles away from his [or her] children is not voluntarily unemployed or underemployed. Instead, he [or she] is a loving parent attempting to do the right thing for his [or her] children. To punish such a parent by requiring higher child support . . . is neither good law nor good policy" (*Abouhalkah v Sharps*, 795 NE2d 488, 492 [Ind Ct App 2003]).

Here, it is undisputed that the father quit his job in Virginia and relocated to Onondaga County in order to rehabilitate his relationship with his son, which had suffered since the child was moved to New York. The equities weigh heavily in favor of the father here given that it was the mother who moved the child hundreds of miles away from the father and thereby created the difficulties inherent in long-distance parenting. Thus, under these circumstances, we conclude that the father demonstrated the requisite change in circumstances necessary to reexamine his child support obligation (*see Smith*, 143 AD3d at 727-728). We therefore reverse the order, grant the objection, reinstate the petition, and remit the matter to Family Court to determine the appropriate amount of child support, after a further hearing if necessary (*see Matter of Brink v Brink*, 147 AD3d 1443, 1445 [4th Dept 2017]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

908

CA 17-02165

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

HENDERSON HARBOR MARINERS' MARINA, INC., AND MARLA COHEN, PLAINTIFFS-RESPONDENTS,

V ORDER

UPSTATE NATIONAL BANK, DEFENDANT-APPELLANT. (APPEAL NO. 1.)

BARCLAY DAMON LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL, WALLEN, P.C., OSWEGO (TIMOTHY J. FENNELL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered August 11, 2017. The order denied defendant's motion to set aside the jury verdict in favor of plaintiffs on plaintiffs' second cause of action and to dismiss plaintiffs' second cause of action.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435 [2d Dept 1989]; *see also* CPLR 5501 [a] [1]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

909

CA 17-02166

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

HENDERSON HARBOR MARINERS' MARINA, INC., AND MARLA COHEN, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

UPSTATE NATIONAL BANK, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

BARCLAY DAMON LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL, WALLEN, P.C., OSWEGO (TIMOTHY J. FENNELL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered November 3, 2017. The judgment, among other things, awarded plaintiffs money damages as against defendant.

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

Memorandum: Plaintiffs commenced this action seeking damages for, inter alia, breach of a Remediation Agreement (Agreement) pursuant to which defendant took responsibility for addressing petroleum contamination that existed at a marina. Plaintiffs purchased the marina in 2002 from an affiliate of defendant; defendant served as the mortgage lender for the transaction. At the time of the sale, all parties were aware that the marina had been contaminated by petroleum spills and that the New York State Department of Environmental Conservation (DEC) would require remediation of the site. Thus, as part of the sale, and as an inducement to plaintiffs to purchase the property, the parties executed the Agreement. The Agreement required defendant to enter into a Voluntary Cleanup Agreement (VCA) with the DEC to remediate the environmental damage from the petroleum contamination "as soon as possible" and to "diligently pursue" the VCA's tasks "through completion." The Agreement also required plaintiffs to give 30 days' written notice to defendant prior to seeking damages for defendant's failure to perform.

Defendant did not complete the remediation work until May 2014. In their cause of action for breach of the Agreement, plaintiffs alleged that defendant's lack of diligence in completing the remediation caused plaintiffs significant economic damages in the form of, inter alia, lost profits. Defendant moved for summary judgment

seeking, inter alia, dismissal of the cause of action for breach of the Agreement, and Supreme Court denied the motion. We dismissed a prior appeal from the order denying that motion inasmuch as the order was subsumed in the subsequently entered judgment (*Henderson Harbor Mariners' Mar., Inc. v I.F.S. Lisbon*, 159 AD3d 1447 [4th Dept 2018]).

The matter proceeded to trial and the jury returned a verdict, inter alia, finding defendant liable to plaintiffs for breach of the Agreement and awarding plaintiffs damages of $1.1 million for, among other things, plaintiffs' lost profits. Defendant appeals from the judgment entered on the jury's verdict.

We reject defendant's contention that the court erred in denying its motion for summary judgment dismissing plaintiffs' cause of action for breach of the Agreement. We conclude that, contrary to defendant's contention, the second amended complaint adequately states a cause of action for breach of the Agreement (*see generally JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). Moreover, even assuming, arguendo, that defendant met its initial burden on the motion, we conclude that the court properly determined that plaintiffs raised issues of fact with respect to whether they provided written notice to defendant as a condition precedent to suit and whether defendant failed to perform its obligations under the Agreement (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We reject defendant's contention that the Agreement limited plaintiffs' damages to the cost of third-party claims arising from the site contamination and the cost of corrective action. The Agreement contained no such limitation of damages provision (*cf. Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 192 AD2d 83, 87 [1st Dept 1993], *affd* 84 NY2d 430 [1994]).

Contrary to defendant's further contention, the court did not abuse its discretion in denying defendant's motion pursuant to CPLR 3126 to preclude the testimony of plaintiffs' expert forensic economist on the ground that plaintiffs' expert disclosure was insufficient (*see generally Rivera v Montefiore Med. Ctr.*, 28 NY3d 999, 1002 [2016]). Defendant failed to establish that there was an intentional or willful failure to disclose by plaintiffs and that it was prejudiced by plaintiffs' allegedly deficient response to its demand for expert disclosure (*see Sisemore v Leffler*, 125 AD3d 1374, 1375 [4th Dept 2015]).

We reject defendant's contention that the trial court erred in denying its motion to set aside the verdict and for judgment in its favor on the issue of, inter alia, the damages awarded for plaintiffs' lost profits. Contrary to defendant's contention, we conclude that plaintiffs' lost profits were within "the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it" (*Whitmier & Ferris Co. v Buffalo Structural Steel Corp.*, 104 AD2d 277, 279 [4th Dept 1984], *affd* 66 NY2d 1013 [1985]; *see Ashland Mgt. v Janien*, 82 NY2d 395, 403 [1993]). Although "[d]amages resulting from the loss of future profits are often an approximation" (*Ashland Mgt.*, 82 NY2d at 403), we further conclude

that plaintiffs established their damages here with reasonable certainty and without undue speculation (*see id.*).

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

941

KA 13-00446

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAHARI JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 22, 2013. The appeal was held by this Court by order entered November 9, 2017, decision was reserved and the matter was remitted to Supreme Court, Onondaga County, for further proceedings (155 AD3d 1547). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is modified as a matter of discretion in the interest of justice by directing that all of the sentences shall run concurrently and as modified the judgment is affirmed.

Memorandum: We previously held this case, reserved decision, and remitted the matter to Supreme Court (Brunetti, A.J.) to make and state for the record a determination of whether defendant is a youthful offender (*People v Jones*, 155 AD3d 1547 [4th Dept 2017], *amended on rearg* 156 AD3d 1493 [4th Dept 2017]; *see generally People v Middlebrooks*, 25 NY3d 516, 525-527 [2015]; *People v Rudolph*, 21 NY3d 497, 499-501 [2013]). Upon remittal, the court (Cuffy, A.J.) determined that defendant, who had been convicted of the armed felony offenses of assault in the first degree (Penal Law § 120.10 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]), was not a minor participant in the crimes and that there were no mitigating circumstances bearing directly on the manner in which the crimes were committed. Consequently, the court concluded that defendant was not an eligible youth and denied his request for youthful offender treatment. We conclude that the court did not thereby abuse its discretion (*see generally Middlebrooks*, 25 NY3d at 526-527; *People v Garcia*, 84 NY2d 336, 342-343 [1994]).

CPL 720.10 (3) provides that “a youth who has been convicted of an armed felony offense . . . is an eligible youth if the court determines that one or more of the following factors exist: (i)

mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution." Contrary to defendant's contention, "traditional sentencing factors, such as the criminal's age, background and criminal history, are not appropriate to the mitigating circumstances analysis . . . Rather, the court must rely only on factors related to the defendant's conduct in committing the crime, such as a lack of injury to others or evidence that the defendant did not display a weapon during the crime" (*People v Victor J.*, 283 AD2d 205, 206 [1st Dept 2001], *lv denied* 96 NY2d 942 [2001] [internal quotation marks omitted]), or other factors that are directly related to the crime of which defendant was convicted (*see People v Cruickshank*, 105 AD2d 325, 334-335 [3d Dept 1985], *affd sub nom. People v Dawn Maria C.*, 67 NY2d 625 [1986]). Here, we perceive no basis to disturb the court's determination that defendant is not an eligible youth because, in the first crime of which he was convicted, "defendant carried a gun to an encounter with known gang members, displayed the gun, . . . and . . . fired a shot that struck one of the" gang members (*People v Flores* 134 AD3d 425, 426 [1st Dept 2015], *lv denied* 29 NY3d 948 [2017]), and he was again armed with a loaded weapon when he was arrested several weeks later.

Although the court did not abuse its discretion in sentencing the 18-year-old defendant as an adult, we agree with defendant that the sentence imposed, an aggregate determinate term of imprisonment of 35 years, is unduly harsh and severe under the circumstances of this case. It is well settled that this Court's "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]), and that "we may 'substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' " (*People v Johnson*, 136 AD3d 1417, 1418 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]; *see People v White*, 153 AD3d 1565, 1568 [4th Dept 2017], *lv denied* 30 NY3d 1065 [2017]).

The victim in this case is a rival gang member who attempted to rob members of defendant's gang. Defendant arrived at the scene of the attempted robbery and shot at the victim, who was struck by a bullet but survived. Defendant obviously deserves a stern sentence but, in our view, 35 years is too severe. Indeed, the maximum punishment for intentional murder is 25 years to life (*see* Penal Law § 70.00 [2] [a]; [3] [a]). Defendant has no prior criminal record (he was adjudicated a youthful offender on a misdemeanor), he was only 18 years old when he committed the crimes, and the People offered him a 20-year sentence prior to trial as part of a plea bargain. Under the circumstances, and considering that the victim was attempting to commit an armed robbery when he was shot, we conclude that defendant's sentence is unduly harsh and severe.

We therefore modify the judgment as a matter of discretion in the interest of justice by directing that all of the sentences run concurrently (*see* CPL 470.15 [6] [b]). The sentence, as modified,

will result in an aggregate determinate sentence of 25 years, which will protect the public from defendant for more than two decades and is sufficient to deter others from engaging in similar conduct.

All concur except SMITH, J.P., and WINSLOW, J., who dissent in part and vote to affirm in the following memorandum: We agree with the majority that no "mitigating circumstances that bear directly upon the manner in which the crime was committed" exist in this case (CPL 720.10 [3] [i]), that defendant was not a relatively minor participant in the crimes (*see* CPL 720.10 [3] [ii]), and that Supreme Court therefore did not abuse its discretion in denying defendant's request for a youthful offender adjudication (*see generally People v Middlebrooks*, 25 NY3d 516, 526-527 [2015]; *People v Garcia*, 84 NY2d 336, 342-343 [1994]; *People v Victor J.*, 283 AD2d 205, 206 [1st Dept 2001], *lv denied* 96 NY2d 942 [2001]). We disagree, however, with the majority's determination to reduce the sentence. Consequently, we dissent in part and vote to affirm.

Defendant's conviction arose from two incidents that occurred within a period of several weeks. Both incidents took place in a neighborhood that defendant's gang members considered to be their territory, and both were related to gang activities. With respect to the first incident, the jury found defendant guilty of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]) for the shooting of a member of a rival gang during a gang battle in the City of Syracuse on Christmas Eve. The jury necessarily concluded that defendant caused the rival gang member to sustain serious physical injury. The evidence at trial also establishes that defendant was armed with a .380 caliber handgun and that he began firing it immediately upon arriving in the area. Numerous shots were fired by defendant and others, and some of the bullets struck nearby houses.

The second incident occurred several weeks later, within a few blocks of the site of the Christmas Eve shooting, and resulted in defendant's conviction of another count of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). A Syracuse police officer stopped defendant and other gang members, and a search revealed that defendant possessed a .380 caliber handgun. The officer had been looking for defendant based on information that defendant had been involved in yet another shooting with a .380 caliber handgun, again in the same area, on the night before the search.

We are aware that defendant had a difficult childhood, due in part to his limited intellect and lack of positive role models, and that he had no adult convictions before this series of events, although he had several placements in juvenile detention facilities. We also note that the court imposed a significant sentence. Nevertheless, even the presentence memorandum submitted on behalf of defendant acknowledged, inter alia, defendant's penchant for carrying and firing a loaded handgun and the injury he caused in the Christmas Eve shooting and concluded that, "[b]ased solely on the circumstances of [defendant's] current conviction, one may form the opinion that he is a dangerous young man who needs to be locked up for a long time."

Under these circumstances, we are not persuaded that we should exercise our authority to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

947

KA 15-00043

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK M. HACKETT, ALSO KNOWN AS PATRICK HACKETT,
DEFENDANT-APPELLANT.

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

PATRICK M. HACKETT, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Genesee County Court (Thomas E. Moran, J.), rendered November 13, 2014. The judgment convicted defendant, upon a jury verdict, of rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of rape in the third degree (Penal Law § 130.25 [2]). The charge arose in April 2013, when the 44-year-old defendant engaged in sexual intercourse with a 15-year-old runaway. The victim reported the incident and cooperated with law enforcement by communicating with defendant via text message about the sexual encounter, and then giving her phone to the police, who continued to communicate with defendant using the victim's phone. The text messages from defendant to the victim were key pieces of evidence against him at trial.

In his main brief, defendant contends that County Court erred in summarily denying his pretrial motion to suppress the text messages recovered from his cell phone on the ground that some of the messages were unlawfully obtained by police during a search incident to his arrest and prior to obtaining the search warrant, in violation of the United States Supreme Court's decision in *Riley v California* (— US —, 134 S Ct 2473 [2014]). Preliminarily, defendant's motion to suppress the text messages was his second suppression motion, which is contrary to the single motion rule set forth in CPL 255.20 (2) and, as defendant correctly concedes, the motion was filed more than 45 days after his arraignment, which is contrary to CPL 255.20 (1). Further,

although a change in the applicable law may constitute "good cause" pursuant to CPL 255.20 (3) to entertain a motion filed outside of the limits imposed by CPL 255.20 (1) and (2), it is implicit that the change in the law must actually afford the defendant the relief that he or she seeks. We reject defendant's contention that the Supreme Court's decision in *Riley* provided the requisite good cause for defendant's untimely second motion.

The *Riley* Court determined that "officers must generally secure a warrant before conducting [a search of data stored in a cell phone]" (*Riley*, — US at —, 134 S Ct at 2485). Here, the search warrant application for defendant's phone indicates, among other things, that, after defendant's arrest and the recovery of a cell phone from him during a search incident to the arrest, the applicant officer sent a text message to the phone number that had been used during earlier communications between the victim and defendant, and the officer noted that the phone recovered from defendant upon his arrest signaled the arrival of a new text message moments later. Contrary to defendant's contention, however, nothing in the warrant application supports the inference that the police opened or manipulated the phone to get inside to retrieve data prior to obtaining the search warrant. Although *Riley* prohibits warrantless searches of cell phones incident to a defendant's arrest, *Riley* does not prohibit officers from sending text messages to a defendant, making observations of a defendant's cell phone, or even manipulating the phone to some extent upon a defendant's arrest (*see id.* at —, 134 S Ct at 2485, 2487). Indeed, *Riley* provides that the search incident to arrest exception to the warrant requirement entitles law enforcement officers to "examine the physical aspects of the phone" after it has been seized (*id.* at —, 134 S Ct at 2485). Inasmuch as the information included in the warrant application is not suggestive of a warrantless search of the phone, we conclude that the Supreme Court's decision in *Riley* did not provide good cause for defendant's untimely second suppression motion. Thus, the motion was properly denied (*see* CPL 255.20 [3]; *People v Cimino*, 49 AD3d 1155, 1156 [4th Dept 2008], *lv denied* 10 NY3d 861 [2008]; *see generally People v Wilburn*, 50 AD3d 1617, 1618 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]).

Moreover, even if the officer's actions in sending a confirmatory text message to defendant's phone did constitute an unlawful search under *Riley*, we nevertheless conclude that the validity of the warrant to search defendant's phone was not vitiated. The police did not use the alleged illegal search " 'to assure themselves that there [was] cause to obtain a warrant' in the first instance" (*People v Burdine*, 147 AD3d 1471, 1472 [4th Dept 2017], *amended on rearg* 149 AD3d 1626 [4th Dept 2017], *lv denied* 29 NY3d 1076 [2017], quoting *People v Burr*, 70 NY2d 354, 362 [1987], *cert denied* 485 US 989 [1988]), and the remaining factual allegations in the warrant application provided probable cause to search the cell phone that was recovered from defendant at the time of his arrest.

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 reject defendant's further contention in his main brief that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, defendant stipulated that his date of birth was July 26, 1968, and he did not dispute that the victim was 15 years old in April 2013. Thus, the evidence at trial established that defendant was "twenty-one years old or more" and that the victim was "less than seventeen years old" at the time that defendant allegedly had sexual intercourse with the victim (Penal Law § 130.25 [2]). With respect to the element of sexual intercourse, the jury heard the victim's testimony describing the incident. Moreover, the evidence at trial was not solely limited to the testimony of the victim. Although there is a lack of medical, scientific, or other physical evidence of the crime, the jury saw incriminating text messages from defendant to the victim in which he admitted that he engaged in sexual intercourse with her and professed his love to her. In addition, defendant's trial testimony in which he denied having sexual intercourse with the victim was not credible inasmuch as he provided the jury with improbable explanations for the incriminating text messages.

Defendant's contention in his main brief that the court committed reversible error by giving an unbalanced interested witness instruction is not preserved for our review (*see People v Rasmussen*, 275 AD2d 926, 927 [4th Dept 2000], *lv denied* 95 NY2d 968 [2000]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We also reject the contention in defendant's pro se supplemental brief that he was denied effective assistance of counsel based on alleged failures by trial counsel to file a timely discovery demand, to prepare a defense or call fact witnesses, to impeach prosecution witnesses, and to make effective motions to suppress evidence. The record establishes that defense counsel demanded discovery within the 30-day deadline set forth in CPL 240.80 (1), and that the People subsequently provided the requested discovery to defendant. In addition, defense counsel filed pretrial motions on defendant's behalf, and successfully moved for an order precluding the People from introducing in evidence cell phone records from Verizon. Counsel also successfully moved to suppress defendant's journal, and obtained confidential records from the Department of Social Services by subpoena duces tecum. Moreover, counsel used the records that he obtained to effectively cross-examine the victim at trial. Thus, we conclude that the "evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that [defense counsel] provided meaningful representation" (*People v Trait*, 139 AD2d 937, 938 [4th Dept 1988], *lv denied* 72 NY2d 867 [1988]; *see People v Baldi*, 54 NY2d 137, 147 [1981]).

With respect to defendant's further contention in his pro se supplemental brief that the People violated the court's *Sandoval* ruling, we can discern no meaningful distinction between the question that the court permitted in its *Sandoval* ruling, i.e., whether

defendant had been convicted of two felonies in April 1993, and the question that the prosecutor asked defendant at trial, i.e., whether there were two charges associated with that 1993 conviction. Even assuming, arguendo, that the slight semantic difference in the form of the question violated the court's *Sandoval* ruling, we conclude that any error was "not so egregious or unduly prejudicial as to create a significant probability that defendant would have been acquitted but for such an error" (*People v Alexander*, 160 AD3d 1121, 1124 [3d Dept 2018], *lv denied* 31 NY3d 1144 [2018]; *see People v Sparks*, 29 NY3d 932, 935 [2017]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Contrary to defendant's contention in his pro se supplemental brief, the court did not err in permitting the People to present testimony that defendant committed an uncharged bad act. We conclude that the testimony that defendant gave the 15-year-old victim alcohol prior to having sexual intercourse with her was properly admitted in evidence to complete the narrative of events on the night in question (*see generally People v Maxey*, 129 AD3d 1664, 1665 [4th Dept 2015], *lv denied* 27 NY3d 1002 [2016], *reconsideration denied* 28 NY3d 933 [2016]; *People v Khan*, 88 AD3d 1014, 1014-1015 [2d Dept 2011], *lv denied* 18 NY3d 884 [2012]), and the probative value of that testimony was not substantially outweighed by the potential for prejudice (*see generally People v Alvino*, 71 NY2d 233, 242 [1987]; *People v Givans*, 45 AD3d 1460, 1462 [4th Dept 2007]). In any event, "inasmuch as the evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the [alleged] error", any error in admitting that testimony in evidence was harmless (*People v Castillo*, 151 AD3d 1802, 1803 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017]; *see Crimmins*, 36 NY2d at 241-242).

We have considered the remaining contentions in defendant's pro se supplemental brief and conclude that they are without merit.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

950

KA 16-01757

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALLEN D. FUNK, DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered November 20, 2015. The judgment convicted defendant, upon a jury verdict, of assault in the second degree, resisting arrest, reckless endangerment in the second degree, reckless driving and criminal mischief 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 and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Ontario County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, assault in the second degree (Penal Law § 120.05 [3]). The case arose from an incident in which the police attempted to arrest defendant pursuant to an arrest warrant issued by the State of Pennsylvania for absconding from parole supervision. When the police approached and identified themselves, defendant led them in a foot pursuit that circled an apartment building until defendant got in his pickup truck. One of the officers who had been in pursuit arrived at defendant's vehicle, ordered him to exit and slammed his radio against the window intending to break the glass and stop defendant's escape. With the officer still holding onto the vehicle's door handle, defendant accelerated quickly and drove away, sending the officer into the air and then onto the ground.

We reject defendant's contention that his conviction of assault in the second degree is not supported by legally sufficient evidence that the officer sustained physical injury, which is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). " '[S]ubstantial pain' cannot be defined precisely, but it can be said that it is more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). Here, witnesses of the incident

testified that the officer was thrown airborne and dragged by the vehicle, and one witness testified that she was surprised that the officer was able to get up after the incident. The officer described that the pain was "tremendous," "significant," and "severe." The medical records that were admitted in evidence established that the officer went to urgent care the day after the incident and was evaluated for multiple contusions and soft tissue hematoma to the right hip and right knee, acute neck pain associated with cervical sprain, acute cervical strain, acute traumatic thoracic and lumbar back pain, sprain of the left hamstring and possible hamstring tear, multiple superficial abrasions, and sprain of the right lateral collateral ligament. At that time, he described his pain as a 5 out of 10, but 8 out of 10 with movement and activity. He was prescribed ibuprofen 600 mg tablets, and was instructed to remain out of work for five days and to avoid strenuous activity. Six days later at a follow-up appointment, the officer noted improvement, but still expressed problems and pain in his right knee, left hamstring, right hip, and neck/upper back. At the follow-up appointment, the officer reported that his pain and stiffness initially got worse after the urgent care visit and gradually there had been improvement. Although there had been improvement and some negative test results, the officer's range of motion was found to be limited in his back and the physician concluded that he was not yet ready to return to work full duty. Instead, the physician noted that the officer should be able to return to work the following week. We conclude that the evidence is sufficient to establish that the officer sustained physical injury (*see People v Talbott*, 158 AD3d 1053, 1054 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]). Viewing the evidence in light of the elements of assault in the second degree 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 on the issue of physical injury (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's contention, defense counsel's failure to object to the alleged instance of prosecutorial misconduct during summation did not constitute ineffective assistance of counsel inasmuch as the prosecutor's summation was within "the broad bounds of rhetorical comment permissible" (*People v McEathron*, 86 AD3d 915, 916 [4th Dept 2011], *lv denied* 19 NY3d 975 [2012] [internal quotation marks omitted]; *see People v Jones*, 155 AD3d 1547, 1548-1549 [4th Dept 2017], *amended on rearg* 156 AD3d 1493 [4th Dept 2017]), and "any improper comments made by the prosecutor on summation were isolated and not so egregious that defendant was deprived of a fair trial" (*People v Grant*, 160 AD3d 1406, 1407 [4th Dept 2018], *lv denied* 31 NY3d 1148 [2018]). We similarly reject defendant's contention that defense counsel was ineffective for failing to request that the court charge the jury with the lesser included offense of obstructing governmental administration in the second degree inasmuch as "there is no reasonable view of the evidence to support a finding that defendant committed obstructing governmental administration in the second degree but not assault in the second degree" (*People v Acevedo*, 118 AD3d 1103, 1107 [3d Dept 2014], *lv denied* 26 NY3d 925 [2015]; *see generally People v Calderon*, 66 AD3d 314, 320 [1st Dept 2009], *lv denied* 13 NY3d

858 [2009]).

We agree with defendant, however, that he was improperly sentenced as a second felony offender inasmuch as the predicate conviction, i.e., the Pennsylvania crime of burglary (18 Pa Cons Stat § 3502), is not the equivalent of a New York felony. Although defendant failed to preserve that contention for our review (*see People v Hall*, 149 AD3d 1610, 1610 [4th Dept 2017]), we exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Upon our review of Pennsylvania statutory and case law, "there is no element in the Pennsylvania statute comparable to the element in the analogous New York statute that an intruder 'knowingly' enter or remain unlawfully in the premises . . . [and t]he absence of this scienter requirement from the Pennsylvania burglary statute renders improper the use of the Pennsylvania burglary conviction as the basis of the defendant's predicate felony adjudication" (*People v Flores*, 143 AD3d 840, 840 [2d Dept 2016]; *see generally People v Helms*, 30 NY3d 259, 263-264 [2017]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to resentence defendant (*see People v Nieves-Rojas*, 126 AD3d 1373, 1373-1374 [4th Dept 2015]). In light of our determination, defendant's remaining contention regarding the severity of the sentence is moot (*see id.* at 1374).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

952

CAF 17-00500

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

IN THE MATTER OF MALGORZATA ELZBIETA WOJCIULEWICZ, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN MCCAULEY, RESPONDENT-APPELLANT.

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

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

ANDREW S. GREENBERG, SYRACUSE, ATTORNEY FOR THE CHILD.

TIMOTHY A. ROULAN, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (William W. Rose, R.), entered February 9, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner primary legal and physical custody of the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order that, inter alia, awarded petitioner mother primary legal and physical custody of the three subject children with specified visitation to the father. Although we agree with the father that Family Court failed to set forth the "facts it deem[ed] essential" for its custody determination (CPLR 4213 [b]; *see Matter of Graci v Graci*, 187 AD2d 970, 971 [4th Dept 1992]), the record is sufficient for us to make our own factual findings "in the interests of judicial economy and the well-being of the child[ren]" (*Matter of Brandon v King*, 137 AD3d 1727, 1727-1728 [4th Dept 2016]; *see generally Matter of Howell v Lovell,* 103 AD3d 1229, 1231 [4th Dept 2013]; *Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450 [4th Dept 2007]).

We conclude that the court's determination is supported by a sound and substantial basis in the record (*see generally Matter of Burns v Herrod*, 132 AD3d 1336, 1336 [4th Dept 2015]). In making a custody determination, "numerous factors are to be considered,

including the continuity and stability of the existing custodial arrangement, the quality of the child's home environment and that of the parent seeking custody, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, and the individual needs and expressed desires of the child" (*Matter of Caughill v Caughill*, 124 AD3d 1345, 1346 [4th Dept 2015] [internal quotation marks omitted]; *see Bryan K.B.*, 43 AD3d at 1450).

Here, while the parties lived together, the mother was the primary caretaker and means of emotional and financial support for the children. After the parties separated, the father began to play a larger role in the children's lives. The mother has been a victim of domestic violence, first with the father when they resided together, and then with an abusive live-in boyfriend with whom she had other children. The mother ended the relationship with that boyfriend after she determined that the relationship was not in the best interests of either herself or the children, and she now lives in a three-bedroom townhouse with the children. The father has made attempts to improve the quality of the children's home environment in the long term by attending college and working part-time, which required enrolling the children in an after-school program and reducing the amount of time that he could spend at home with the children. The father has resided in the same home and school district for twelve years. Thus, both parents have worked to overcome challenges in providing stable home environments for the children.

Although each parent is now able to offer a stable home environment for the children, we conclude that the mother is better suited to provide for the children's emotional development inasmuch as the record establishes that she has a history of looking after their emotional needs, and she demonstrated a commitment to addressing their mental health by enrolling them in therapy. Both parents are supportive of the children's intellectual development and are dedicated to involvement in their schooling, and both parents are on equal footing financially, supplementing work income with public assistance.

There are two critical factors that weigh in favor of the mother: the father's use of excessive punishment, including excessive corporal punishment, and his failure to foster the children's relationship with the mother. The record reflects multiple instances of excessive punishment from the father, the most serious of which involved striking one of the children multiple times with a belt. After the incident, that child ran away from the father's home. Since that time, the child has lived with the mother and refused to see the father. The beating left scars on the child, and the father has subsequently failed to attempt to maintain any contact with the child. Additionally, the father made a concerted effort to interfere with contact between the children and the mother when the children were in his custody, as well as to interfere with contact between the children in his custody and their siblings. The record establishes that, for a period of six months, the mother was only able to see two of the children if she went to their school and saw them during lunch and the

father prevented phone contact between the mother and the children. It is well settled that "[a] concerted effort by one parent to interfere with the other parent's contact with the child[ren] is so inimical to the best interests of the child[ren] . . . as to, per se, raise a strong probability that the [interfering parent] is unfit to act as a custodial parent" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011] [internal quotation marks omitted]). Moreover, the record establishes that all three children have not spent any time together in several years. The mother offers a home environment that is loving and nurturing, while the father's home is an environment of fear. We thus conclude that it is in the children's best interests for the mother to have primary physical custody with visitation to the father.

Contrary to the father's contention, where, as here, the court is making an initial custody determination, "relocation is but 'one factor among many' to be considered by [the] court" (*Matter of Sorrentino v Keating*, 159 AD3d 1505, 1507 [4th Dept 2018]; *see Matter of Saperston v Holdaway*, 93 AD3d 1271, 1272 [4th Dept 2012], *appeal dismissed* 19 NY3d 887 [2012], 20 NY3d 1052 [2013]), and the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) need not be strictly applied (*see Saperston*, 93 AD3d at 1272).

Finally, we note that the contention of the Attorney for the Child representing the oldest child that the court erred in ordering unsupervised visitation with the father is not properly before us because the Attorney for the Child did not appeal from the court's order (*see generally Matter of Amollyah B. [Tiffany R.]*, 161 AD3d 1558, 1558 [4th Dept 2018]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

955.1

CA 18-00625

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

VILLAGE OF ARKPORT, PLAINTIFF-RESPONDENT,

V ORDER

ROBERT MAURO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

REEVE BROWN PLLC, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

VOGEL LAW OFFICE, P.C., DANSVILLE (JOHN W. VOGEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered November 17, 2016. The judgment awarded plaintiff money damages as against defendant Robert Mauro.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 28, 2018,

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

955

CA 17-01609

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

VILLAGE OF ARKPORT, PLAINTIFF-RESPONDENT,

V ORDER

MARGARET HORAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

REEVE BROWN PLLC, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

VOGEL LAW OFFICE, P.C., DANSVILLE (JOHN W. VOGEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered November 17, 2016. The judgment awarded plaintiff money damages as against defendant Margaret Horan.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 28, 2018,

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

973

KA 15-00031

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOMINIC FLOWERS, DEFENDANT-APPELLANT.

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

DOMINIC FLOWERS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered October 17, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, assault in the first degree (two counts), assault 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 after a jury trial of murder in the second degree (Penal Law § 125.25 [2]), assault in the second degree (§ 120.05 [2]), and two counts each of assault in the first degree (§ 120.10 [1], [3]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Contrary to defendant's contention in his main and pro se supplemental briefs, the evidence is legally sufficient to establish his identity as one of the people who opened fire on a crowded street, killing one person and injuring two others (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). The People presented evidence that defendant and a codefendant were driven to the scene of the shooting by defendant's sister. Moments after the two men exited the vehicle, the sister, who testified for the People at trial, heard numerous gunshots, and shortly thereafter the two men rushed back to her vehicle. At that time, defendant's sister observed defendant in possession of a firearm.

Moreover, casings found at the scene established that two different types of firearms were used in proximity to each other and in proximity to the corner where defendant's sister had parked her vehicle. One month later, ammunition matching the brand *and* caliber of *both* types of casings was found during the execution of a search

warrant at the residence of defendant's mother, which occurred while defendant was present. In our view, " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found [defendant's identity] proved beyond a reasonable doubt' " (*Danielson*, 9 NY3d at 349; *see generally Bleakley*, 69 NY2d at 495).

Although defendant raises several other challenges to the legal sufficiency of the evidence, he failed to preserve those challenges for our review inasmuch as his motion for a trial order of dismissal was not specifically directed at those grounds (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we reject those challenges (*see generally Bleakley*, 69 NY2d at 495).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), including the instruction that defendant could be found liable as either a principal or an accomplice (*see* Penal Law § 20.00), we conclude that, contrary to defendant's contention in his main and pro se supplemental briefs, the verdict on each count is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although different findings would not have been unreasonable, we conclude that the jury did not fail to give the evidence the weight it should be accorded (*see generally id.*). The jury credited the testimony of defendant's sister, and we defer to the jury's credibility determination under these circumstances (*see People v Washington*, 160 AD3d 1451, 1452 [4th Dept 2018]; *People v Harris*, 56 AD3d 1267, 1268 [4th Dept 2008], *lv denied* 11 NY3d 925 [2009]).

Before trial, the People submitted a *Sandoval* application, notifying County Court of their intent to impeach defendant's credibility by questioning him concerning his prior criminal, vicious or immoral acts. The court permitted the People to question defendant concerning the facts and circumstances underlying one prior criminal act and, with respect to a second act, limited the People's questions to the existence of a felony conviction. We conclude that the court did not abuse its broad discretion in its ruling (*see generally People v Smith*, 27 NY3d 652, 660 [2016]), and the court's exercise of discretion "should not be disturbed merely because the court did not provide a detailed recitation of its underlying reasoning . . . , particularly where, as here, the basis of the court's decision may be inferred from the parties' arguments" (*People v Walker*, 83 NY2d 455, 459 [1994]; *see People v Wertman*, 114 AD3d 1279, 1281 [4th Dept 2014], *lv denied* 23 NY3d 969 [2014]; *cf. People v Graham*, 107 AD3d 1421, 1422 [4th Dept 2013], *affd* 25 NY3d 994 [2015]).

Defendant further contends in his main brief that the court erred in admitting in evidence the ammunition that was recovered during the search of the residence of defendant's mother. Initially we note that, contrary to defendant's contention, his alleged possession of that ammunition does not constitute a prior bad act or a prior uncharged crime and thus is not *Molineux* evidence (*see generally People v Brewer*, 129 AD3d 1619, 1620 [4th Dept 2015], *affd* 28 NY3d 271 [2016]; *People v Anderson*, 304 AD2d 450, 451 [1st Dept 2003], *lv*

denied 100 NY2d 592 [2003]; *People v Duggan*, 229 AD2d 688, 689-690 [3d Dept 1996], *lv denied* 88 NY2d 984 [1996]). Moreover, the court properly exercised its discretion in admitting the ammunition in evidence inasmuch as it "was relevant circumstantial evidence of defendant's [participation in the shooting], specifically because the type [and brand] of ammunition matched the type of weapon [used in the shooting] and [the brand of casings found at the scene]. The connection between the rounds of ammunition and the charges sought to be proved was not so tenuous as to be improbable" (*People v Vasquez*, 214 AD2d 93, 104 [1st Dept 1995], *lv denied* 88 NY2d 943 [1996], citing *People v Mirenda*, 23 NY2d 439, 453 [1969]; *see People v Gray*, 116 AD3d 480, 481 [1st Dept 2014], *affd* 27 NY3d 78 [2016]; *cf. People v Buonincontri*, 18 AD3d 569, 569 [2d Dept 2005], *affd* 6 NY3d 726 [2005]).

We reject defendant's contention in his main brief that there was an insufficient foundation for the admission in evidence of a surveillance video obtained from the hospital where the codefendant sought treatment after the shooting. The hospital's director of corporate security, who maintained the building's video recording surveillance system and thus "was familiar with [its] operation" (*People v Costello*, 128 AD3d 848, 848 [2d Dept 2015], *lv denied* 26 NY3d 927 [2015], *reconsideration denied* 26 NY3d 1007 [2015]), testified that the exhibit admitted at trial " 'truly and accurately represent[ed] what was before the camera' " on the night of the events (*People v Patterson*, 93 NY2d 80, 84 [1999]; *see also People v Davis*, 28 NY3d 294, 303 [2016]).

Defendant further contends in his main brief that he was denied a fair trial by prosecutorial misconduct on summation. That contention is not preserved for our review "inasmuch as defense counsel did not object to certain instances . . . and failed to take any further actions such as requesting a curative instruction or moving for a mistrial when his objections were sustained" (*People v Gibson*, 134 AD3d 1512, 1512-1513 [4th Dept 2015], *lv denied* 27 NY3d 1151 [2016]; *see People v Tolbert*, 283 AD2d 930, 931 [4th Dept 2001], *lv denied* 96 NY2d 908 [2001]). In any event, we conclude that the prosecutor's comments were not "so egregious" as to warrant reversal and did not cause "such substantial prejudice to . . . defendant that he [was] denied due process of law" (*People v Mott*, 94 AD2d 415, 418-419 [4th Dept 1983]).

We reject the further contention of defendant in his pro se supplemental brief that he was denied effective assistance of counsel. Insofar as defendant contends that defense counsel failed to interview witnesses, did not consult with defendant, did not supply defendant with discoverable material and improperly advised defendant not to testify, those contentions are based on matters outside the record and are not reviewable on direct appeal (*see People v Washington*, 39 AD3d 1228, 1230 [4th Dept 2007], *lv denied* 9 NY3d 870 [2007]; *People v Lawrence*, 27 AD3d 1120, 1121 [4th Dept 2006], *lv denied* 6 NY3d 850 [2006]). "Defendant's remaining complaints concerning defense counsel's representation are based on disagreements with trial tactics, and defendant has failed to establish the absence of any

legitimate explanation for defense counsel's decisions" (*Lawrence*, 27 AD3d at 1121; *see People v Seaton*, 147 AD3d 1531, 1532 [4th Dept 2017]; *see generally People v Caban*, 5 NY3d 143, 154 [2005]).

In his pro se supplemental brief, defendant contends that he was denied his right of confrontation when the autopsy report was admitted in evidence and one medical examiner was permitted to testify regarding the findings made and documented by a second medical examiner who prepared the report. That contention is not preserved for our review (*see People v Chelley*, 121 AD3d 1505, 1506 [4th Dept 2014], *lv denied* 24 NY3d 1218 [2015], *reconsideration denied* 25 NY3d 1070 [2015]; *People v Bonner*, 94 AD3d 1500, 1501-1502 [4th Dept 2012], *lv denied* 19 NY3d 1101 [2012], *reconsideration denied* 20 NY3d 1059 [2013]). In any event, defendant's contention lacks merit (*see People v Freycinet*, 11 NY3d 38, 42 [2008]; *see also People v John*, 27 NY3d 294, 315 [2016]; *Chelley*, 121 AD3d at 1506-1507; *People v Acevedo*, 112 AD3d 454, 455 [1st Dept 2013], *lv denied* 23 NY3d 1017 [2014]).

Although defendant further contends in his pro se supplemental brief that he was denied his right to be present at a material stage of the proceedings, we conclude that defendant "failed to meet his burden of coming forward with substantial evidence establishing his absence" from any material stage of the proceedings (*People v Foster*, 1 NY3d 44, 48 [2003]; *see People v Rivera*, 83 AD3d 1370, 1371 [4th Dept 2011], *lv denied* 17 NY3d 904 [2011]).

Finally, we reject defendant's contention in his main and pro se supplemental briefs that the sentence is unduly harsh and severe.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

986

CA 18-00362

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

CHARLES E. LORD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WHELAN AND CURRY CONSTRUCTION SERVICES, INC., FELDMEIER EQUIPMENT, INC., AND 6800 TOWNLINE ROAD PARTNERSHIP, DEFENDANTS-APPELLANTS.

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

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), AND WEGENSKI LAW FIRM, BREWERTON, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered November 2, 2017. The order, inter alia, denied defendants' motion for summary judgment and granted plaintiff's cross motion for partial summary judgment.

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: Plaintiff commenced this Labor Law and common-law negligence action to recover damages for injuries that he sustained when he fell through a roof while working on a demolition project. Defendants contend that Supreme Court erred in granting plaintiff's cross motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) cause of action. We reject that contention. Plaintiff established that defendants' failure to provide adequate fall protection was a proximate cause of the accident (*see Calderon v Walgreen Co.*, 72 AD3d 1532, 1533 [4th Dept 2010], *appeal dismissed* 15 NY3d 900 [2010]). In opposition, defendants failed to raise an issue of fact whether plaintiff's own negligence was the "sole proximate cause" of his injuries, in particular, whether safety harnesses "were readily available at the work site, albeit not in the immediate vicinity of the accident" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *cf. Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016]). Thus, we likewise reject defendants' contention that plaintiff was the sole proximate cause of his injuries and that the court therefore erred in denying their motion for summary judgment dismissing the complaint.

We agree with defendants, however, that the court erred in searching the record and granting summary judgment to plaintiff on his

Labor Law § 241 (6) cause of action, and we therefore modify the order accordingly. Contrary to plaintiff's assertion, although defendants did not advance their contention before the trial court, we conclude that the contention is properly before us because defendants lacked an opportunity to raise it at any time before this appeal (*cf. Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). Further, " '[a] motion for summary judgment on one claim or defense does not provide a basis for searching the record and granting summary judgment on an unrelated claim or defense' " (*Miller v Mott's Inc.*, 5 AD3d 1019, 1020 [4th Dept 2004]; *see Sadkin v Raskin & Rappoport, P.C.*, 271 AD2d 272, 273 [1st Dept 2000]). Here, the only issue raised with respect to the Labor Law § 241 (6) cause of action was on defendants' motion, wherein they asserted that dismissal was warranted on the ground that plaintiff was the sole proximate cause of his injuries. The court therefore erred in granting summary judgment to plaintiff based on alleged violations of 12 NYCRR 23-1.7 (b) (1) (iii) (c) and 23-3.3 (c).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1013

KA 17-00011

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE ROSARIO, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered April 27, 2015. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree (two 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 Niagara County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of sexual abuse in the first degree (Penal Law § 130.65 [2]), defendant contends that County Court erred in accepting the plea because he made a statement during the allocution that cast significant doubt on his guilt or otherwise called into question the voluntariness of the plea and the court failed to conduct a sufficient inquiry to ensure that the plea was knowingly and voluntarily entered. We agree. Although defendant's contention survives his valid waiver of the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 255 [2006]), he failed to preserve that contention for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Burtes*, 151 AD3d 1806, 1807 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017]; *People v Gibson*, 140 AD3d 1786, 1787 [4th Dept 2016], *lv denied* 28 NY3d 1072 [2016]; *People v VanDeViver*, 56 AD3d 1118, 1118 [4th Dept 2008], *lv denied* 11 NY3d 931 [2009], *reconsideration denied* 12 NY3d 788 [2009]). This case nonetheless falls within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]; *People v DeJesus*, 144 AD3d 1564, 1565 [4th Dept 2016]). Defendant made a statement during the plea allocution that raised a potentially viable affirmative defense pursuant to Penal Law § 130.10 (1), thereby "giving rise to a duty on

the part of the court, before accepting the guilty plea, to ensure that defendant was aware of that defense and was knowingly and voluntarily waiving it" (*DeJesus*, 144 AD3d at 1565; *see People v Mox*, 20 NY3d 936, 938-939 [2012]; *People v Dukes*, 120 AD3d 1597, 1598 [4th Dept 2014]). We conclude that the court's inquiry here was insufficient to meet that obligation (*see Mox*, 20 NY3d at 939; *DeJesus*, 144 AD3d at 1565). We therefore reverse the judgment of conviction, vacate the plea, and remit the matter to County Court for further proceedings on the indictment.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1016

KA 16-01190

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEE THOMAS, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS, THE ABBATOY LAW FIRM, PLLC (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL CALARCO, DISTRICT ATTORNEY, LYONS (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered July 5, 2016. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted murder in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]), arising from an incident at defendant's residence in which he fired a shotgun multiple times at two men, which resulted in the death of one of the men (hereafter, victim). We affirm.

Contrary to defendant's contention, we conclude that County Court properly refused to suppress physical evidence that was seized without a warrant from the driveway of defendant's residence inasmuch as that evidence was in plain view upon arrival of the police on the scene following a 911 call reporting the shooting (*see People v Jassan J.*, 84 AD3d 620, 620 [1st Dept 2011], *lv denied* 18 NY3d 925 [2012]; *People v Evans*, 21 AD3d 1317, 1317-1318 [4th Dept 2005], *lv denied* 6 NY3d 775 [2006]; *see generally People v Brown*, 96 NY2d 80, 89 [2001]).

Defendant also contends that the court erred in refusing to suppress the statements that he made to the police at his residence before he received his *Miranda* warnings because he was subjected to custodial interrogation. We reject that contention. "In determining whether a defendant was in custody for *Miranda* purposes, '[t]he test is not what the defendant thought, but rather what a reasonable

[person], innocent of any crime, would have thought had he [or she] been in the defendant's position' " (*People v Kelley*, 91 AD3d 1318, 1318 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012], quoting *People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). Here, the record of the suppression hearing establishes that the police responded to defendant's residence following the 911 call reporting the shooting and, although defendant was initially asked to back up into the kitchen, the police explained that they simply wanted to be able to safely enter the residence and check the premises. Thereafter, a police officer collectively interviewed defendant, his girlfriend, and two roommates in the kitchen of the residence, defendant was never handcuffed or otherwise restrained, and defendant was free to move during the interview (*see People v Rodriguez*, 111 AD3d 1333, 1333-1334 [4th Dept 2013], *lv denied* 22 NY3d 1158 [2014]; *People v Ramirez*, 243 AD2d 734, 735 [2d Dept 1997], *lv denied* 91 NY2d 878 [1997], *reconsideration denied* 91 NY2d 929 [1998]; *People v Lavere*, 236 AD2d 809, 809 [4th Dept 1997], *lv denied* 90 NY2d 860 [1997]). Furthermore, although a police officer testified that he would not have allowed defendant to leave upon initially entering the residence, "[a] police [officer's] unarticulated plan has no bearing on the question whether a suspect was in custody at a particular time . . . [and] the subjective intent of the officer . . . is irrelevant" where, as here, there is no evidence that such subjective intent was communicated to the defendant (*People v Jeremiah*, 147 AD3d 1199, 1201 [3d Dept 2017], *lv denied* 29 NY3d 1033 [2017] [internal quotation marks omitted]). We conclude that, under those circumstances, "a reasonable person innocent of any wrongdoing would not have believed that he or she was in custody" (*Rodriguez*, 111 AD3d at 1334).

Contrary to defendant's further contention, inasmuch as "the initial statement[s were] not the product of pre-*Miranda* custodial interrogation, the post-*Miranda* [statements] given by defendant [at the police station] cannot be considered the fruit of the poisonous tree" (*People v Murphy*, 43 AD3d 1276, 1277 [4th Dept 2007], *lv denied* 9 NY3d 1008 [2007] [internal quotation marks omitted]). Thus, defendant's related contention that defense counsel was ineffective in failing to raise that ground for suppression of the post-*Miranda* statements is without merit because "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to make a motion or argument that has little or no chance of success" (*People v Caban*, 5 NY3d 143, 152 [2005] [internal quotation marks omitted]).

Upon our review of the videotape of defendant's interrogation at the police station, we conclude that the court properly refused to suppress defendant's written and oral statements made during the interrogation because, contrary to defendant's contention, the record does not establish that those statements were involuntary (*see People v Clark*, 139 AD3d 1368, 1369-1370 [4th Dept 2016], *lv denied* 28 NY3d 928 [2016]; *People v Salamone*, 61 AD3d 1400, 1401 [4th Dept 2009], *lv denied* 12 NY3d 929 [2009]; *People v McWilliams*, 48 AD3d 1266, 1267 [4th Dept 2008], *lv denied* 10 NY3d 961 [2008]; *cf. People v Guilford*, 21 NY3d 205, 212-213 [2013]).

Defendant also contends that he was deprived of his constitutional right to a public hearing when the court denied his request to view the videotape of the interrogation in open court during the suppression hearing and instead viewed it in chambers before rendering its written decision. That contention is not preserved for our review inasmuch as defendant requested that the court view the videotape in open court on "different grounds, and the court 'did not expressly decide, in response to protest, the issue[] now raised on appeal' . . . , notwithstanding its 'mere reference' [during argument] . . . to a matter related to the present issue[]" (*People v Cruz*, 154 AD3d 429, 429-430 [1st Dept 2017], *lv denied* 30 NY3d 1059 [2017], quoting *People v Miranda*, 27 NY3d 931, 932-933 [2016]; *see* CPL 470.05 [2]; *People v Lopez*, 185 AD2d 189, 190-191 [1st Dept 1992], *lv denied* 80 NY2d 975 [1992]). 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 further contends that the court erred in denying his challenge for cause to a prospective juror. Although defendant preserved that contention for our review (*see* CPL 270.20 [2]; *People v Harris*, 19 NY3d 679, 685 [2012]), we conclude that it lacks merit. "A prospective juror may be challenged for cause on several grounds" (*People v Furey*, 18 NY3d 284, 287 [2011]), including, as relevant here, that the prospective juror "bears some . . . relationship to [counsel for the People or for the defendant] of such nature that it is likely to preclude him [or her] from rendering an impartial verdict" (CPL 270.20 [1] [c]; *see People v Scott*, 16 NY3d 589, 592-593, 595 [2011]; *People v Collins*, 145 AD3d 1479, 1479-1480 [4th Dept 2016]). "[N]ot all relationships, particularly professional ones, between a prospective juror and relevant persons, including counsel for either side, require disqualification for cause as a matter of law" (*People v Greenfield*, 112 AD3d 1226, 1228 [3d Dept 2013], *lv denied* 23 NY3d 1037 [2014]; *see Furey*, 18 NY3d at 287). "Trial courts are directed to look at myriad factors surrounding the particular relationship in issue, such as the frequency, recency or currency of the contact, whether it was direct contact, and the nature of the relationship as personal and/or professional . . . or merely 'a nodding acquaintance' " (*Greenfield*, 112 AD3d at 1228-1229, quoting *People v Provenzano*, 50 NY2d 420, 425 [1980]; *see Furey*, 18 NY3d at 287).

Here, the information before the court established, at most, that there was an occasional, professional relationship between defense counsel and the prospective juror, who worked primarily in legal publishing, arising from defense counsel's position on a school board that had limited control over some portion of the prospective juror's secondary, part-time paid employment and partial volunteer work in the school district's theater program. The record thus establishes that the relationship was "not [a] particularly close one[and] arose in a professional context[,] and [was] thus not of a type [likely] to preclude [the] prospective juror from rendering an impartial verdict" (*People v Molano*, 70 AD3d 1172, 1174 [3d Dept 2010], *lv denied* 15 NY3d 776 [2010]; *see People v DeFreitas*, 116 AD3d 1078, 1080 [3d Dept 2014], *lv denied* 24 NY3d 960 [2014]; *cf. Greenfield*, 112 AD3d at 1229-

1230). Contrary to defendant's related contention, we also conclude that the court, in reaching its determination to deny the challenge for cause, did not violate its obligation to try and determine "[a]ll issues of fact or law arising on the challenge" (CPL 270.20 [2]; *cf. People v Guldi*, 152 AD3d 540, 543 [2d Dept 2017], *lv denied* 30 NY3d 1019 [2017]).

Contrary to defendant's additional contention, the court did not deny him the expert judgment of counsel, to which the Sixth Amendment entitles him (*see People v Colville*, 20 NY3d 20, 32 [2012]), when it elicited defendant's personal consent to confirm that he was in agreement with the position taken by defense counsel that a seated juror should be discharged. The record refutes defendant's contention "that the decision . . . was made solely in deference to defendant, that it was against the advice of [defense] counsel, or that it was inconsistent with defense counsel's trial strategy" (*People v Gottsche*, 118 AD3d 1303, 1304 [4th Dept 2014], *lv denied* 24 NY3d 1084 [2014]; *see People v Richardson*, 143 AD3d 1252, 1254-1255 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v Black*, 137 AD3d 1679, 1679-1680 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016], *reconsideration denied* 28 NY3d 1026 [2016]).

Defendant contends that the court erred in denying his motion to exclude from the courtroom during opening statements any of the People's witnesses who may have been present. Although the decision to exclude a witness from the courtroom prior to his or her testimony is within the discretion of the trial court (*see People v Baker*, 14 NY3d 266, 274 [2010]), "the practice of such exclusion 'is a time-honored one and should not be abandoned' . . . , 'particularly where the testimony of the witness[ ] is in any measure cumulative or corroborative' " (*People v Felder*, 39 AD2d 373, 380 [2d Dept 1972], *affd* 32 NY2d 747 [1973], *rearg denied* 39 NY2d 743 [1976], *appeal dismissed* 414 US 948 [1973]; *see People v Cooke*, 292 NY 185, 190-191 [1944], *rearg denied* 292 NY 622 [1944]). Even assuming, arguendo, that the court should have excluded any of the People's witnesses from the courtroom during opening statements in order to prevent such witnesses from learning about the expected testimony of other witnesses (*see generally People v Santana*, 80 NY2d 92, 100 [1992], *rearg dismissed* 81 NY2d 1008 [1993]), we conclude that reversal is not warranted because defendant has failed to demonstrate any prejudice resulting from the presence of the only witness specified on the record as being in the courtroom during opening statements, i.e., an investigator who was not an eyewitness to the shooting and merely collected evidence from the scene (*see People v Todd*, 306 AD2d 504, 504 [2d Dept 2003], *lv denied* 1 NY3d 581 [2003]; *People v Leggett*, 55 AD2d 990, 991 [3d Dept 1977]; *People v M. J.*, 42 AD2d 717, 717 [2d Dept 1973]; *Felder*, 39 AD2d at 380).

We reject defendant's contention that the court erred in refusing to charge the jury with one of his requested justification defenses. Viewing the record in the light most favorable to defendant, we conclude that there is no reasonable view of the evidence from which the jury could have found that defendant reasonably believed that the

victim was committing or attempting to commit a kidnapping of defendant's girlfriend (*see* Penal Law § 35.15 [2] [b]; *see generally People v Petty*, 7 NY3d 277, 284-285 [2006]; *People v Sadler*, 153 AD3d 1285, 1286 [2d Dept 2017], *lv denied* 30 NY3d 1022 [2017]).

Finally, the sentence is not unduly harsh or severe.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1019

CA 18-00032

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

KIMBERLY STRIBING, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BILL GRAY'S INC., DEFENDANT-RESPONDENT,
AND SHANIQUA R. HARTFIELD, DEFENDANT.

SHAW & SHAW P.C., HAMBURG (CHRISTOPHER M. PANNOZZO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JOHN WALLACE, BUFFALO (ALYSON C. CULLITON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered October 10, 2017. The order granted the motion of defendant Bill Gray's Inc. seeking summary judgment dismissing plaintiff's complaint against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained as a result of an assault by defendant Shaniqua R. Hartfield in the parking lot of a restaurant owned and operated by defendant Bill Gray's Inc. (defendant). Hartfield was defendant's employee and was at work on the day of the assault. Shortly before the assault, Hartfield's shift was terminated by defendant's manager because Hartfield was engaged in a loud and disruptive cell phone conversation while working. After being told that her shift was terminated, Hartfield was directed by defendant's manager to leave the premises. Hartfield changed out of her work uniform, clocked out, and left the restaurant building. While in the parking lot, Hartfield continued her loud and disruptive cell phone conversation. Defendant's manager sent an employee out to the parking lot to supervise the situation. Meanwhile, an unknown person had called 911 and sirens could be heard as police vehicles approached the restaurant. Plaintiff was seated in the outside dining area of the restaurant and signaled to Hartfield with what witnesses described as the "shush" sign. Hartfield responded by striking plaintiff in the head from behind. According to the deposition testimony of plaintiff's daughter, an eyewitness to the assault, the situation "escalated very quickly" and the assault happened "very fast." Defendant moved for summary judgment dismissing the complaint against it. Supreme Court granted the motion, and we affirm.

Contrary to plaintiff's contention, defendant established as a matter of law that the doctrine of respondeat superior is inapplicable because Hartfield was not acting within the scope of her employment at the time of the assault. The doctrine of respondeat superior renders an employer "vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment" (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]). Although the issue whether an employee is acting within the scope of his or her employment is generally a question of fact, summary judgment is appropriate "in a case such as this, in which the relevant facts are undisputed" (*Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1131 [4th Dept 2008], *lv denied* 11 NY3d 708 [2008]). Here, we conclude that defendant met its initial burden of establishing that Hartfield's assault of plaintiff was not committed in furtherance of defendant's business and was not within the scope of employment (*see Burlarley v Wal-Mart Stores, Inc.*, 75 AD3d 955, 956-957 [3d Dept 2010]; *Zanghi v Laborers' Intl. Union of N. Am., AFL-CIO*, 8 AD3d 1033, 1034 [4th Dept 2004], *lv denied* 4 NY3d 703 [2005]), and plaintiff failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Contrary to plaintiff's further contention, defendant established as a matter of law that it is not liable under the theories of negligent hiring, retention, and supervision of Hartfield. It is well settled that a defendant may be held liable under those theories for the conduct of an employee only if the defendant knew or should have known of the employee's alleged violent propensities (*see Ronessa H. v City of New York*, 101 AD3d 947, 948 [2d Dept 2012]; *Yeboah v Snapple, Inc.*, 286 AD2d 204, 205 [1st Dept 2001]). Here, we conclude that defendant met its initial burden by establishing that it neither knew nor should have known of Hartfield's alleged violent propensities, and plaintiff failed to raise an issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562). We likewise conclude that, contrary to plaintiff's contention, the court properly granted defendant's motion with respect to plaintiff's claim that defendant was negligent under a theory of premises liability (*see generally Wirth v Wayside Pub, Inc.*, 142 AD3d 1346, 1347 [4th Dept 2016]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1041

CA 17-01999

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

DUVAL PITTS, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 120886.)

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOMINIC PELLEGRINO, ROCHESTER, FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Renee Forgensi Minarik, J.), entered October 4, 2017. The judgment found defendant 100% responsible for claimant's injuries.

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

Memorandum: Claimant, an inmate at a state correctional facility, commenced this negligence action seeking damages for injuries he sustained when he was assaulted by a fellow inmate during an afternoon recreation session. Following the liability portion of a bifurcated trial, the Court of Claims determined that defendant was negligent and was fully responsible for claimant's injuries. Defendant now appeals.

Contrary to defendant's contention, the court properly determined that defendant's failure to continuously post officers in the subject recreation yard was a proximate cause of claimant's injuries. At trial, claimant's expert testified that direct supervision, i.e., supervision without any physical barriers, serves as a deterrent against inmate assaults. Yet defendant employed a practice in which there was no direct supervision of inmates in the recreation yard for approximately 30 minutes each day during a "shift change" in the tower overlooking the yard. Also, certain prison personnel testified at trial that there was an increase in "incidents" in the yard during the shift change. In light of that testimony and the other evidence adduced at trial, we conclude that a fair interpretation of the evidence supports the court's determination that defendant's decision to remove the officers from the yard during the shift change was a proximate cause of claimant's injuries (*see Cianchetti v Burgio*, 145 AD3d 1539, 1540-1541 [4th Dept 2016], *lv denied* 29 NY3d 908 [2017]; *Farace v State of New York*, 266 AD2d 870, 870-871 [4th Dept 1999]; *see*

generally Sanchez v State of New York, 99 NY2d 247, 252-255 [2002]).

Finally, we reject defendant's contention that the claim is barred by governmental function immunity. Defendant waived that affirmative defense inasmuch as defendant did not plead it in its amended answer (*see* CPLR 3018 [b]; *see also Valdez v City of New York*, 18 NY3d 69, 78 [2011]; *Murchison v State of New York*, 97 AD3d 1014, 1017 [3d Dept 2012]*; Vasquez v Figueroa*, 262 AD2d 179, 180 [1st Dept 1999]; *see generally Centi v McGillin*, 155 AD3d 1493, 1495 [3d Dept 2017], *lv dismissed* 31 NY3d 1144 [2018]; *Griffith Energy, Inc. v Evans*, 85 AD3d 1564, 1566 [4th Dept 2011]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1046

CA 17-02152

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

ROSE ORTEGA AND RAYMOND ORTEGA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HEALTHCARE SERVICES GROUP, INC.,
DEFENDANT-APPELLANT.

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

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (LAURA C. DOOLITTLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered April 7, 2017. The order, insofar as appealed from, granted the motion of plaintiffs to set aside a jury verdict.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied and the jury verdict is reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for injuries Rose Ortega (plaintiff) allegedly sustained as a result of a slip and fall that occurred at a facility, which was maintained by defendant. Following the damages phase of a bifurcated trial, the jury awarded plaintiff $4,200 for past pain and suffering, $3,300 for past lost wages, and $2,500 for past medical expenses. Plaintiffs moved to set aside the verdict as against the weight of the evidence on the issue of damages, and for a new trial thereon (*see* CPLR 4404 [a]). Defendant appeals from an order that, inter alia, granted the motion and ordered a new trial on damages unless defendant stipulated to increase the award for past pain and suffering to $300,000, for past lost wages to $40,000, and for past medical expenses by an amount "reflecting the cost of medical treatment that plaintiff received following the slip and fall accident in regard to her cervical spine and right shoulder." We agree with defendant that Supreme Court erred in granting the motion, and we therefore reverse the order insofar as appealed from, deny the motion, and reinstate the verdict.

A trial court's "discretionary authority to set aside a jury verdict as against the weight of the evidence under CPLR 4404 (a) is to be exercised with considerable caution" (*Ballas v Occupational &*

Sports Medicine of Brookhaven, P.C., 46 AD3d 498, 498 [2d Dept 2007], *lv dismissed* 10 NY3d 803 [2008], *lv denied* 12 NY3d 702 [2009]). It is well settled that a verdict may be set aside as against the weight of the evidence only if "the evidence so preponderate[d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]; *see McGregor v Permclip Prods. Corp.*, 162 AD3d 1555, 1556 [4th Dept 2018]). Here, the central issue at the damages trial was whether plaintiff's claimed shoulder and cervical spine injuries were causally related to the subject fall, or if they resulted from unrelated prior motor vehicle accidents or other unrelated incidents or conditions. Given the conflicting evidence on that issue, plaintiff's selective and incomplete disclosure of her health history to her healthcare providers and the examining physicians, and her inability to recall prior accidents and injuries during cross-examination, we conclude that the verdict on damages is not against the weight of the evidence because a fair interpretation of the evidence supports the jury's determination that plaintiff's shoulder and cervical spine injuries were unrelated to the subject fall and that the only injury sustained by plaintiff in the fall was a knee sprain.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1050

KA 14-02227

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRAIG DAVIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered September 11, 2014. The appeal was held by this Court by order entered September 29, 2017, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (153 AD3d 1631). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts each of rape in the second degree (Penal Law § 130.30 [1]), criminal sexual act in the second degree (§ 130.45 [1]), and sexual abuse in the third degree (§ 130.55), and one count of endangering the welfare of a child (§ 260.10 [1]). On a prior appeal, we determined that defendant met the initial burden on his *Batson* application, but we held the case, reserved decision and remitted the matter to County Court for the People to articulate a nondiscriminatory reason for striking an African-American prospective juror, and for the court to determine whether the proffered reason was pretextual (*People v Davis*, 153 AD3d 1631, 1631-1632 [4th Dept 2017]). Upon remittal, the court conducted a hearing and determined that the reason proffered by the People for the peremptory challenge was nondiscriminatory and not pretextual.

We agree with defendant that the People failed to meet their burden at step two of the *Batson* analysis to articulate a "race-neutral reason" for striking the prospective juror (*People v Hecker*, 15 NY3d 625, 655 [2010], *cert denied* 563 US 947 [2011]; *see Batson v Kentucky*, 476 US 79, 98 [1986]). On remittal, the prosecutor testified that he did not remember his reason for striking the prospective juror at issue, but stated that it had "nothing to do with race." The prosecutor testified that, instead, "there was something

on [the prospective juror's] jury questionnaire . . . that [he] did not particularly like," which would have provided a basis for exercising a peremptory challenge if he "could not clarify [that] issue" during voir dire. The prosecutor, however, had no recollection of the subject prospective juror's actual questionnaire, which, apparently, was not preserved.

We conclude that the prosecutor's articulated reason for striking the only African-American prospective juror was insufficient to satisfy the People's burden. As noted, the prosecutor could not recall a specific reason for striking the prospective juror, but rather assured the court in a conclusory fashion that the challenge was not based on race and was based, instead, on "something" in the prospective juror's questionnaire. Thus, the prosecutor's explanation "amounted to little more than a denial of discriminatory purpose and a general assertion of good faith" (*People v Dove*, 172 AD2d 768, 769 [2d Dept 1991], *lv denied* 78 NY2d 1075 [1991] [internal quotation marks omitted]; *see Purkett v Elem*, 514 US 766, 769 [1995]; *Batson*, 476 US at 98; *People v Bolling*, 79 NY2d 317, 320 [1992]; *see also People v Bridgeforth*, 28 NY3d 567, 576 [2016]; *People v Davis*, 253 AD2d 634, 635-636 [1st Dept 1998]; *People v Mims*, 149 AD2d 948, 949 [4th Dept 1989], *lv denied* 74 NY2d 744 [1989], *lv dismissed* 76 NY2d 792 [1990]). Where, as here, "the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, . . . precedents require that [defendant's] conviction be reversed" (*Batson*, 476 US at 99). We therefore reverse the judgment and grant a new trial (*see People v Mallory*, 121 AD3d 1566, 1568 [4th Dept 2014]; *Mims*, 149 AD2d at 948; *see also Batson*, 476 US at 99).

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1053

KA 16-01786

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JARVIS STREETER, ALSO KNOWN AS KITTY,
DEFENDANT-APPELLANT.

KELIANN M. ARGY, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered July 21, 2016. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, endangering the welfare of a child, compelling prostitution (four counts), sex trafficking (four counts) and rape in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, predatory sexual assault against a child (Penal Law § 130.96), rape in the third degree (§ 130.25 [2]), and four counts each of compelling prostitution (§ 230.33) and sex trafficking (§ 230.34 [1]), defendant contends that the evidence is legally insufficient to support the conviction of each offense and that the verdict is against the weight of the evidence. Defendant's challenge to the sufficiency of the evidence is not preserved for our review inasmuch as defendant's motion for a trial order of dismissal was not specifically directed at the alleged errors asserted on appeal (*see generally People v Gray*, 86 NY2d 10, 19 [1995]).

In any event, we conclude that defendant's contention lacks merit. The testimony of the witnesses established each element of every offense submitted to the jury, and the witnesses' testimony "was not incredible as a matter of law inasmuch as it was not impossible of belief, i.e., it was not manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Harris*, 56 AD3d 1267, 1268 [4th Dept 2008], *lv denied* 11 NY3d 925 [2009]). We thus conclude that the evidence is legally sufficient to support the conviction and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the

weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant also contends that he is entitled to dismissal of the count of predatory sexual assault against a child (Penal Law § 130.96) because, before jury deliberations began, County Court dismissed the lesser included count of the indictment charging him with course of sexual conduct against a child in the first degree (§ 130.75; *see People v Slishevsky*, 97 AD3d 1148, 1151 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]), and the latter charge is a necessary element of the former. That contention is not preserved for our review inasmuch as "the arguments defendant makes on appeal are entirely different from those he made before and during the trial concerning the presence and submission of [those counts]" (*People v Cerda*, 78 AD3d 539, 540 [1st Dept 2010], *lv denied* 16 NY3d 829 [2011]). In any event, dismissal of a lesser included count is not the equivalent of an acquittal (*see People v Wardell*, 46 AD2d 856, 857 [1st Dept 1974]), and thus the pre-deliberation dismissal of the count of course of sexual conduct against a child in the first degree on the ground that it is a lesser included offense did not require dismissal of the greater offense (*see generally Cerda*, 78 AD3d at 540).

Although defendant further contends that he was denied a fair trial by prosecutorial misconduct, he failed to preserve that contention for our review "inasmuch as he did not object to any alleged instances" of misconduct (*People v Black*, 137 AD3d 1679, 1680 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016], *reconsideration denied* 28 NY3d 1026 [2016]). Regardless, " '[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Pendergraph*, 150 AD3d 1703, 1704 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. Defendant has "failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's alleged shortcomings" (*People v Dickeson*, 84 AD3d 1743, 1743 [4th Dept 2011], *lv denied* 19 NY3d 972 [2012]). Additionally, defendant failed to demonstrate that the motions, arguments and objections, "if made, would have been successful" and that defense counsel's failure to make those motions, arguments and objections deprived him of meaningful representation (*People v Johnson*, 118 AD3d 1502, 1502 [4th Dept 2014], *lv denied* 24 NY3d 1120 [2015]). Thus, viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1058

CAF 16-02214

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

IN THE MATTER OF MARK A. MANDILE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KATRINA V. DESHOTEL, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered November 3, 2016 in a proceeding pursuant to Family Court Act article 4. The order, among other things, confirmed an order of the Support Magistrate.

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, confirmed the determination of the Support Magistrate that she willfully violated a prior child support order and awarded petitioner father a judgment for child support arrears. Contrary to the mother's contention, Family Court properly confirmed the finding of the Support Magistrate that she willfully violated the support order. "The [mother] is presumed to have sufficient means to support [her] child (*see* Family Ct Act § 437), and [her] failure to pay support constitutes 'prima facie evidence of a willful violation' " (*Matter of Huard v Lugo*, 81 AD3d 1265, 1267 [4th Dept 2011], *lv denied* 16 NY3d 710 [2011], quoting § 454 [3] [a]; *see Matter of Barksdale v Gore*, 101 AD3d 1742, 1742 [4th Dept 2012]). "Thus, proof that [a] respondent has failed to pay support as ordered alone establishes [a] petitioner's direct case of willful violation, shifting to [the] respondent the burden of going forward" (*Matter of Powers v Powers*, 86 NY2d 63, 69 [1995]).

Here, it is undisputed that the mother failed to pay the amounts directed by the support order, and the burden thus shifted to her to submit "some competent, credible evidence of [her] inability to make the required payments" (*id*. at 70; *see Barksdale*, 101 AD3d at 1742-1743). The mother failed to meet that burden. Although the mother presented some evidence of medical conditions that allegedly disabled her from work, her medical records indicate that the diagnoses related to those conditions were "based solely on [the mother's] subjective complaints, rather than any objective testing" (*Matter of Straight v*

Skinner, 33 AD3d 1175, 1176 [3d Dept 2006]; *see Matter of St. Lawrence County Support Collection Unit v Laneuville*, 101 AD3d 1199, 1200 [3d Dept 2012]).

Moreover, the Support Magistrate noted that the mother did not seek treatment for her alleged conditions until shortly after the father filed his first violation petition and that she had testified several years earlier that she did not intend to work because she could be fully supported by her paramour. According deference to the Support Magistrate's credibility assessments (*see Matter of Yamonaco v Fey*, 91 AD3d 1322, 1323 [4th Dept 2012], *lv denied* 19 NY3d 803 [2012]), we find no reason to disturb his determination that the mother failed to demonstrate her inability to comply with the child support order.

We reject the mother's further contention that the court erred in refusing to cap her unpaid child support arrears at $500. It is true that "[w]here the sole source of a noncustodial parent's income is public assistance, 'unpaid child support arrears in excess of five hundred dollars shall not accrue' " (*Matter of Edwards v Johnson*, 233 AD2d 884, 885 [4th Dept 1996], quoting Family Ct Act § 413 [1] [g]). As noted above, although the mother received public assistance and did not maintain employment, circumstantial evidence suggested that she "ha[d] access to, and receive[d], financial support from [her live-in paramour]" (*Matter of Rohme v Burns*, 92 AD3d 946, 947 [2d Dept 2012]; *see Matter of Deshotel v Mandile*, 151 AD3d 1811, 1812 [4th Dept 2017]). Inasmuch as " '[a] court need not rely upon a party's own account of his or her finances, but may impute income . . . to a party based on . . . money received from friends and relatives' " (*Deshotel*, 151 AD3d at 1811-1812), we conclude that the court did not err in denying the mother's motion to cap her arrears at $500 (*cf. Edwards*, 233 AD2d at 885). We have considered the mother's remaining contention and conclude that it is without merit.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1062

CA 18-00254

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

ANTWAN ANDERSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NATIONAL GRID USA SERVICE CO., VERIZON COMMUNICATIONS, INC., AND DANUTA KOZBOR-FOGELBERG, DEFENDANTS-RESPONDENTS.

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (MICHAEL J. MASINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NATIONAL GRID USA SERVICE CO. AND VERIZON COMMUNICATIONS, INC.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 19, 2017. The order and judgment, among other things, granted defendants' motions for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff, a cable and internet service technician, commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell off the roof of a detached garage on property owned by defendant Danuta Kozbor-Fogelberg while attempting to access a utility pole owned by National Grid USA Service Co. and Verizon Communications, Inc. (defendants) in order to perform an internet reconnection for a residential customer. Plaintiff had determined that he could not obtain ground-level access to the utility pole, which was located behind the garage, because, inter alia, the path to the pole was blocked by a locked gate on the property and plaintiff was purportedly unable to contact the property owner to unlock the gate. Without contacting his supervisor to obtain further instruction or assistance, plaintiff thereafter decided to climb over the pitched roof of the garage to gain access to the pole. As plaintiff reached the peak of the roof, the ladder he was carrying over his shoulder got caught in utility wires suspended over the garage; simultaneously, his ankle became entangled with a telephone wire that was hanging just above the roof. Plaintiff tried to free himself by shaking his leg loose from the telephone wire, but he fell backward, dropped the ladder, and rolled off the front of the roof onto the driveway below. As limited by his brief, plaintiff appeals

from an order and judgment to the extent that it granted defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action. We affirm.

"It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law" (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]). "Defendants moving for summary judgment on Labor Law § 200 and common-law negligence causes of action may thus show their entitlement to summary judgment 'by establishing that plaintiff's accident resulted from the manner in which the work was performed, not from any dangerous condition on the premises, and [that] defendants exercised no supervisory control over the work' " (*Gillis v Brown*, 133 AD3d 1374, 1376 [4th Dept 2015]). Here, defendants established that the wires hanging above the roof of the garage did not, as alleged by plaintiff, constitute a "tripping and walking hazard" along an area of the property leading to the work site; instead, the alleged defect arose from plaintiff's method of performing the work by foregoing appropriate, authorized means of obtaining access to the utility pole and deciding to traverse the pitched roof of the garage over which the wires hung (*see generally id.*). Inasmuch as defendants exercised no supervisory control over the injury-producing work, defendants established their entitlement to summary judgment dismissing the section 200 and common-law negligence causes of action (*see Lombardi*, 80 NY2d at 295; *Gillis*, 133 AD3d at 1376). Plaintiff failed to raise a triable issue of fact in opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1063

CA 17-01441

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

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO
BAC HOME LOANS SERVICING, LP, FORMERLY KNOWN
AS COUNTRYWIDE HOME LOANS SERVICING, LP,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK J. SPENCER, ALSO KNOWN AS PATRICK SPENCER,
ET AL., DEFENDANTS,
AND SANDRA B. SPENCER, DEFENDANT-APPELLANT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., GENEVA (AMARIS ELLIOTT-ENGEL OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVIDSON FINK LLP, ROCHESTER (RICHARD FRANCO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered April 19, 2017. The order, insofar as appealed from, granted those parts of the motion of plaintiff seeking summary judgment, seeking to strike the answer of defendant Sandra B. Spencer and seeking the appointment of a referee.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, those parts of the motion seeking summary judgment on the amended complaint, seeking to strike the answer of defendant Sandra B. Spencer, and seeking appointment of a referee are denied, and the fifth through ninth ordering paragraphs are vacated.

Memorandum: Plaintiff commenced this action seeking to foreclose a mortgage secured by residential property owned by Sandra B. Spencer (defendant). We conclude that Supreme Court erred in granting plaintiff's motion seeking, inter alia, summary judgment on its amended complaint against defendant. In her pro se answer to the amended complaint, defendant alleged that the loan was subject to Federal Housing Administration guidelines and that plaintiff failed to comply with the regulations of the Department of Housing and Urban Development requiring the mortgagee to undertake certain pre-foreclosure measures, including a face-to-face meeting with the mortgagor, with respect to such loans. Although defendant did not specifically cite 24 CFR 203.604, the regulation establishing the face-to-face meeting requirement, in her answer, we afford the pro se answer a liberal reading (*see generally HSBC Mtge. Corp. [USA] v*

Johnston, 145 AD3d 1240, 1241 [3d Dept 2016]; *Wells Fargo Bank, N.A. v Erobobo*, 127 AD3d 1176, 1177 [2d Dept 2015], *lv dismissed* 25 NY3d 1221 [2015]), and conclude that defendant "sufficiently apprise[d] plaintiff" that she was challenging plaintiff's compliance with the requirements of that regulation (*Johnston*, 145 AD3d at 1241).

Plaintiff failed to establish that it complied with the requirements of 24 CFR 203.604 and thus failed to establish that it was entitled to judgment as a matter of law on the amended complaint (*see Green Planet Servicing, LLC v Martin*, 141 AD3d 892, 893 [3d Dept 2016]; *HSBC Bank USA, N.A. v Teed*, 48 Misc 3d 194, 196-197 [Steuben County Ct 2014]; *cf. US Bank N.A. v McMullin*, 55 Misc 3d 1053, 1060-1064 [Sup Ct, Albany County 2017]). More specifically, plaintiff did not arrange or attempt to arrange a face-to-face interview with defendant at any time "before three full monthly installments . . . [were] unpaid" (§ 203.604 [b]). Instead, the first attempt was made in June 2011, i.e., more than six months after the first installment went unpaid. Moreover, plaintiff did not establish that it sent notices to defendant by certified mail, as required by section 203.604 (d).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1068

CA 17-01406

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

GLASCO ROZIER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BTNH, INC., DOING BUSINESS AS DELAWARE NURSING & REHABILITATION CENTER, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

JOY A. KENDRICK, BUFFALO, FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, BUFFALO (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered March 29, 2017. The order, insofar as appealed from, denied those parts of the motion of plaintiff seeking to preclude certain testimony and seeking partial summary judgment.

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

Same memorandum as in *Rozier v BTNH, Inc.* ([appeal No. 2] — AD3d — [Nov. 9, 2018] [4th Dept 2018])

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1069

CA 18-00264

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

GLASCO ROZIER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BTNH, INC., DOING BUSINESS AS DELAWARE NURSING & REHABILITATION CENTER, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

JOY A. KENDRICK, BUFFALO, FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, BUFFALO (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 2, 2017. The judgment awarded defendant costs upon a jury verdict of no cause of action.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that he allegedly sustained when he slipped and fell on ice in defendant's parking lot. In appeal No. 1, plaintiff appeals from an order that, inter alia, denied that part of his pretrial motion seeking to preclude habit evidence. In appeal No. 2, plaintiff appeals from a judgment entered on the jury's verdict finding no negligence on the part of defendant. We note at the outset that the appeal from the order in appeal No. 1 must be dismissed inasmuch as the order in that appeal is subsumed in the judgment in appeal No. 2 (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Contrary to plaintiff's contention, Supreme Court properly allowed defendant's maintenance staff to testify concerning their custom and habit with respect to snow and ice removal procedures. " 'Proof of a deliberate repetitive practice by one in complete control of the circumstances' is admissible provided that the party presenting such proof demonstrates 'a sufficient number of instances of the conduct in question' " (*Biesiada v Suresh*, 309 AD2d 1245, 1245 [4th Dept 2003], quoting *Halloran v Virginia Chems.*, 41 NY2d 386, 392 [1977]; *see Mancuso v Koch* [appeal No. 2], 74 AD3d 1736, 1738 [4th Dept 2010]). Here, the testimony of the maintenance staff concerning their daily routine in maintaining the subject parking lot was

properly admitted as evidence of their conduct prior to the incident at issue.

We reject plaintiff's further contention that the court erred in denying his posttrial motion seeking, inter alia, to set aside the verdict as against the weight of the evidence. It is well established that " '[a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence' " (*Sauter v Calabretta*, 103 AD3d 1220, 1220 [4th Dept 2013]). "That determination is addressed to the sound discretion of the trial court, but if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*Ruddock v Happell*, 307 AD2d 719, 720 [4th Dept 2003]). Here, based upon our review of the record, we conclude that the court properly refused to set aside the jury verdict as against the weight of the evidence (*see generally Rew v Beilein* [appeal No. 2], 151 AD3d 1735, 1737-1738 [4th Dept 2017]).

In light of our determination, plaintiff's contentions regarding certain evidentiary rulings relating to proof of damages are moot (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). We have considered plaintiff's remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1070

CA 18-00193

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

DEEPIKA REDDY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WSYR NEWSCHANNEL 9, NEWPORT TELEVISION, LLC, AND CHRISTIE CASCIANO, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

DEEPIKA REDDY, PLAINTIFF-APPELLANT PRO SE.

BARCLAY DAMON LLP, BUFFALO (JOSEPH M. FINNERTY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered November 28, 2017. The order, inter alia, granted the motion of defendants for summary judgment and dismissed the second amended complaint.

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

Memorandum: Plaintiff, a Syracuse dentist, was the subject of a disciplinary proceeding in 2010. As a result of that proceeding, plaintiff entered into a consent order that suspended her license to practice in the areas of endodontics and oral surgery pending her completion of a specific course of retraining in those areas. Defendants incorrectly reported in a televised news story that plaintiff was suspended from practicing dentistry and did not explain that the suspension was limited to her practice of endodontics and oral surgery. Plaintiff thereafter commenced the instant defamation action.

In appeal No. 1, plaintiff appeals from an order that, inter alia, granted defendants' motion for summary judgment dismissing the second amended complaint. In appeal No. 2, plaintiff appeals from an order denying her motion to vacate the order in appeal No. 1 pursuant to CPLR 5015 (a). We affirm in both appeals.

In appeal No. 1, even assuming, arguendo, that plaintiff is a private rather than a public figure, we conclude that defendants met their initial burden on their summary judgment motion by establishing that they did not act in a " 'grossly irresponsible manner' " (*Elibol v Berkshire-Hathaway, Inc.*, 298 AD2d 944, 945 [4th Dept 2002], quoting *Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199 [1975]), and

that plaintiff failed to raise a triable issue of fact with respect thereto (*see id.*; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We have considered plaintiff's remaining contentions in appeal No. 1 and her contention in appeal No. 2 and conclude that they are without merit.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1071

CA 18-00197

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

DEEPIKA REDDY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WSYR NEWSCHANNEL 9, NEWPORT TELEVISION, LLC, AND CHRISTIE CASCIANO, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

DEEPIKA REDDY, PLAINTIFF-APPELLANT PRO SE.

BARCLAY DAMON LLP, BUFFALO (JOSEPH M. FINNERTY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 2, 2018. The order denied the motion of plaintiff to vacate the prior order of the court.

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

Same memorandum as in *Reddy v WSYR NewsChannel 9* ([appeal No. 1] — AD3d — [Nov. 9, 2018] [4th Dept 2018]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1073

TP 18-00740

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

IN THE MATTER OF DARNELL BALLARD, PETITIONER,

V 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 [Russell P. Buscaglia, A.J.], entered November 22, 2017) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1074

KA 17-01664

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD GRIFFITH, DEFENDANT-APPELLANT.

WILLIAM CLAUSS, ROCHESTER, FOR DEFENDANT-APPELLANT.

HOWARD GRIFFITH, DEFENDANT-APPELLANT PRO SE.

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

Appeal from an order of the Onondaga County Court (Thomas J. Miller, J.), entered July 21, 2017. The order denied defendant's petition seeking a downward modification of his previously-imposed classification as a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order that denied his petition pursuant to Correction Law § 168-o (2) seeking a downward modification of his previously-imposed classification as a level three risk under the Sex Offender Registration Act ([SORA] § 168 *et seq*.). As a preliminary matter, we note that defendant's pro se notice of appeal states that he is appealing pursuant to CPL 450.10 (1) "as it applies" to Correction Law § 168-n. CPL 450.10 (1), however, does not grant defendant the right to appeal from an order denying his petition for a downward modification of his risk level; instead, that right is conferred by CPLR 5701 (*see generally People v Charles*, 162 AD3d 125, 126, 137-140 [2d Dept 2018], *lv denied* 32 NY3d 904 [2018]). Nevertheless, we deem the appeal to have been taken pursuant to the proper statute, and we therefore reach the merits of the issues raised on appeal (*see* CPLR 2001).

We agree with defendant that he was denied effective assistance of counsel, and we therefore reverse the order, reinstate the petition, and remit the matter to County Court for a new hearing on the petition. Defendant contended in the petition, among other things, that he was entitled to a downward modification of his risk level classification. His assigned counsel, however, wrote a letter

to the court indicating that the petition lacked merit, counsel would not support the petition, and he had advised defendant to withdraw the petition so that defendant would not needlessly delay his right to file a new modification petition in two years. We conclude that defense counsel "essentially[] became a witness against [defendant] and took a position adverse to him," which denied defendant effective assistance of counsel (*People v Caccavale*, 305 AD2d 695, 695 [2d Dept 2003]; *see People v Freire*, 157 AD3d 963, 964 [2d Dept 2018]; *People v Brown*, 152 AD3d 1209, 1212 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017]). In addition, a defendant may commence a Correction Law § 168-o (2) proceeding no more than once annually (*see People v Lashway*, 25 NY3d 478, 483 [2015]), thus defense counsel's advice was incorrect as well as adverse to defendant's position.

Contrary to defendant's contentions in his pro se supplemental brief, the court did not err in refusing to allow him to challenge his plea or other aspects of his underlying conviction. It is well settled that a SORA proceeding may not be used to challenge the underlying conviction (*see generally People v Buniek*, 121 AD3d 659, 659 [2d Dept 2014], *lv denied* 24 NY3d 914 [2015]; *People v Clavette*, 96 AD3d 1178, 1179 [3d Dept 2012], *lv denied* 20 NY3d 851 [2012]; *People v Ayala*, 72 AD3d 1577, 1578 [4th Dept 2010], *lv denied* 15 NY3d 816 [2010]).

In light of our determination, we do not address the remaining contentions in defendant's main brief.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1077

KA 16-02094

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADRIAN HALL, 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 Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered October 18, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted reckless endangerment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted reckless endangerment in the first degree (Penal Law §§ 110.00, 120.25). Contrary to defendant's contention, he knowingly, intelligently, and voluntarily waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and his valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1078

KA 17-00161

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL F. RAMSEY, DEFENDANT-APPELLANT.

ROSALYN B. AKALONU, NEW CITY, FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Douglas A. Randall, J.), entered November 28, 2016. The order denied the motion of defendant to set aside his sentence pursuant to CPL 440.20.

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

Memorandum: Defendant appeals from an order that denied his motion pursuant to CPL 440.20 seeking to set aside the sentence imposed upon his conviction of, inter alia, three counts each of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]) and criminal possession of a weapon in the second degree (former § 265.03), and one count of criminal possession of a weapon in the third degree (former § 265.02 [4]). Defendant was sentenced on that conviction to concurrent and consecutive terms of imprisonment amounting to an aggregate term of 25 to 50 years, after being reduced by operation of law (*see* Penal Law § 70.30 [1] [e] [i], [vi]). Defendant's conviction stems from his armed robbery of a market, during which he shot a cashier. We previously affirmed the judgment of conviction (*People v Ramsey*, 199 AD2d 985 [4th Dept 1993], *lv denied* 83 NY2d 857 [1994]), and now conclude that defendant has not met his burden of proving by a preponderance of the evidence that the consecutive sentencing was "unauthorized, illegally imposed or otherwise invalid as a matter of law" (CPL 440.20 [1]; *see People v Young*, 143 AD3d 1242, 1243 [4th Dept 2016], *lv denied* 28 NY3d 1128 [2016]). We therefore conclude that County Court properly denied the motion, and thus we affirm.

Contrary to defendant's contention, the court properly directed that the sentences imposed for the two counts of attempted robbery in the first degree related to the cashier shall run consecutively to the

sentence imposed for another count of that crime related to the second victim (*see generally* Penal Law § 70.25 [2]; *People v Couser*, 28 NY3d 368, 384-385 [2016]; *People v Salamone*, 89 AD3d 961, 962 [2d Dept 2011], *lv denied* 18 NY3d 928 [2012], *reconsideration denied* 18 NY3d 997 [2012]). The record establishes that defendant shot the cashier outside the presence of the second victim and, only after that shooting was completed, threatened and demanded money from the second victim while displaying a firearm. It is not illegal to impose consecutive sentences where, as here, each crime "was a separate and distinct act committed against a separate victim" (*Salamone*, 89 AD3d at 962; *see People v Laureano*, 87 NY2d 640, 643 [1996]).

We further conclude that the remaining consecutive sentences imposed on the criminal possession of a weapon counts were lawful. Defendant failed to show by a preponderance of the evidence that the three counts of criminal possession of a weapon in the second degree (Penal Law § 265.03) involved the same intent, and thus the court also properly denied the motion to that extent (*see generally People v Okafore*, 72 NY2d 81, 87 [1988]; *Young*, 143 AD3d at 1243). Additionally, inasmuch as criminal possession of a weapon in the third degree (former § 265.02 [4]) has no intent element and requires only knowing possession, "the issue of whether consecutive sentences require separate unlawful intents . . . is not implicated" (*People v Harris*, 96 AD3d 502, 503 [1st Dept 2012], *affd* 21 NY3d 739 [2013]). We have examined defendant's remaining contentions and conclude that they are without merit.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1082

KAH 16-00564

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RICHARD GLOSS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SUSAN KICKBUSH, SUPERINTENDENT, GOWANDA
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

RICHARD GLOSS, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered January 19, 2016 in a habeas corpus proceeding. The judgment, among other things, denied the petition.

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

Memorandum: Petitioner is serving an indeterminate term of incarceration of 25 years to life for his conviction of, inter alia, murder in the second degree (*People v Gloss*, 83 AD2d 782, 782 [4th Dept 1981]). Petitioner commenced this proceeding seeking a writ of habeas corpus on the grounds that, inter alia, the indictment contained duplicitous counts, the prosecution withheld exculpatory evidence, County Court made erroneous evidentiary rulings during the trial, County Court's reasonable doubt charge was erroneous, and he is actually innocent. Supreme Court denied the petition. We affirm.

Initially, we reject respondent's contention that the appeal should be dismissed on the ground that no appeal lies from an ex parte order. Notice of the habeas corpus petition was not required to be provided to respondent (*see* CPLR 7002 [a]; *People ex rel. Charles B. v McCulloch*, 155 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 31 NY3d 906 [2018]).

Petitioner contends in his main brief that the sentence is unduly harsh and severe, and that it also constitutes cruel and unusual punishment as applied to him. Those contentions are not properly before us because petitioner did not raise them in the petition (*see People ex rel. McWhinney v Smith*, 219 AD2d 879, 879 [4th Dept 1995]). Moreover, we note that the proper avenue for petitioner to challenge

the denial of parole is not by way of habeas corpus petition, but is to file a CPLR article 78 petition challenging the denial of parole and, if that petition is denied, to appeal (*see generally Matter of Peterson v Stanford*, 151 AD3d 1960, 1961 [4th Dept 2017]; *Matter of Fischer v Graziano*, 130 AD3d 1470, 1470 [4th Dept 2015]).

Petitioner further contends in his main brief that certain evidentiary rulings and the reasonable doubt charge of County Court during the underlying murder trial were erroneous. Supreme Court properly rejected the petition with respect to those grounds. "Habeas corpus relief is not an appropriate remedy for asserting claims that were or could have been raised on direct appeal or in a CPL article 440 motion" (*People ex rel. Haddock v Dolce*, 149 AD3d 1593, 1593 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017] [internal quotation marks omitted]; *see People ex rel. Williams v Sheahan*, 145 AD3d 1517, 1517 [4th Dept 2016], *lv denied* 29 NY3d 908 [2017]), or where the petitioner, if successful, would not be entitled to immediate release (*see Williams*, 145 AD3d at 1518). Here, each of the aforementioned grounds was either raised on direct appeal and rejected, or should have been raised on direct appeal or by CPL article 440 motion. Moreover, petitioner would not be entitled to immediate release if successful, and, instead, would be entitled to a new trial (*see* CPL 470.20 [1]; *see generally People ex rel. Kaplan v Commissioner of Correction of City of N.Y.*, 60 NY2d 648, 649 [1983]).

We have reviewed the contentions in petitioner's pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1087

CA 17-01450

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

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

V MEMORANDUM AND ORDER

NATHANIEL W., FOR CIVIL MANAGEMENT PURSUANT TO ARTICLE 10 OF THE MENTAL HYGIENE LAW, RESPONDENT-APPELLANT.

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (KAREN BAILEY TURNER OF COUNSEL), FOR RESPONDENT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered May 2, 2017 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 determining, following a nonjury trial, that he is a dangerous sex offender requiring confinement (*see* § 10.03 [e]) and committing him to a secure treatment facility. We affirm.

We reject respondent's contention that the determination is against the weight of the evidence. Supreme Court "was in the best position to evaluate the weight and credibility" of the conflicting expert testimony presented and we see no reason to disturb the court's decision to credit the testimony of petitioner's expert (*Matter of Allan M. v State of New York*, 163 AD3d 1493, 1493 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of State of New York v Scott W.*, 160 AD3d 1424, 1426 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018]; *Matter of Billinger v State of New York*, 137 AD3d 1757, 1758 [4th Dept 2016], *lv denied* 27 NY3d 911 [2016]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1090

CA 18-00900

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

ALLIED WORLD NATIONAL ASSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V ORDER

PEERLESS INSURANCE COMPANY - A STOCK COMPANY,
DEFENDANT-APPELLANT.

JAFFE & ASHER LLP, WHITE PLAINS (MARSHALL T. POTASHNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARTER SECREST & EMERY LLP, BUFFALO (PATRICK M. TOMOVIC OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 7, 2017. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1094

KA 17-00746

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RONALD THOMAS, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Onondaga County Court (Stephen J. Dougherty, A.J.), entered March 23, 2017. Defendant was resentenced upon his conviction of assault in the second degree and criminal possession of a weapon in the third degree.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1098

KA 13-01622

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JUSTIN R. WURTENBERG, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, TREVETT CRISTO P.C. (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered May 31, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree, attempted robbery in the second degree (two counts), and assault in the second degree (two counts).

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1100

KA 17-00759

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON HEMINGWAY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ELIZABETH RIKER 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 (Joseph E. Fahey, J.), rendered January 15, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [1]), defendant contends that reversal of the judgment and vacatur of the plea are required because County Court failed to advise him, at the time of the plea, of the period of postrelease supervision that would be imposed at sentencing. We agree (*see People v Turner*, 24 NY3d 254, 259 [2014]; *People v Catu*, 4 NY3d 242, 245 [2005]; *People v Palmer*, 137 AD3d 1615, 1615 [4th Dept 2016]). In light of our determination, we do not address defendant's remaining contentions.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1103

KAH 16-01834

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RICKY WINTERS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

K. CROWLEY, SUPERINTENDENT, ORLEANS CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR PETITIONER-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered August 22, 2016 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition for a writ of habeas corpus. The appeal has been rendered moot by petitioner's release from custody (*see People ex rel. Valentin v Annucci*, 159 AD3d 1391, 1392 [4th Dept 2018], *lv denied* 31 NY3d 911 [2018]; *People ex rel. Moore v Stallone*, 151 AD3d 1839, 1839 [4th Dept 2017]; *People ex rel. Yourdon v Semrau*, 133 AD3d 1351, 1351 [4th Dept 2015]), and we conclude that the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1104

CA 17-02002

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

RICHARD H. WARNER, INDIVIDUALLY, AND AS GUARDIAN OF MARY DOROTHY WARNER, AN INCAPACITATED PERSON, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 098768.)
(APPEAL NO. 1.)

THE COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR CLAIMANT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBURG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (J. David Sampson, J.), entered March 15, 2017. The judgment dismissed the claim after a trial.

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

Memorandum: Claimant filed two separate claims, one seeking damages for personal injuries sustained by claimant's decedent, and a second seeking damages for her wrongful death (*see Warner v State of New York*, 125 AD3d 1324, 1325 [4th Dept 2015], *lv denied* 25 NY3d 906 [2015]). In appeal Nos. 1 and 2, claimant appeals from two judgments, entered after a nonjury trial on both claims, in which the Court of Claims dismissed the claims. We affirm in both appeals. Contrary to claimant's contention, the court applied the correct standard of "ordinary rules of negligence" and did not apply principles of qualified immunity (*Brown v State of New York*, 31 NY3d 514, 519 [2018]). We reject claimant's further contention that the court's determination is against the weight of the evidence (*see generally Mosley v State of New York*, 150 AD3d 1659, 1660 [4th Dept 2017]; *Livingston v State of New York*, 129 AD3d 1660, 1660 [4th Dept 2015], *lv denied* 26 NY3d 903 [2015]). The court determined that claimant failed to establish by a preponderance of the evidence that a dangerous condition existed; that even if a dangerous condition existed, the evidence did not establish that defendant had notice of it; and, in any event, that claimant failed to establish by a preponderance of the evidence that the dangerous condition was a proximate cause of the accident (*see Brown*, 31 NY3d at 519-520). We

conclude that the court's determinations are based upon a fair interpretation of the evidence (*see Mosley*, 150 AD3d at 1661; *Livingston*, 129 AD3d at 1660).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1105

CA 17-02003

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

RICHARD H. WARNER, AS EXECUTOR OF THE ESTATE
OF MARY DOROTHY WARNER, DECEASED,
CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 105712.)
(APPEAL NO. 2.)

THE COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR CLAIMANT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBURG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (J. David Sampson, J.), entered March 15, 2017. The judgment dismissed the claim after a trial.

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

Same memorandum as in *Warner v State of New York* ([appeal No. 1] — AD3d — [Nov. 9, 2018] [4th Dept 2018]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1106

CA 17-02004

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

RICHARD H. WARNER, INDIVIDUALLY, AND AS GUARDIAN OF MARY DOROTHY WARNER, AN INCAPACITATED PERSON, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 098768.)

RICHARD H. WARNER, AS EXECUTOR OF THE ESTATE OF MARY DOROTHY WARNER, DECEASED, CLAIMANT-APPELLANT,

V

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 105712.)
(APPEAL NO. 3.)

THE COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR CLAIMANT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBURG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered May 31, 2017. The order denied the motion of claimant to set aside judgments pursuant to CPLR 4404 (b).

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435 [2d Dept 1989]; *see also* CPLR 5501 [a] [1], [2]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1115

CA 17-01015

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF ANTHONY N., CONSECUTIVE NO. 18852, FROM
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO
MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered February 15, 2017 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, adjudged that petitioner shall continue to be committed to a secure treatment facility.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1123

KA 16-02290

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ABDULLAHI MUDEY, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), 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 (Barry M. Donalty, J.), rendered May 12, 2016. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree (two counts).

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1132

CAF 17-01422

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

IN THE MATTER OF DEBORAH J. KILLABY,
PETITIONER-RESPONDENT,

V ORDER

LAWRENCE P. LEE, RESPONDENT-APPELLANT,
AND RACHEL BANTLE, RESPONDENT-RESPONDENT.

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

TYSON BLUE, MACEDON, FOR RESPONDENT-RESPONDENT.

SEAN D. LAIR, SODUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, A.J.), entered July 24, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded primary physical custody of the subject child to petitioner.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1143

TP 18-00968

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

IN THE MATTER OF CLARENCE GOURDINE, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

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, Wyoming County [Michael M. Mohun, A.J.], entered May 22, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1144

KA 16-01792

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY L. WALLS, DEFENDANT-APPELLANT.

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

MATTHEW D. NAFUS, SPECIAL DISTRICT ATTORNEY, SCOTTSVILLE, FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered June 13, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance 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 sale of a controlled substance in the fourth degree (Penal Law § 220.34 [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Johnson*, 161 AD3d 1529, 1529 [4th Dept 2018]; *People v Dieguez-Castillo*, 124 AD3d 1344, 1345 [4th Dept 2015], *lv denied* 25 NY3d 950 [2015]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1148

KA 16-00923

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY MUNFORD, DEFENDANT-APPELLANT.

SESSLER LAW PC, GENESEO (STEVEN D. SESSLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered May 5, 2016. The judgment convicted defendant, upon his plea of guilty, of assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the third degree (Penal Law § 120.00 [1]). We affirm. The record does not support defendant's contention that the People moved to dismiss the indictment in the furtherance of justice pursuant to CPL 210.40. Thus, contrary to defendant's further contention, reversal is not warranted on the ground that there was no valid accusatory instrument upon which to convict him.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1154

CAF 17-01898

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

IN THE MATTER OF MICHAEL F. MCKENZIE, SR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JESSICA L. POLK, RESPONDENT-APPELLANT.

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

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Genesee County (Eric R. Adams, A.J.), entered September 7, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded the parties joint legal custody of the subject child with primary physical residence to petitioner.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, respondent mother appeals from an order that, inter alia, modified a prior order of custody and visitation by awarding the parties joint legal custody of the subject child with primary physical residence with petitioner father and visitation to the mother. We reject the mother's contention that there was not a sufficient change in circumstances warranting an inquiry into whether modification of the prior order is in the child's best interests. "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 child[ ]" (*Matter of Hight v Hight*, 19 AD3d 1159, 1160 [4th Dept 2005] [internal quotation marks omitted]). Here, there was a sufficient change in circumstances inasmuch as the parties "had in practice altered the custody and visitation arrangement set forth in the stipulated order" (*Matter of Donnelly v Donnelly*, 55 AD3d 1373, 1373 [4th Dept 2008]). Contrary to the mother's further contention, we conclude that a sound and substantial basis in the record supports Supreme Court's determination that awarding the father primary physical custody of the subject child is in the child's best interests (*see Matter of Cross v*

Caswell, 113 AD3d 1107, 1107-1108 [4th Dept 2014]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1155

CAF 16-02301

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

IN THE MATTER OF CHRISTIAN W., JEREMIAH G.,
AND ARZELL G.

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

MICHAEL W., RESPONDENT-APPELLANT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

JAMES E. BROWN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RICHARD L. SULLIVAN OF COUNSEL), ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered December 5, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject children and placed him under the supervision of petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order determining, inter alia, that he neglected the subject children. Contrary to the father's contention, Family Court did not err in permitting the Attorney for the Children (AFC) to present additional evidence after the in camera hearing inasmuch as the AFC had not yet rested and thus had not closed her case. In any event, even assuming, arguendo, that she had rested and closed her case, we would nevertheless conclude that the court did not abuse or improvidently exercise its "considerable discretion" in permitting the AFC to reopen her case (*Scott VV. v Joy VV.*, 103 AD3d 945, 949 [3d Dept 2013], *lv denied* 21 NY3d 909 [2013]; *see Matter of Jewelisbeth JJ. [Emmanuel KK.]*, 97 AD3d 887, 888-889 [3d Dept 2012]; *Matter of Julia BB. [Diana BB.]*, 42 AD3d 208, 215-216 [3d Dept 2007], *lv denied* 9 NY3d 815 [2007]; *see generally Feldsberg v Nitschke*, 49 NY2d 636, 643 [1980], *rearg denied* 50 NY2d 1059 [1980]).

The father further contends that he was denied his due process rights when the court conducted an interview with one of the children outside the presence of the father and his counsel. Inasmuch as the

father raised no objections to the in camera interview procedures, he failed to preserve his contention for our review (*see Matter of Jesse XX. [Marilyn ZZ.]*, 69 AD3d 1240, 1243 [3d Dept 2010]; *Matter of Karen BB.*, 216 AD2d 754, 756 [3d Dept 1995]).

Finally, we conclude that " '[t]he record, viewed in its totality, establishes that the father received meaningful representation' " (*Matter of Sean P. [Sean P.]*, 162 AD3d 1520, 1521 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018]; *see Matter of Derrick C.*, 52 AD3d 1325, 1326 [4th Dept 2008], *lv denied* 11 NY3d 705 [2008]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1157

CA 18-00888

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

IRENE Y. MELSON AND COCKTAILS & MORE, LLC,
PLAINTIFFS-RESPONDENTS,

V ORDER

NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, DEFENDANT-APPELLANT,
GIOVANNI BRIATICO, INDIVIDUALLY, AND GIOVANNI BRIATICO, DOING BUSINESS AS COMMUNITY ELECTRIC,
DEFENDANTS.

GIOVANNI BRIATICO, INDIVIDUALLY, AND GIOVANNI BRIATICO, DOING BUSINESS AS COMMUNITY ELECTRIC,
THIRD-PARTY PLAINTIFFS,

V

LARRONE B. WILLIAMS,
THIRD-PARTY DEFENDANT-RESPONDENT.

BARCLAY DAMON LLP, BUFFALO (KARIM A. ABDULLA OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF S.D. RITCHIE, II, KAMUELA, HAWAII (STAFFORD D. RITCHIE, II, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS AND THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered August 29, 2017. The order, among other things, denied in part the motion of defendant Niagara Mohawk Power Corporation, doing business as National Grid, for summary judgment dismissing plaintiffs' complaint and all cross claims against it.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 4 and 10, 2018,

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1163

CA 17-01381

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

STATE OF NEW YORK MORTGAGE AGENCY,
PLAINTIFF-RESPONDENT,

V ORDER

SAM ROBERT FARRUGGIA, DEFENDANT,
MICHELLE M. FARRUGGIA, ALSO KNOWN AS
MICHELLE FARRUGGIA, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

THOMAS J. CASERTA, JR., NIAGARA FALLS, FOR DEFENDANT-APPELLANT.

AKERMAN LLP, NEW YORK CITY (JORDAN M. SMITH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 17, 2017. The order denied the motion of defendant Michelle M. Farruggia to compel plaintiff to offer her a loan modification.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1165

TP 18-00952

PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF JUSTO RICHARDS, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

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, Wyoming County [Michael M. Mohun, A.J.], entered May 22, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1166

KA 16-01372

PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID SCHEIFLA, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered June 8, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree (10 counts) and petit larceny (10 counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the total amount of restitution to $897.38, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of 10 counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and 10 counts of petit larceny (§ 155.25). Contrary to defendant's contention, we conclude that "the waiver of the right to appeal was not rendered invalid based on [County Court's] failure to require defendant to articulate the waiver in his own words" (*People v Alsaifullah*, 162 AD3d 1483, 1484 [4th Dept 2018] [internal quotation marks omitted]; *see People v Ripley*, 94 AD3d 1554, 1554-1555 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]). Here, "[t]he plea colloquy and the written waiver of the right to appeal signed [and acknowledged in court] by defendant demonstrate that [he] knowingly, intelligently and voluntarily waived the right to appeal, including the right to appeal the severity of the sentence" (*People v Hill*, 162 AD3d 1762, 1762 [4th Dept 2018], *lv denied* — NY3d — [Sept. 14, 2018]). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Defendant contends, and the People correctly concede, that the amount of restitution ordered by the court violates Penal Law § 60.27

(1) and (4) (a). We note that, inasmuch as defendant's contention concerns the legality of the sentence, it is not encompassed by the waiver of the right to appeal (*see People v Johnson*, 125 AD3d 1419, 1421 [4th Dept 2015], *lv denied* 26 NY3d 1089 [2015]; *People v Boatman*, 110 AD3d 1463, 1463-1464 [4th Dept 2013], *lv denied* 22 NY3d 1039 [2013]; *see generally People v Suits*, 158 AD3d 949, 950-952 [3d Dept 2018]). We therefore modify the judgment by reducing the total amount of restitution from $942.38 to $897.38.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1167

KA 17-01483

PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MORICE E. ARMSTRONG, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Victoria M. Argento, J.), entered June 6, 2017. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in granting the People's request for an upward departure. We reject that contention. "A court may make an upward departure from a presumptive risk level when, after consideration of the indicated factors[,] . . . [the court determines that] there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines" (*People v Abraham*, 39 AD3d 1208, 1209 [4th Dept 2007] [internal quotation marks omitted]). Here, the People established by clear and convincing evidence the existence of numerous aggravating factors not adequately taken into account by the risk assessment guidelines, including the violent manner in which defendant committed a prior felony sex offense, the level of violence and threats employed during the present case, and the fact that defendant committed the present offense while already a level two sex offender (*see People v Shim*, 139 AD3d 68, 76-77 [2d Dept 2016], *lv denied* 27 NY3d 910 [2016]; *People v O'Flaherty*, 23 AD3d 237, 237 [1st Dept 2005], *lv denied* 6 NY3d 705 [2006]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1168

KA 17-01522

PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEON D. HAYES, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered May 22, 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 affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We reject defendant's contention that he should not have been assessed 30 points under risk factor 5, age of victim, because the People did not establish by clear and convincing evidence that the victim was less than 11 years old. Defendant pleaded guilty to attempted course of sexual conduct against a child in the first degree under Penal Law § 130.75 (1) (a), an element of which is that the victim is a child less than 11 years old. Inasmuch as "[f]acts previously . . . elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated" for SORA purposes (Correction Law § 168-n [3]), County Court properly allocated 30 points under risk factor 5 (*see People v Asfour*, 148 AD3d 1669, 1670 [4th Dept 2017], *lv denied* 29 NY3d 914 [2017]; *see also People v Leach*, 158 AD3d 1240, 1241 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018]).

Given the relative ages of defendant and his victim and the fact that the victim was less than 11 years old at the time of the crime, we conclude that the record establishes by clear and convincing evidence that defendant was 20 years old or younger at the time of the crime, and we thus reject defendant's contention that the court

erroneously assessed 10 points under risk factor 8, age at first sex crime.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1170

KA 16-01987

PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADRIAN FAVORS, III, ALSO KNOWN AS “ACE,”
DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered July 11, 2016. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the first degree (Penal Law § 140.30 [3]). We agree with defendant that, as the People correctly concede, defendant did not waive his right to appeal inasmuch as that condition was part of a prior plea agreement that was withdrawn before the instant plea was entered (*see People v Shay*, 130 AD3d 1499, 1499 [4th Dept 2015]; *People v Graham*, 187 AD2d 389, 389-390 [1st Dept 1992], *lv denied* 81 NY2d 840 [1993]). We nonetheless decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see People v Sakinovic*, 149 AD3d 1596, 1596 [4th Dept 2017]). Finally, the sentence is not unduly harsh or severe.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1179

CA 17-00670

PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF LARRY B., CONSECUTIVE NO. 246987, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V ORDER

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

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (MEGAN E. DORR OF COUNSEL), FOR PETITIONER-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered February 10, 2017 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, adjudged that petitioner is subject to strict and intensive supervision and treatment.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1180

CA 17-02169

PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

SHEILA MARIE REDMOND TAMME, PLAINTIFF-APPELLANT,

V ORDER

ROBERT W. KESSLER, GORDON S. DICKENS AND WOODS OVIATT GILMAN, LLP, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

GALLET DREYER & BERKEY, LLP, NEW YORK CITY (ADAM M. FELSENSTEIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered August 2, 2017. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1181

CA 17-02172

PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF THE MARY REDMOND REVOCABLE LIVING TRUST AGREEMENT UNDER AGREEMENT DATED OCTOBER 22, 2010 AND IN THE MATTER OF THE ESTATE OF MARY M. REDMOND, DECEASED.

ORDER

SHEILA MARIE REDMOND TAMME, RESPONDENT-APPELLANT;

WOODS OVIATT GILMAN, LLP, PETITIONER-RESPONDENT.
(APPEAL NO. 2.)

GALLET DREYER & BERKEY, LLP, NEW YORK CITY (ADAM M. FELSENSTEIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order and decree of the Surrogate's Court, Monroe County (John M. Owens, S.), entered April 7, 2017. The order and decree, among other things, awarded petitioner legal fees and disbursements.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1182

CA 18-00972

PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

MONICA RICHARDS, PLAINTIFF-APPELLANT,

V ORDER

JULIA L. BASTIN, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (MATTHEW D. PFALZER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered January 8, 2018. The order granted in part the motion of defendant Julia L. Bastin for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 22 and 27, 2018,

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1183

CA 17-01810

PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

KENNETH O. HALL, PLAINTIFF-RESPONDENT,

V ORDER

LSREF4 LIGHTHOUSE CORPORATE ACQUISITIONS, LLC, LIGHTHOUSE MANAGEMENT SERVICES, LLC, HOME PROPERTIES, L.P., AND HOME PROPERTIES, INC., DEFENDANTS-APPELLANTS.

LITTLER MENDELSON, P.C., FAIRPORT (MARGARET A. CLEMENS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (HAROLD A. KURLAND OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 17, 2017. The order and judgment, inter alia, directed defendants to pay plaintiff's legal fees.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 21, 2018,

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1186

CA 17-00429

PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF QABAIL HIZBULLAHANKHAMON,
PETITIONER-APPELLANT,

V ORDER

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

QABAIL HIZBULLAHANKHAMON, PETITIONER-APPELLANT PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered November 10, 2016 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1188

KA 17-01152

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON M. MEDEN, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered May 5, 2017. The judgment convicted defendant, upon his plea of guilty, of failure to register as a sex offender.

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 failure to register as a sex offender (Correction Law §§ 168-f [4]; 168-t), defendant contends that his waiver of the right to appeal is invalid. We reject that contention (*see generally People v Calvi*, 89 NY2d 868, 871 [1996]). Defendant's valid waiver of the right to appeal does not encompass his challenge to the severity of the sentence, however, "because the record establishes that defendant waived his right to appeal before County Court advised him of the potential periods of imprisonment that could be imposed" (*People v Mingo*, 38 AD3d 1270, 1271 [4th Dept 2007]; *see People v Fraisar*, 151 AD3d 1757, 1757 [4th Dept 2017], *lv denied* 29 NY3d 1127 [2017]; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1195

CAF 17-01971

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF TIMOTHY C. YOUELLS,
PETITIONER-RESPONDENT,

V ORDER

AMANDA M. MILLS, RESPONDENT-APPELLANT.

ROBERT A. DINIERI, CLYDE, FOR RESPONDENT-APPELLANT.

DOUGLAS M. JABLONSKI, WOLCOTT, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, A.J.), entered November 6, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner primary physical custody of the subject child.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1200

CA 17-01132

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ.

PATRICK LORETO, IN THE RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC, AND RICCARDO DURSI, IN THE RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-C5, TIMOTHY FOSTER, AS RECEIVER, DEFENDANTS-RESPONDENTS, KENNETH P. RAY, JR., EXECUTOR OF THE ESTATE OF KENNETH P. RAY, DECEASED, DEFENDANT-RESPONDENT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 1.)

JOSEPH A. TADDEO, JR., ROCHESTER, FOR PLAINTIFF-APPELLANT-RESPONDENT PATRICK LORETO, IN THE RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC.

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

BOND, SCHOENECK & KING, PLLC, ROCHESTER (GREGORY J. MCDONALD OF COUNSEL), FOR DEFENDANT-RESPONDENT TIMOTHY FOSTER, AS RECEIVER.

RIKER DANZIG SCHERER HYLAND & PERRETTI LLP, MORRISTOWN, NEW JERSEY (MICHAEL R. O'DONNELL OF COUNSEL), FOR DEFENDANT-RESPONDENT WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-C5.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 5, 2016. The order, among other things, granted the motion of defendant Wells Fargo Bank, N.A., as Trustee for the Registered Holders of Credit Suisse First Boston Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2007-C5 seeking an order establishing the amount by which it is to be equitably subrogated and allowing the sale of certain property.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1201

CA 17-01133

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ.

PATRICK LORETO, IN THE RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC, AND RICCARDO DURSI, IN THE RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC, PLAINTIFFS-APPELLANTS,

V ORDER

WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-C5, TIMOTHY FOSTER, AS RECEIVER, KENNETH P. RAY, JR., AS EXECUTOR OF THE ESTATE OF KENNETH P. RAY, DECEASED, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 2.)

JOSEPH A. TADDEO, JR., ROCHESTER, FOR PLAINTIFF-APPELLANT PATRICK LORETO, IN THE RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC.

FELT EVANS, LLP, CLINTON (JAY G. WILLIAMS, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT KENNETH P. RAY, JR., AS EXECUTOR OF THE ESTATE OF KENNETH P. RAY, DECEASED.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (GREGORY J. MCDONALD OF COUNSEL), FOR DEFENDANT-RESPONDENT TIMOTHY FOSTER, AS RECEIVER.

RIKER DANZIG SCHERER HYLAND & PERRETTI LLP, MORRISTOWN, NEW JERSEY (MICHAEL R. O'DONNELL OF COUNSEL), FOR DEFENDANT-RESPONDENT WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-C5.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 11, 2017. The order denied the motion of plaintiff Patrick Loreto, in the right of and on behalf of Encore Properties of Rochester, LLC, for leave to renew his motion for a default judgment against defendant Encore Property Management of Western New York, LLC.

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

at Supreme Court.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1202

CA 17-01134

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ.

PATRICK LORETO, IN THE RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC, AND RICCARDO DURSI, IN THE RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-C5, TIMOTHY FOSTER, AS RECEIVER, DEFENDANTS-RESPONDENTS, KENNETH P. RAY, JR., EXECUTOR OF THE ESTATE OF KENNETH P. RAY, DECEASED, DEFENDANT-RESPONDENT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 3.)

JOSEPH A. TADDEO, JR., ROCHESTER, FOR PLAINTIFF-APPELLANT-RESPONDENT PATRICK LORETO, IN THE RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC.

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

BOND, SCHOENECK & KING, PLLC, ROCHESTER (GREGORY J. MCDONALD OF COUNSEL), FOR DEFENDANT-RESPONDENT TIMOTHY FOSTER, AS RECEIVER.

RIKER DANZIG SCHERER HYLAND & PERRETTI LLP, MORRISTOWN, NEW JERSEY (MICHAEL R. O'DONNELL OF COUNSEL), FOR DEFENDANT-RESPONDENT WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-C5.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered May 8, 2017. The order, among other things, granted the motion of defendant Wells Fargo Bank, N.A., as Trustee for the Registered Holders of Credit Suisse First Boston Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2007-C5 to confirm in part and reject in part the preliminary report by the referee.

It is hereby ORDERED that the order so appealed from is

unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1203

CA 17-01766

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ.

PATRICK LORETO, IN THE RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC, AND RICCARDO DURSI, IN THE RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-C5, TIMOTHY FOSTER, AS RECEIVER, DEFENDANTS-RESPONDENTS, KENNETH P. RAY, JR., EXECUTOR OF THE ESTATE OF KENNETH P. RAY, DECEASED, DEFENDANT-RESPONDENT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 4.)

JOSEPH A. TADDEO, JR., ROCHESTER, FOR PLAINTIFF-APPELLANT-RESPONDENT PATRICK LORETO, IN THE RIGHT OF AND ON BEHALF OF ENCORE PROPERTIES OF ROCHESTER, LLC.

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

BOND, SCHOENECK & KING, PLLC, ROCHESTER (GREGORY J. MCDONALD OF COUNSEL), FOR DEFENDANT-RESPONDENT TIMOTHY FOSTER, AS RECEIVER.

RIKER DANZIG SCHERER HYLAND & PERRETTI LLP, MORRISTOWN, NEW JERSEY (MICHAEL R. O'DONNELL OF COUNSEL), FOR DEFENDANT-RESPONDENT WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-C5.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered September 25, 2017. The order, among other things, granted the motion of defendant Wells Fargo Bank, N.A., as Trustee for the Registered Holders of Credit Suisse First Boston Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2007-C5 to confirm the referee's report of amount due.

It is hereby ORDERED that the order so appealed from is

unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1204

CA 17-01198

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF AMANDA R. COMPTON,
PETITIONER-APPELLANT,

V ORDER

ROBERT R. COMPTON AND ROBBIE G. COMPTON,
RESPONDENTS-RESPONDENTS.

PAUL B. WATKINS, FAIRPORT, FOR PETITIONER-APPELLANT.

ANNECHINO LAW FIRM, P.C., EAST ROCHESTER (JOHN A. ANNECHINO, JR., OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

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

Appeal from a decree and order of the Surrogate's Court, Monroe County (John M. Owens, S.), entered December 2, 2016. The decree and order, inter alia, dismissed the amended petition to revoke an extrajudicial consent to adopt.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1205

CA 18-00644

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ.

DR. JOY L. KREEGER, M.D., CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES AND WESTERN NEW YORK DEVELOPMENTAL DISABILITIES STATE OPERATIONS OFFICE, DEFENDANTS-RESPONDENTS.
(CLAIM NO. 128565.)

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR CLAIMANT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered November 17, 2017. The order, among other things, granted defendants' cross motion for summary judgment and dismissed the claim.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1211

CA 18-00808

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ.

CHRISTOPHER WATT, K&W ENTERPRISES AND KAREN D. WATT, PLAINTIFFS-APPELLANTS,

V ORDER

TOWN OF GAINES, CAROL C. CULHANE, SUPERVISOR, JAMES KIRBY, COUNCILPERSON, SUSAN SMITH, COUNCILPERSON, AND CAROL C. CULHANE, INDIVIDUALLY, DEFENDANTS-RESPONDENTS.

FRANK A. ALOI, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (JEREMY A. COLBY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered July 5, 2017. The order granted the motion of defendants to dismiss the complaint.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1213

KA 16-01159

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD J. ZUREK, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), 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 (Barry M. Donalty, J.), rendered November 4, 2015. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]). Contrary to defendant's contention, the record establishes that his waiver of the right to appeal was knowing, intelligent and voluntary (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Colon*, 122 AD3d 1309, 1309 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]), and the valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1216

KA 16-01989

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAVID E. SCHMIDT, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Victoria M. Argento, J.), entered August 3, 2016. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1219

CAF 17-01329

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

IN THE MATTER OF YOLANDA BAUTISTA,
PETITIONER-APPELLANT,

V ORDER

MICHELLE A. MALAVE AND QUENTIN L. RIDDLE,
RESPONDENTS-RESPONDENTS.

YOLANDA BAUTISTA, PETITIONER-APPELLANT PRO SE.

WARREN WELCH ESQ., LLC, ROCHESTER (WARREN WELCH OF COUNSEL), FOR RESPONDENT-RESPONDENT MICHELLE A. MALAVE.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR RESPONDENT-RESPONDENT QUENTIN L. RIDDLE.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (John B. Gallagher, Jr., J.), entered June 9, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed the petitions filed by petitioner.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1225

CA 18-00773

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

RICHARD CETTELL AND JOANN CETTELL,
PLAINTIFFS-RESPONDENTS,

V ORDER

NATIONAL FUEL GAS SUPPLY CORPORATION,
DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (MICHAEL RUBIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (MARC C. PANEPINTO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered February 9, 2018. The order, among other things, granted plaintiffs' motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 8, 2018,

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1238

CAF 17-01237

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

IN THE MATTER OF ERIC E.F., PETITIONER-APPELLANT,

V ORDER

ROBIN A.H. AND LACEY N.D., RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

PAUL A. NORTON, CLINTON, FOR PETITIONER-APPELLANT.

LAW OFFICES OF GUSTAVE J. DETRAGLIA, JR., UTICA (MICHELE E. DETRAGLIA OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered June 2, 2017 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of custody and visitation.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 12, 2018,

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1239

CAF 17-01212

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

IN THE MATTER OF THE ADOPTION OF A CHILD
WHOSE FIRST NAME IS ISABELLA

ROBIN A.H. AND LACEY N.R.D.,
PETITIONERS-RESPONDENTS,

V ORDER

ERIC F., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

PAUL A. NORTON, CLINTON, FOR RESPONDENT-APPELLANT.

LAW OFFICES OF GUSTAVE J. DETRAGLIA, JR., UTICA (MICHELE E. DETRAGLIA OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered June 14, 2017. The order determined, inter alia, that the consent of respondent is not required for the adoption of the subject child.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 12, 2018,

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1249

CA 18-00014

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

IN THE MATTER OF ORISKA INSURANCE COMPANY,
PETITIONER-APPELLANT,

V ORDER

MARIE T. VULLO, AS ACTING SUPERINTENDENT OF NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, AND NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,
RESPONDENTS-RESPONDENTS.

KERNAN AND KERNAN, P.C., UTICA (LEIGHTON R. BURNS OF COUNSEL), FOR PETITIONER-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered April 19, 2017 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1256.1

KA 11-01844

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EMMANUEL D. LITTLE, DEFENDANT-APPELLANT.

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

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

Appeal from a sentence of the Monroe County Court (James J. Piampiano, J.), rendered June 23, 2011. The appeal was held by this Court by order entered March 27, 2015, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (126 AD3d 1478). The proceedings were held and completed.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1256

CA 17-01273

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

IN THE MATTER OF SALEEM SPENCER,
PETITIONER-APPELLANT,

V ORDER

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

SALEEM SPENCER, PETITIONER-APPELLANT PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (M. William Boller, A.J.), entered May 30, 2017 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1266

CAF 17-01670

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF CHRISSY W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

CHRISTOPHER W., RESPONDENT-APPELLANT.

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

JAMES E. BROWN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RICHARD L. SULLIVAN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered August 8, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject child and placed the child in the custody of petitioner.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1269

CAF 17-01564

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF PETER W. KEESLER, JR.,
PETITIONER-RESPONDENT,

V ORDER

JILLAINE CHENEY, RESPONDENT-APPELLANT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

RANDY S. MARGULIS, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered July 27, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal and physical custody of the subject child.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1271

CA 18-00896

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ.

ANDREW SCHUBAUER, PLAINTIFF-RESPONDENT,

V ORDER

2150 RECYCLING CENTER, INC., AND M&M U PULL IT, INC., DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (KEVIN J. KRUPPA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HOGANWILLIG, PLLC, AMHERST (SCOTT MICHAEL DUQUIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 12, 2017. The order, among other things, denied the motion of defendants for summary judgment.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

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

1277

CA 18-00841

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ.

SERAFIN PROPERTIES, LLC, PLAINTIFF-APPELLANT,

V ORDER

AMORE ENTERPRISES, INC., DEFENDANT-RESPONDENT.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GUY J. AGOSTINELLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LEWANDOWSKI & ASSOCIATES, WEST SENECA (KIMBERLY M. THRUN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered February 6, 2018 in a declaratory judgment action. The judgment, among other things, declared that plaintiff does not have a prescriptive easement over defendant's property.

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

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

MOTION NO. (1530/94) KA 18-01762. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANCIS SMYTHE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed Nov. 9, 2018.)

MOTION NO. (1235/01) KA 97-05264. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TERRENCE SINKLER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Nov. 9, 2018.)

MOTION NO. (1117/03) KA 00-02226. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDWARD BROWN, DEFENDANT-APPELLANT. -- Motion for renewal of writ of error coram nobis and other relief denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND TROUTMAN, JJ. (Filed Nov. 9, 2018.)

MOTION NO. (772/04) KA 03-01479. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD A. JONES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., NEMOYER, CURRAN, TROUTMAN, AND WINSLOW, JJ. (Filed Nov. 9, 2018.)

MOTION NO. (1281/05) KA 04-02217. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANDREW GENTILE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., NEMOYER, CURRAN, TROUTMAN, AND WINSLOW, JJ. (Filed Nov. 9, 2018.)

MOTION NO. (1612/06) KA 04-00377. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DEATRICK MARSHALL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Nov. 9, 2018.)

MOTION NO. (738/07) KA 03-00814. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT A. GRIFFIN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND TROUTMAN, JJ. (Filed Nov. 9, 2018.)

MOTION NO. (1222/14) KA 13-01494. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD BAUSANO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis and other relief denied. PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, TROUTMAN, AND WINSLOW, JJ. (Filed Nov. 9, 2018.)

MOTION NO. (588/17) KA 15-01221. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JASON WILLIAMS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, JJ. (Filed Nov. 9, 2018.)

MOTION NO. (626/18) CA 17-01939. -- BELLA ROSS, PLAINTIFF-APPELLANT, V AVI LANDAU, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND WINSLOW, JJ. (Filed Nov. 9, 2018.)

MOTION NO. (824/18) CA 17-01570. -- IN THE MATTER OF MARY E. EDWARDS, BERNARD LEFFLER, CLAIRE LEFFLER, JAMIE L. SMITH AND PAUL SUTTON, PETITIONERS-APPELLANTS, V ZONING BOARD OF APPEALS OF TOWN OF AMHERST, UPSTATE CELLULAR NETWORK, DOING BUSINESS AS VERIZON WIRELESS, AND PUBLIC STORAGE, INC., RESPONDENTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ. (Filed Nov. 9, 2018.)

MOTION NO. (907/18) CA 17-02023. -- KRISTY MONTANARO, PLAINTIFF-RESPONDENT, V ROBERT M. WEICHERT AND SUSAN M. WEICHERT, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Nov. 9, 2018.)

KA 17-02226. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KIMBERLY A. GENSON, DEFENDANT-APPELLANT. Motion to dismiss granted. Memorandum: The matter is remitted to Genesee County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Nov. 9, 2018.)

KA 18-00657. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSHUA M. LOUDER, DEFENDANT-APPELLANT. Motion to dismiss granted. Memorandum:

The matter is remitted to Monroe County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Nov. 9, 2018.)