SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 20, 2019

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

HON. TRACEY A. BANNISTER, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

387/18
KA 16-00295
PRESENT: SMITH, J.P., CENTRA, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

NICOLE L. GREEN, ALSO KNOWN AS NICOLE GREEN,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 1, 2015. The judgment convicted defendant, upon her plea of guilty, of attempted burglary in the second degree. The judgment was affirmed by order of this Court entered April 27, 2018 in a memorandum decision (160 AD3d 1422), and defendant on September 18, 2018 was granted leave to appeal to the Court of Appeals from the order of this Court (32 NY3d 1004), and the Court of Appeals on November 26, 2019 reversed the order and remitted the case to this Court for a determination of all issues raised but not determined on the appeal to this Court (— NY3d — [Nov. 26, 2019]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v Thomas*, — NY3d —, 2019 NY Slip Op 08545 [2019], *revg People v Green,* 160 AD3d 1422 [4th Dept 2018]). We previously affirmed the judgment convicting defendant upon her plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), concluding that defendant's waiver of the right to appeal was knowing, voluntary and intelligent, and that the waiver encompassed her challenge to the severity of the sentence (*Green*, 160 AD3d at 1422-1423). The Court of Appeals reversed, stating that it "cannot conclude that the appeal waiver[] on the record[] in *Green* [was] knowingly or voluntarily made in the face of erroneous advisements warning of absolute bars to the pursuit of all potential remedies, including those affording collateral relief on certain nonwaivable issues in both state and federal courts" (*Thomas*, — NY3d at —, 2019 NY Slip Op 08545, *8). The Court of Appeals remitted the matter to this Court “for a determination of all issues raised but not determined” previously (*id.*, — NY3d at —, 2019 NY Slip Op 08545, *8).

After review of defendant’s contention upon remittitur, we conclude that the sentence is not unduly harsh or severe.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

877/18
KA 16-00063
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STORM U. LANG, ALSO KNOWN AS STORM U. J. LANG,
ALSO KNOWN AS STORM LANG, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 8, 2015. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree (two counts) and sexual abuse in the second degree. The judgment was affirmed by order of this Court entered October 5, 2018 in a memorandum decision (165 AD3d 1584), and defendant on January 31, 2019 was granted leave to appeal to the Court of Appeals from the order of this Court (32 NY3d 1174), and the Court of Appeals on November 26, 2019 reversed the order and remitted the case to this Court for a determination of all issues raised by not determined on the appeal to this Court (— NY3d — [Nov. 26, 2019]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v Thomas*, — NY3d —, 2019 NY Slip Op 08545 [2019], *revg People v Lang*, 165 AD3d 1584 [4th Dept 2018]). We previously affirmed a judgment convicting defendant upon his plea of guilty of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]) and one count of sexual abuse in the second degree (§ 130.60 [2]) and concluded that the waiver of the right to appeal was valid (*Lang*, 165 AD3d at 1584-1585). On appeal, the Court of Appeals determined that the waiver of the right to appeal was involuntarily made and unenforceable inasmuch as County Court mischaracterized the appellate rights waived (*Thomas*, — NY3d at —, 2019 NY Slip Op 08545, *6). The Court remitted the matter to us for determination of issues raised but not determined on the appeal (*id.* at —, 2019 NY Slip Op 08545, *7). We now affirm.

Defendant failed to preserve for our review his contention that the court erred in making a determination on youthful offender status without giving him or defense counsel an opportunity to be heard (*see generally People v Rivera*, 111 AD3d 1280, 1282 [4th Dept 2013], *lv denied* 22 NY3d 1090 [2014]; *People v Brotz*, 108 AD3d 1236, 1236 [4th Dept 2013]). In any event, defendant's contention is without merit inasmuch as the court complied with CPL 380.50 (1). Contrary to defendant's further contention, the court did not abuse its discretion in refusing to grant him youthful offender status (*see People v Abdul-Jaleel*, 142 AD3d 1296, 1298-1299 [4th Dept 2016], *lv denied* 29 NY3d 946 [2017]; *People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see Abdul-Jaleel*, 142 AD3d at 1299; *Lewis*, 128 AD3d at 1400-1401).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

839
KA 16-01484
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY BLACKSHELL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WILLIAM G. PIXLEY, PITTSFORD, FOR DEFENDANT-APPELLANT.

JOHNNY BLACKSHELL, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered July 8, 2016. The judgment convicted defendant upon a jury verdict of murder in the first degree (three counts), 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, in appeal No. 1, from a judgment convicting him upon a jury verdict of, inter alia, three counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]). That judgment arises from an incident in which several people fired weapons from a moving vehicle into a crowd of people who were leaving a basketball game at the Boys and Girls Club in the City of Rochester, causing the death of three people. In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (§ 265.03 [3]), arising from a separate incident in which he possessed a loaded .25 caliber handgun in a vehicle. In appeal No. 3, defendant appeals from a judgment convicting him upon his plea of guilty of, among other charges, attempted murder in the second degree (§§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]), arising from a series of incidents in which he and others stole weapons from a house, robbed one person at gunpoint, and shot another person who was standing on a street corner. We affirm in all three appeals.

Addressing first appeal No. 1, we conclude that defendant's contention in his main brief that County Court "committed reversible error by instructing the jury on the doctrine of transferred intent .

. . [is] unpreserved for appellate review” inasmuch as he did not object to that instruction either during the charge conference or when the court gave the instructions to the jury (*People v Jeffrey*, 164 AD3d 604, 605 [2d Dept 2018], *lv denied* 32 NY3d 1065 [2018]; *see People v Williams*, 163 AD3d 1422, 1422 [4th Dept 2018]; *People v Carey*, 159 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 31 NY3d 1079 [2018]). Contrary to defendant’s further contention in his main brief, his motion for a trial order of dismissal with respect to all of the charges that were based on transferred intent did not constitute a timely objection to the court’s jury instruction regarding that doctrine (*see People v Rudney*, 83 AD2d 746, 746 [4th Dept 1981]; *see also People v Wolf*, 98 NY2d 105, 117 n 2 [2002]).

In any event, the court’s instruction was proper. Upon our review of the record, we conclude that “[t]he evidence . . . supports an inference that, rather than acting recklessly, defendant fired shots with the intent to kill one or more of his enemies, whom he mistakenly believed to be present, and instead killed [several] bystander[s]” (*People v Cruz*, 154 AD3d 429, 429 [1st Dept 2017], *lv denied* 30 NY3d 1059 [2017], *lv denied* 33 NY3d 1030 [2019]; *see also People v Lopez*, 155 AD3d 892, 893 [2d Dept 2017], *lv denied* 30 NY3d 1116 [2018]). Consequently, we conclude that the jury was properly instructed on intentional murder under a theory of transferred intent (*see* CPL 300.10 [2]; *see generally People v Dubarry*, 25 NY3d 161, 171-172 [2015]; *People v Wells*, 7 NY3d 51, 56-57 [2006]).

Defendant also failed to preserve for our review his contention in his main brief that one of the prosecutor’s comments on summation was not supported by the evidence and that defendant was therefore deprived of a fair trial by that comment (*see People v Young*, 100 AD3d 1427, 1428 [4th Dept 2012], *lv denied* 20 NY3d 1105 [2013]; *see also* CPL 470.05 [2]). In any event, we conclude that the comment “did not exceed the broad bounds of rhetorical comment permissible in closing argument” (*People v Galloway*, 54 NY2d 396, 399 [1981]). Even assuming, arguendo, that the prosecutor’s comment went beyond those bounds, we further conclude that it was “not so egregious as to deprive defendant of a fair trial” (*People v McEathron*, 86 AD3d 915, 916 [4th Dept 2011], *lv denied* 19 NY3d 975 [2012]).

Defendant further contends in his main brief that the People failed to provide him with copies of the affidavits that accompanied the applications for the eavesdropping warrants within 15 days after arraignment, and therefore the court in appeal No. 1 erred in refusing to preclude evidence obtained based on communications that law enforcement agents intercepted pursuant to those warrants (*see* CPL 700.70). Inasmuch as defendant failed to seek preclusion of the evidence on those grounds, his contention is not preserved for our review (*see* CPL 470.05 [2]; *see also People v Romero*, 120 AD3d 947, 949 [4th Dept 2014], *lv denied* 24 NY3d 1004 [2014]; *People v DePonceau*, 96 AD3d 1345, 1346 [4th Dept 2012], *lv denied* 19 NY3d 1025 [2012]; *People v Espiritusanto*, 4 AD3d 826, 826 [4th Dept 2004], *lv denied* 2 NY3d 799 [2004]). In any event, that contention lacks merit. The record reflects that the People served copies of the eavesdropping warrants on defendant within 15 days of arraignment on the original indictment and again within 15 days of arraignment on the superseding indictment. Although the People did not serve the supporting affidavits until a later date, the record establishes that the court properly granted the People several extensions of time to serve the affidavits, after the People demonstrated good cause and the absence of prejudice to defendant (*see* CPL 700.70). We thus conclude that “the purpose of the 15-day statutory service requirement . . . to facilitate the service and filing of all pretrial motions within 45 days after arraignment or within 45 days after service of the papers pursuant to CPL 700.70, was accomplished” (*People v Liberatore*, 79 NY2d 208, 214 [1992]). We have considered defendant’s further contentions regarding the eavesdropping warrants, and we conclude that they lack merit.

Defendant contends in his pro se supplemental brief that the court in appeal No. 1 erred in permitting the People to present certain *Molineux* evidence (*see generally People v Molineux*, 168 NY 264, 293 [1901]). We reject that contention. Where, as here, “ ‘identity is in issue and has not been conclusively established, evidence relevant to identification is admissible notwithstanding its incidental proof of guilt of a crime other than those charged’ ” (*People v Igbinosun*, 24 AD3d 1250, 1251 [4th Dept 2005]; *see People v Goodrell*, 130 AD3d 1502, 1503 [4th Dept 2015]; *People v Harvey*, 105 AD3d 1429, 1430 [4th Dept 2013], *lv denied* 22 NY3d 996 [2013]). The evidence at issue concerned a prior burglary, in the course of which defendant stole a weapon used in the charged crimes, and ballistic and other evidence connecting defendant to that weapon before and after the commission of the charged crimes. We conclude here that “ballistic evidence tended to suggest that [one of the]weapons used in the shooting matched the . . . weapon[] stolen in the aforementioned burglary and, therefore, the burglary evidence tended to establish defendant’s identity as a person involved in the shooting” at issue (*People v Harwood*, 139 AD3d 1186, 1188 [3d Dept 2016], *lv denied* 28 NY3d 1028 [2016]; *see People v Leach*, 90 AD3d 1073, 1074 [2d Dept 2011], *affd* 21 NY3d 969 [2013]; *People v Nunes*, 168 AD3d 1187, 1192 [3d Dept 2019], *lv denied* 33 NY3d 979 [2019]). We have considered defendant’s further contentions in his pro se supplemental brief concerning the court’s *Molineux* ruling, and we conclude that they lack merit.

Contrary to defendant’s further contention in his pro se supplemental brief, he was not denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, defendant contends in his main brief that the judgments in appeal Nos. 2 and 3 must be reversed on the ground that he pleaded guilty based on the promise that the sentences in those appeals would run concurrently with the sentence in appeal No. 1. In view of our determination affirming the judgment in appeal No. 1, that contention lacks merit (*see People v Roig*, 117 AD3d 1462, 1463 [4th Dept 2014], *lv denied* 23 NY3d 1042 [2014]; *People v Khammonivang*, 68 AD3d 1727, 1727-1728 [4th Dept 2009], *lv denied* 14 NY3d 889 [2010]; *cf. People v*

Fuggazzatto, 62 NY2d 862, 863 [1984]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

840
KA 16-01485
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY BLACKSHELL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WILLIAM G. PIXLEY, PITTSFORD, FOR DEFENDANT-APPELLANT.

JOHNNY BLACKSHELL, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered August 5, 2016. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Blackshell* ([appeal No. 1] — AD3d — [Dec. 20, 2019] [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

841
KA 18-00678
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY BLACKSHELL, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

WILLIAM G. PIXLEY, PITTSFORD, FOR DEFENDANT-APPELLANT.

JOHNNY BLACKSHELL, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered September 8, 2017. The judgment convicted defendant upon his plea of guilty of attempted murder in the second degree, assault in the first degree, robbery in the first degree, robbery in the second degree (two counts), burglary in the second degree, criminal possession of a weapon in the second degree, reckless endangerment in the first degree and petit larceny.

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

Same memorandum as in *People v Blackshell* ([appeal No. 1] — AD3d — [Dec. 20, 2019] [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

856
CA 18-01747
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

BOARD OF EDUCATION OF PALMYRA-MACEDON CENTRAL
SCHOOL DISTRICT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FLOWER CITY GLASS CO., INC., FLOWER CITY
GLASS ASSOCIATES, LLC, FLOWER CITY GLASS CO.
OF NEW YORK, LLC, FLOWER CITY GLASS, AND NUDO
PRODUCTS, INC., DEFENDANTS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (MICHAEL A. REDDY OF COUNSEL), FOR DEFENDANTS-APPELLANTS FLOWER CITY GLASS CO., INC., FLOWER CITY GLASS ASSOCIATES, LLC, FLOWER CITY GLASS CO. OF NEW YORK, LLC, AND FLOWER CITY GLASS.

ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT OF COUNSEL), FOR DEFENDANT-APPELLANT NUDO PRODUCTS, INC.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ROBERT W. CONNOLLY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Wayne County (Matthew A. Rosenbaum, J.), entered August 14, 2018. The order, among other things, denied in part defendants' respective motions for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of defendant Nudo Products, Inc. for summary judgment dismissing plaintiff's breach of express warranty cause of action against it to the extent that this cause of action is based on documents or agreements other than the Limited Finish Warranty Agreement and for summary judgment dismissing the cross claims against it for breach of express warranty and common-law indemnification and as modified the order is affirmed without costs.

Memorandum: Plaintiff contracted with defendant Flower City Glass Co., Inc. (Flower City) to perform certain work on a school building (project). After the work had been completed, plaintiff noticed that the wall panels installed pursuant to the contract were defective. Flower City had purchased the wall panels from defendant Nudo Products, Inc. (Nudo). Plaintiff commenced this action asserting, as relevant to these appeals, a breach of contract cause of action against Flower City and defendants Flower City Glass

Associates, LLC, Flower City Glass Co. of New York, LLC, and Flower City Glass (collectively, Flower City defendants) and a breach of express warranty cause of action against Nudo.

The Flower City defendants appeal from that part of an order that denied in part their motion insofar as it sought summary judgment dismissing the amended complaint against them. Nudo, as limited by its brief, appeals from that part of the same order that denied in part its motion for summary judgment dismissing the amended complaint and the Flower City defendants’ cross claims against it.

We reject the Flower City defendants’ contention on their appeal that Supreme Court erred in denying in part their motion with respect to the breach of contract cause of action against them. Initially, we agree with plaintiff that the Flower City defendants’ contention that the certifications of work issued by the project architect and the construction manager constituted plaintiff’s waiver of any alleged breach is not properly before us inasmuch as it was raised for the first time in their reply papers on the motion (*see Edwards v Gorman*, 162 AD3d 1480, 1481 [4th Dept 2018]). The Flower City defendants also improperly raised for the first time in their reply papers the contention that plaintiff failed to sufficiently state a breach of contract cause of action in its amended complaint because plaintiff failed to specify “which, if any, specific contract provisions” were allegedly breached (*see id.*). To the extent that the Flower City defendants argue that the breaches alleged by plaintiff in opposition to their motion constituted new legal theories, that contention was properly raised in their reply papers but lacks merit (*see generally Mathew v Mishra*, 41 AD3d 1230, 1231 [4th Dept 2007]). Here, plaintiff’s arguments in opposition were not new theories of liability but rather specific examples of how Flower City failed to “install[] . . . the panels in a workmanlike and professional manner and in conformance with industry standards and pursuant to the Contract Documents” as alleged in the amended complaint (*see Giacometti v Farrell* [appeal No. 2], 133 AD3d 1387, 1389 [4th Dept 2015]).

With respect to the merits, we agree with the Flower City defendants that they met their initial burden on that part of the motion with respect to the breach of contract cause of action by submitting the certifications issued by the project architect and construction manager, which constituted prima facie evidence that Flower City complied with all contractual requirements (*see Gee v City of New York*, 304 AD2d 615, 616 [2d Dept 2003]; *Stevens v Bast Hatfield, Inc.*, 226 AD2d 981, 981-982 [3d Dept 1996]). We further conclude, however, that plaintiff raised triable issues of fact whether Flower City failed to install the panels “in conformance with industry standards and pursuant to the Contract Documents” and whether that failure proximately caused the damage to plaintiff’s panels (*cf. Gee*, 304 AD2d at 616).

We agree with Nudo on its appeal that the court erred in denying that part of its motion seeking summary judgment dismissing the Flower City defendants’ breach of express warranty cross claim as untimely, and we therefore modify the order accordingly. In order to meet its initial burden on the motion of demonstrating that the applicable statute of limitations period had expired, Nudo was required to establish when the Flower City defendants' cross claim accrued (*see Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355 [4th Dept 2011]; *see also Haynes v Williams*, 162 AD3d 1377, 1378 [3d Dept 2018], *lv denied* 32 NY3d 906 [2018]). Although generally the statute of limitations for a breach of express warranty claim is four years, here Nudo's Limited Finish Warranty Agreement (Limited Warranty), the express warranty at issue, contractually reduced that period to one year (*see* UCC 2-725 [1]). Inasmuch as the Limited Warranty warranted the panels from the development of certain specified defects "for a period of Twenty (20) years," it constitutes a warranty of future performance (*see* UCC 2–725 [2]; *Schwatka v Super Millwork, Inc.*, 106 AD3d 897, 899 [2d Dept 2013]). Thus, the Flower City defendants' cross claim for breach of the Limited Warranty accrued "when the breach [was] or should have been discovered" (UCC 2–725 [2]; *see Schwatka*, 106 AD3d at 899). We agree with Nudo that Flower City knew of the circumstances constituting the alleged breach of the Limited Warranty no later than September 9, 2014, when plaintiff informed Flower City that the panels were exhibiting widespread pitting and appeared to be "rusting from the inside out."

Nudo therefore established that the Flower City defendants' December 27, 2016 cross claim for breach of the Limited Warranty was untimely, and the burden thus shifted to the Flower City defendants to establish that an exception to the limitations period applies (*see Carrington v New York State Off. for People With Dev. Disabilities*, 170 AD3d 1495, 1496 [4th Dept 2019]). In opposition to Nudo's motion, however, the Flower City defendants conceded that they were not seeking direct damages with respect to Nudo's alleged breach of the Limited Warranty and contended that they were instead seeking reimbursement for any judgment plaintiff might obtain against them in the future, that they had not yet suffered that injury, and that the Limited Warranty's limitations period thus had not started to run. Inasmuch as those allegations are merely duplicative of their common-law indemnification cross claim against Nudo and are premised on an incorrect statement of the law regarding when a breach of express warranty claim accrues (*see* UCC 2–725 [2]; *Schwatka*, 106 AD3d at 899), we conclude that the Flower City defendants failed to establish that an exception to the limitations period applies to their breach of express warranty cross claim (*see Carrington*, 170 AD3d at 1496).

We further agree with Nudo that the court erred in denying its motion with respect to the Flower City defendants' common-law indemnification cross claim, and we therefore further modify the order accordingly. "Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Great Am. Ins. Co. v Canandaigua Natl. Bank & Trust Co.*, 23 AD3d 1025, 1028 [4th Dept 2005], *lv dismissed* 7 NY3d 741 [2006] [internal quotation marks omitted]). Here, as discussed above, plaintiff's breach of contract cause of action is based on allegations of Flower City's active wrongdoing, i.e., its failure to install the panels in conformance with contractual requirements (*see High Point of Hartsdale I Condominium v AOI Constr., Inc.*, 31 AD3d 712, 713 [2d Dept 2006]; *Edgewater Constr. Co. v 81 & 3 of Watertown, Inc.*, 252 AD2d 951, 952-953 [4th Dept 1998], *lv denied* 92 NY2d 814 [1998]).

Finally, we also agree with Nudo that the court should have granted that unopposed part of its motion seeking summary judgment dismissing plaintiff's breach of express warranty cause of action against it to the extent that this cause of action was based on documents or agreements other than the Limited Warranty (*see Allington v Templeton Found.*, 167 AD3d 1437, 1439 [4th Dept 2018]; *Donna Prince L. v Waters*, 48 AD3d 1137, 1138 [4th Dept 2008]), and thus we further modify the order accordingly.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

871
CA 19-00028
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF ZELAZNY FAMILY ENTERPRISES, LLC, CHESTER M. ZELAZNY, EDWARD M. ZELAZNY, JAMES J. ZELAZNY, ROBERT W. KWANDRANS, BRIAN P. MURRAY, SR., STEVEN MILLER, RICHARD MAMMARELLO, RONALD D. SANDERS, KENNETH OLIVER, DONALD J. GARRETT, SR., PAUL D. LUTHART, LEE H. HELLERT, JEFFREY L. STOCKWELL, TODD J. ROBERTS, CHARLES J. TIRANNO, ALAN PANEK, PANEK FAMILY FARMS, LLC, ZELAZNY FAMILY FARMS, LP, MICHAEL J. ZELAZNY, NICOLE M. ZELAZNY, MICHAEL ZELAZNY, MARY S. ZELAZNY, SUSAN M. ZELAZNY, PETITIONERS-PLAINTIFFS-APPELLANTS,
FRONTIER STONE LLC AND DAVID KRUG, PETITIONERS-PLAINTIFFS,

V   OPINION AND ORDER

TOWN OF SHELBY AND TOWN BOARD OF TOWN OF SHELBY, RESPONDENTS-DEFENDANTS-RESPONDENTS.

ALARIO & FISCHER, P.C., EAST SYRACUSE (LAUREL J. EVELEIGH OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered August 20, 2018 in a CPLR article 78 proceeding and declaratory judgment action. The order granted the motion of respondents-defendants for a change of venue from Niagara County to Orleans County.

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

Opinion by DeJoseph, J.:

The primary issue raised on this appeal involves the interplay between three statutory provisions concerning venue, i.e., CPLR 504 (2), CPLR 506 (b), and Town Law § 66 (1) and, ultimately, whether Supreme Court properly granted the motion of respondents-defendants (respondents) to transfer venue of this hybrid CPLR article 78 proceeding and declaratory judgment action from Niagara County to Orleans County. We conclude that the court properly transferred venue pursuant to Town Law § 66 (1).

I. FACTS AND PROCEDURAL HISTORY

Petitioners-plaintiffs-appellants (Zelazny petitioners) commenced a hybrid CPLR article 78 proceeding and declaratory judgment action (first proceeding) in Niagara County seeking, inter alia, to declare invalid Local Law No. 5 of 2017 (2017 Law) of respondent-defendant Town of Shelby (Town), which created a wildlife refuge overlay district within the Town, and to annul the negative declaration issued by respondent-defendant Town Board of Town of Shelby (Town Board) under the State Environmental Quality Review Act (ECL art 8) with respect to the 2017 Law. Petitioners-plaintiffs Frontier Stone LLC and David Krug (Frontier petitioners) commenced a nearly identical hybrid CPLR article 78 proceeding and declaratory judgment action (second proceeding) against respondents in Niagara County.

After the court granted the motion of petitioners-plaintiffs (petitioners) to consolidate the first and second proceedings (proceeding), respondents served a demand to change venue of the proceeding to Orleans County pursuant to CPLR 511 (b) and Town Law § 66. As relevant here, the Zelazny petitioners opposed the demand, and respondents then moved pursuant to Town Law § 66 and CPLR 510 to change venue of this proceeding to Orleans County.

In support of that motion, respondents argued that, under Town Law § 66, Orleans County is the only proper venue for this proceeding. In opposition, the Zelazny petitioners argued, inter alia, that venue is proper in Niagara County pursuant to CPLR 506 (b) and that respondents had waived any right to assert improper venue inasmuch as respondents consented to consolidation of the first and second proceedings and negotiated a scheduling order, along with an extension of time to answer.

The court granted respondents' motion and transferred this proceeding to Orleans County. The Zelazny petitioners appeal.

II. ANALYSIS

"To effect a change of venue pursuant to CPLR 510 (1), a defendant must show both that the plaintiff's choice of venue is improper and that its choice of venue is proper" (*Silvera v Strike Long Is.*, 52 AD3d 497, 497 [2d Dept 2008]; *see Agway, Inc. v Kervin*, 188 AD2d 1076, 1077 [4th Dept 1992]; *see generally* CPLR 511 [b]). Here, respondents are both situated in Orleans County, and we conclude that respondents established that the Zelazny petitioners' choice of venue (Niagara County) was improper and that respondents' choice (Orleans County) was proper.

The determination whether respondents are entitled to a change in venue requires an analysis of the interplay between three statutory provisions: CPLR 504 (2), CPLR 506 (b), and Town Law § 66 (1). CPLR 504 (2) provides in relevant part that, "subject to the provisions of subdivision (b) of section 506, the place of trial of all actions against” towns or their boards shall be “in the county in which such . . . town . . . is situated.” CPLR 506 (b) states that, except in certain circumstances that are not present here,

> “[a] proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him [or her] by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located.”

Town Law § 66 (1) provides that “[t]he place of trial of all actions and proceedings against a town or any of its officers or boards shall be the county in which the town is situated.”

We conclude that Town Law § 66 applies and, as such, the proper venue in the instant action is Orleans County rather than Niagara County. Several rules of statutory construction guide that determination. First, in the absence of an irreconcilable conflict, statutory provisions are to be read together whenever possible (*see* McKinney’s Cons Laws of NY, Book 1, Statutes § 391). Second, a repeal of an earlier statute should be implied only where the later statute is in irreconcilable conflict with the earlier statute (*see* § 398), and a general statute ordinarily must yield to a specific statute (*see* § 397).

There is no conflict between Town Law § 66 (1) and CPLR 504 (2) inasmuch as they both provide that the proper venue is the county in which the town is situated. There is also no conflict between Town Law § 66 (1) and CPLR 506 (b) because CPLR 506 (b) broadly applies to all *proceedings* brought against a *body or officer* while Town Law § 66 (1) applies specifically to all *actions and proceedings* against a *town or its board* (*see generally* McKinney’s Cons Laws of NY, Book 1, Statutes §§ 391, 397). For the same reason, Town Law § 66 (1) is the more specific statute. We therefore conclude that Town Law § 66 (1) and CPLR 504 (2) and 506 (b) may be read together and that there has been no implied repeal of Town Law § 66 (1). Additionally, there is no dispute between the parties that this is a hybrid CPLR article 78 proceeding and declaratory judgment action against the Town and the Town Board. Consequently, Town Law § 66 (1) is directly applicable to this case inasmuch as petitioners brought this hybrid *“action[] and proceeding[]* against a *town* [and] . . . its *board”* (*id.* [emphasis added]; *cf*. CPLR 506 [b] [*“Proceeding* against *body* or *officer”* (emphasis added)]).

The Zelazny petitioners contend that venue here is governed by CPLR 504, which they assert was intended to supercede Town Law § 66 (1). We reject that contention. We acknowledge that the Legislative Studies and Reports for CPLR 504 provides as follows:

> “[CPLR 504] consolidated civil practice act §§ 182-a and 182-b, McKinney’s County Law § 52, McKinney’s Second Class Cities Law § 242, McKinney’s Town Law § 66 (1) and McKinney’s Village Law § 341-e. Subject to § 506, it aims at a uniform rule governing actions against counties, cities, towns and villages or any of their officers, boards or departments.” (Legislative Studies and Reports McKinney’s Cons Laws of NY, Book 7B, CPLR 504, at 68 [2006]).

In our view, however, that Legislative Report does not warrant a different result. First, Town Law § 66 (1) has not been implicitly or expressly repealed. Second, and most importantly, this hybrid action and proceeding is not covered by CPLR 504 or 506 (b) inasmuch as neither provision applies to a hybrid action and proceeding. Town Law § 66 (1) includes a specific directive that is directly applicable to this case, i.e., the place of trial for *all actions and proceedings* against a *town* or any of its *boards* shall be the county in which the town is situated.

Contrary to the Zelazny petitioners’ further contention, respondents did not waive their right to challenge venue by seeking additional time to answer. “[I]t is well-settled that a defendant may waive proper venue as a matter of right if it does not timely demand or move for a change of venue in accordance with CPLR 510 and 511” (*Wager v Pelham Union Free Sch. Dist*., 108 AD3d 84, 90 [2d Dept 2013]). Here, we conclude that the extension of time to answer, as set forth in the preliminary pre-trial scheduling order, provided respondents additional time to answer and therefore additional time to serve a timely demand to change venue (*see generally American Tax Funding, LLC v Druckman Law Group, PLLC*, 175 AD3d 1055, 1055 [4th Dept 2019]). Furthermore, the extension of time to answer was not contingent on anything, including that venue was proper in Niagara County. We similarly conclude that respondents’ participation in the consolidation motion did not constitute a waiver of their right to challenge venue. Although counsel for respondents consented to consolidate the first and second proceedings in Niagara County, he indicated no implicit or explicit agreement with the assertion of counsel for the Frontier petitioners that venue was proper in Niagara County. Respondents therefore did not waive their right to challenge venue (*cf. Wager*, 108 AD3d at 87, 90).

In view of the foregoing, the remaining contentions of the Zelazny petitioners are academic.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

918
CA 19-00309
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

PAULINE A. BEAGLE, PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-APPELLANT,
JOHN GIKAS, SAM GIKAS, MILKIE’S ON ELMWOOD, INC.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CHRISTOPHER POOLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

BROWN & KELLY, LLP, BUFFALO (KEVIN D. WALSH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 26, 2018. The order granted the motion of defendants John Gikas, Sam Gikas and Milkie’s on Elmwood, Inc., for summary judgment, dismissed the amended complaint and all cross claims against said defendants and denied the cross motion of defendant City of Buffalo for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion and reinstating the amended complaint and any cross claims against defendants John Gikas, Sam Gikas, and Milkie’s on Elmwood, Inc., and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she tripped and fell on an allegedly defective sidewalk in defendant City of Buffalo (City) that abutted property owned by defendants John Gikas and Sam Gikas (Gikas defendants) and leased to defendant Milkie’s on Elmwood, Inc. (Milkie’s). The parties do not dispute that, at the time of the incident, two sidewalk slabs were elevated by the roots of a nearby tree owned by the City. At some time before the accident, a “cold patch” repair was performed, covering the area between the two sidewalk slabs with asphalt. Nevertheless, on the day of plaintiff’s accident, the sidewalk slabs remained elevated.

Following discovery, the Gikas defendants and Milkie’s (collectively, property defendants) jointly moved for summary judgment dismissing the amended complaint and all cross claims asserted against them. The City thereafter cross-moved for summary judgment dismissing the amended complaint against it. Supreme Court granted the property defendants' motion but denied the City's cross motion. The City appeals. Although plaintiff also filed a notice of appeal, her appeal was deemed dismissed when it was not timely perfected (*see* 22 NYCRR 1250.10 [a]). We conclude that the court erred in granting the property defendants' motion but properly denied the City's cross motion, and we therefore modify the order accordingly.

With respect to the property defendants' motion, "it is well established that, as an abutting landowner [and tenant], [the property defendants are] not liable for injuries sustained as the result of a defect in the sidewalk unless the special use doctrine applies, i.e., the sidewalk was constructed in a special manner for [their] benefit, or unless [they] affirmatively created the defective condition or negligently constructed or repaired the sidewalk or there is a local ordinance charging [them] with the duty to maintain and repair the sidewalk and imposing liability for injuries resulting from [their] failure to do so" (*Guadagno v City of Niagara Falls*, 38 AD3d 1310, 1311 [4th Dept 2007]; *see Clauss v Bank of Am., N.A.*, 151 AD3d 1629, 1630 [4th Dept 2017]; *Shatzel v 152 Buffalo St., Ltd.*, 129 AD3d 1626, 1626-1627 [4th Dept 2015]).

Although the property defendants established as a matter of law that the special use doctrine does not apply and that they did not affirmatively create the allegedly defective condition, the Code of the City of Buffalo (Code) § 413-50 (A) specifically imposes on "owner[s] or occupant[s] of any lands fronting or abutting on any street," i.e., the property defendants, a duty to maintain and repair the sidewalk and provides that their failure to do so will result in liability for injuries to users of the sidewalk. Contrary to the property defendants' contention, that duty to maintain and repair extends to damage caused by the roots of a tree owned by the City where, as here, "the local ordinance contains no exceptions to the duty imposed on abutting landowners to maintain the sidewalk, even if the allegedly dangerous condition was created by a root extending from [City] property" (*Shatzel*, 129 AD3d at 1627; *see Moore v Newport Assoc. L.P.*, 16 Misc 3d 618, 620 [Sup Ct, Kings County 2007]; *Faulk v City of New York*, 16 Misc 3d 1108[A], 2007 NY Slip Op 51346[U], *8 [Sup Ct, Kings County 2007]). The fact that a different section of the Code prohibits anyone but the City from performing asphalt repairs (*see* § 413-46 [D]) does not absolve the property defendants from liability under section 413-50 (A) inasmuch as the Code does permit landowners to reconstruct sidewalks after obtaining the appropriate permit from the City (*see* § 413-46 [A]).

With respect to the City's cross motion, the City contends that plaintiff's failure to plead in her amended complaint that the City had prior written notice of the alleged defect in the sidewalk is fatal to her action. It is well settled that where, as here, a municipality has enacted a prior written notice provision (*see* The Charter of the City of Buffalo § 21-2), compliance with that provision is a condition precedent to tort actions against that municipality (*see Amabile v City of Buffalo*, 93 NY2d 471, 473-474 [1999]; *Malek v Village of Depew*, 156 AD3d 1412, 1413 [4th Dept 2017]; *Benson v City of Tonawanda*, 114 AD3d 1262, 1263 [4th Dept 2014]). Contrary to the contentions of plaintiff and the property defendants, a municipality's actual notice or knowledge of a dangerous condition, as exists in this case, does "not avoid the notice requirement" (*Oswald v City of Niagara Falls*, 13 AD3d 1155, 1157 [4th Dept 2004]; *see Guadagno*, 38 AD3d at 1311-1312; *see generally Amabile*, 93 NY2d at 475-476).

We nonetheless reject the City's contention. The Court of Appeals "has recognized . . . two exceptions to the statutory rule requiring prior written notice, namely, where the locality created the defect or hazard through an affirmative act of negligence . . . and where a 'special use' confers a special benefit upon the locality" (*Amabile*, 93 NY2d at 474; *see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Oboler v City of New York*, 8 NY3d 888, 889 [2007]).

Here, plaintiff invoked the affirmative negligence exception by alleging in her amended complaint that the City "creat[ed]" the dangerous condition. That exception requires evidence "that the municipality affirmatively created the defect through an act of negligence" (*Yarborough*, 10 NY3d at 728; *see Ahern v City of Syracuse*, 150 AD3d 1670, 1670-1671 [4th Dept 2017]). The exception is " 'limited to work by the City that *immediately* results in the existence of a dangerous condition' " (*Oboler*, 8 NY3d at 889; *see Yarborough*, 10 NY3d at 728; *Hawley v Town of Ovid*, 108 AD3d 1034, 1035 [4th Dept 2013]) and "does not apply to conditions that develop over time" (*Horan v Town of Tonawanda*, 83 AD3d 1565, 1567 [4th Dept 2011]; *see Burke v City of Rochester*, 158 AD3d 1218, 1219 [4th Dept 2018]).

In our view, the evidence submitted by the property defendants in support of their motion, which was then incorporated into the City's cross motion, raised triable issues of fact whether the City performed the "cold patch" repair to the area sometime before plaintiff's accident and whether the condition of the sidewalk on the day of plaintiff's accident was the same as when the "cold patch" was first applied. We thus conclude that the City failed to establish as a matter of law that it did not affirmatively create a dangerous condition or that the dangerous condition was due solely to conditions that developed over time (*see e.g. Wald v City of New York*, 115 AD3d 939, 940-941 [2d Dept 2014]; *Hawley*, 108 AD3d at 1034-1035; *Benty v First Methodist Church of Oakfield*, 24 AD3d 1189, 1190 [4th Dept 2005]; *see also Stanciu v Bilello*, 138 AD3d 824, 825-826 [2d Dept 2016]).

With respect to the City's final contention, we conclude that the City failed to establish as a matter of law that the condition of the sidewalk did not constitute a dangerous condition. " '[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case' . . . , and the existence or nonexistence of a defect or dangerous condition 'is generally a question of fact for the jury' " (*Wiedenbeck v Lawrence*, 170 AD3d 1669, 1669-1670 [4th Dept 2019], quoting *Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). Here, evidence that the condition of the sidewalk appeared to be dangerous both before and after the cold patch was applied raises such triable issues of fact (*see Cuebas v Buffalo Motor Lodge/Best Value Inn*, 55 AD3d 1361, 1362 [4th Dept 2008]; *cf. Trionfero v Vanderhorn*, 6 AD3d 903, 904 [3d Dept 2004]).

Mark W. Bennett

Entered: December 20, 2019

Clerk of the Court

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

919
CA 19-00121
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

COLIN BRINSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MELISSA BRINSON, DEFENDANT-APPELLANT.

MELISSA BRINSON, PETITIONER-APPELLANT,

V

COLIN BRINSON, RESPONDENT-RESPONDENT.

HAWTHORNE & VESPER, PLLC, BUFFALO (TINA M. HAWTHORNE OF COUNSEL), FOR DEFENDANT-APPELLANT AND PETITIONER-APPELLANT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR PLAINTIFF-RESPONDENT AND RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 23, 2018. The order and judgment, among other things, awarded plaintiff-respondent a money judgment against defendant-petitioner in the amount of $35,851.38.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating the award of attorney's fees and as modified the order and judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Defendant-petitioner (petitioner) appeals from an order and judgment that, inter alia, granted in part her petition seeking a downward modification of her child support obligation on the grounds that the parties' oldest child was emancipated and that she had lost her job; dismissed her supplemental petition seeking a downward modification of her child support obligation on the ground that two of the parties' other children were constructively emancipated; and granted in part the application of plaintiff-respondent (respondent) seeking, inter alia, child support arrears and counsel fees as provided for by the parties' judgment of divorce.

We reject petitioner's contention that Supreme Court was required to apply a credit against her arrears for certain college expenses. "A credit against child support for college expenses is not mandatory but depends upon the facts and circumstances in the particular case, taking into account the needs of the custodial parent to maintain a household and provide certain necessaries" (*Matter of DelSignore v DelSignore*, 133 AD3d 1207, 1208 [4th Dept 2015] [internal quotation marks omitted]; *cf. Wortman v Wortman*, 11 AD3d 604, 607 [2d Dept 2004]). Petitioner failed to preserve her further contention that certain college expenses were duplicative of her child support obligation (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, her contention is without merit inasmuch as respondent was required to maintain the home for all four of the parties' children, including the oldest child, who returned home during school breaks (*see DelSignore*, 133 AD3d at 1208; *Juhasz v Juhasz* [appeal No. 2], 92 AD3d 1209, 1212 [4th Dept 2012]).

Contrary to petitioner's contention that she was denied her right to counsel, petitioner did not have a right to counsel in this matter (*see Matter of Leonardo v Leonardo*, 94 AD3d 1452, 1454 [4th Dept 2012], *lv denied* 19 NY3d 807 [2012]; *Matter of Commissioner of Social Servs. of City of N.Y. v Remy K.Y.*, 298 AD2d 261, 262 [1st Dept 2002]; *see generally Matter of Kissel v Kissel*, 59 AD2d 1036, 1036 [4th Dept 1977]) inasmuch as respondent withdrew his request that she be held in contempt (*see generally Kissel*, 59 AD2d at 1036).

We reject petitioner's further contention that, because she disputed the alleged arrears, she was necessarily entitled to a hearing prior to the court's determination with respect thereto. Petitioner failed to raise a material issue of fact that would warrant a hearing inasmuch as she did not contest respondent's calculation of the arrears and instead contended only that he provided certain untimely and insufficient documentation of those arrears (*cf. Burroughs v Burroughs*, 262 AD2d 993, 993 [4th Dept 1999]).

Petitioner also contends that she was entitled to a hearing because two of the parties' children were constructively emancipated. We reject that contention. "[U]nder the doctrine of constructive emancipation, a child of employable age who actively abandons the noncustodial parent by refusing all contact and visitation may forfeit any entitlement to support" (*Matter of Oneida County Dept. of Social Servs. v Christman*, 125 AD3d 1409, 1410 [4th Dept 2015] [internal quotation marks omitted]; *see Matter of Burr v Fellner*, 73 AD3d 1041, 1041 [2d Dept 2010]). Petitioner's contention is incorrect as a matter of law with respect to one of the children, who was only 16 years old and was therefore not " 'of employable age' " (*Foster v Daigle*, 25 AD3d 1002, 1005 [3d Dept 2006], *lv dismissed* 6 NY3d 890 [2006]). With respect to the other child, petitioner failed to establish, or even to allege, that the child had abandoned a relationship with petitioner by refusing *all* contact and visitation with her (*see Christman*, 125 AD3d at 1410).

We agree with petitioner, however, that the court should have conducted an evidentiary hearing before granting that part of respondent's application seeking an award of his attorney's fees inasmuch as respondent failed to furnish sufficient documentation of the value of the services performed by the attorney. We conclude that this issue is preserved inasmuch as petitioner contested previous requests for attorney’s fees, at the final appearance respondent first requested the $3,000 in attorney’s fees but submitted no supporting documentation, and petitioner was not afforded an adequate opportunity to dispute the same (*see generally* CPLR 5501 [a] [3]). “ ‘Attorney’s fees should not be awarded without conducting a hearing or requiring proof by affidavit substantiating the attorney’s fees requested’ ” (*Moses v Moses*, 231 AD2d 850, 850 [4th Dept 1996]; *see Matthews v Matthews*, 238 AD2d 926, 927 [4th Dept 1997]). An award for attorney’s fees is improper absent documentation of the submitted value of the services performed (*see Johnston v Johnston*, 63 AD3d 1555, 1556 [4th Dept 2009]; *Marshall v Marshall*, 1 AD3d 323, 324 [2d Dept 2003]; *cf. Ackerman v Midura*, 145 AD3d 647, 648 [2d Dept 2016]). Thus, we conclude that “it was an abuse of discretion to award the amount of counsel fees requested, without affording [petitioner] the opportunity to elicit further information on the reasonable value of those services” (*Matter of Kobel v Martelli*, 112 AD2d 756, 757 [4th Dept 1985]). We therefore modify the order and judgment by vacating the award of attorney’s fees, and we remit the matter to Supreme Court for a determination regarding attorney’s fees based upon proper proof (*see Matthews*, 238 AD2d at 926; *Moses*, 231 AD2d at 850).

We have reviewed petitioner’s remaining contentions and conclude that none requires reversal or further modification of the order and judgment.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

983
CAF 19-00290
PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF KEVIN P. BRINK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KIMBERLY M. BRINK, RESPONDENT-APPELLANT.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (DAVID S. WHITTEMORE OF COUNSEL), FOR RESPONDENT-APPELLANT.

GERALD J. VELLA, SPRINGVILLE, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Cattaraugus County (Moses M. Howden, J.), entered June 6, 2018 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's objections to the amended order of the Support Magistrate.

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 4, respondent mother appeals from an order that, inter alia, confirmed the amended order of the Support Magistrate (Farwell, S.M.), which granted petitioner father's petition seeking to terminate his child support obligation and require the mother to pay him child support. We affirm.

As we explained on the prior appeal, the parties are the parents of two minor children, born in 2001 and 2004, respectively (*Matter of Brink v Brink*, 147 AD3d 1443, 1443 [4th Dept 2017]). The parties were divorced in 2006, and the judgment incorporated a voluntary agreement concerning, inter alia, child custody, visitation, and support (*id.*).

The subject of the prior appeal was the father's 2014 petition seeking a downward modification of his child support obligation based on an increase in his visitation since 2010, i.e., he shared an equal amount of time with the children, and a significant decrease in his earnings since 2012 as the result of a job loss (*id.* at 1444). The Support Magistrate (Morgan, S.M.) denied the petition following an evidentiary hearing (*id.*). In a written decision, the Support Magistrate held that the father failed to demonstrate any change in circumstances since the relevant 2013 support order. In particular, the Support Magistrate held that "the father's income reduction from 2012 to 2013 did not constitute the requisite change in circumstances ‘because this [income reduction] took place before the hearing whereby the current [2013] order of support was determined’ ” (*id*.). Family Court (Nenno, J.) thereafter confirmed the order denying the petition (*id*.). We reversed. We rejected the father’s contention that a sufficient change in circumstances existed to warrant a recalculation of his child support obligation based on the parties’ equal access time with the children because the “change in the visitation schedule occurred years before the 2013 [support] order and thus [could not] serve as the basis for any recalculation of his child support obligation” (*id*. at 1445). We concluded, however, that the father’s reduced income from 2012 to 2013 constituted such a change in circumstances (*id.*). We therefore reinstated the petition and remitted the matter to Family Court for a determination of the appropriate amount of child support to be paid by the father, after a further hearing, if necessary.

Upon remittal, the father’s 2014 petition was combined with a 2016 modification petition that he filed while the prior appeal was pending. The 2016 petition again alleged that the parties share an equal amount of time with the children and that the father’s income during 2015 and 2016 had been decreasing while the mother’s income had been increasing. As noted, the father therefore sought to modify the existing support order by terminating his child support obligation and requiring the mother to pay child support to him. The appeal herein stems solely from the court’s resolution of the 2016 petition. After a hearing on that petition, the Support Magistrate (Farwell, S.M.) determined that the father “demonstrated a change of his employment and income which occurred between 2015 and 2016” and, “[a]s a result of [the father’s] lower annual income and [the mother’s] increased earnings which exceed [the father’s], coupled with their equal sharing of the children[,] the designation of the custodial and noncustodial parent for child support purposes [needed to] be changed.” Consequently, in an amended order, the Support Magistrate designated the mother as the noncustodial parent, and directed the mother to pay the father child support. The amended order was confirmed by Family Court (Howden, J.), and the mother appeals.

We reject the mother’s contention that the doctrine of law of the case requires that she be designated the custodial parent for child support purposes (*see generally Matter of Bartz v Village of LeRoy*, 159 AD3d 1338, 1340 [4th Dept 2018]). As stated above, our prior decision established that the father’s reduced income constituted a sufficient change in circumstances to warrant a recalculation of his child support obligation (*Brink*, 147 AD3d at 1445). Based on that determination together with the allegations in the 2016 petition regarding the father’s decreased income and the mother’s increased income in 2015 and 2016, the Support Magistrate was entitled to modify the father’s support obligation, including by terminating his obligation altogether and requiring the mother to pay child support (*see generally id.* at 1444).

Contrary to the mother’s further contention, the Support Magistrate did not err in considering the equal placement of the children. Although a court can generally determine the custodial parent for purposes of child support "by identifying which parent has physical custody of the child[ ] for a majority of the time[,] . . . where the parents share physical custody with approximately an even distribution of parenting time, the parent with the higher income is deemed the noncustodial parent for purposes of the [Child Support Standards Act]" (*Matter of Rapp v Horbett*, 174 AD3d 1315, 1316 [4th Dept 2019] [internal quotation marks omitted]). The Support Magistrate did not err in considering the children's equal placement with the parties because the change in circumstances justifying her recalculation of the parties' child support obligation was the change in each party's income, not the father's equal access.

We have reviewed the mother's remaining contention and conclude that it does not warrant reversal or modification of the order.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

986
CAF 18-02058
PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF WILLIAM KRIER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JEANNE KRIER, RESPONDENT-APPELLANT.

MARY S. HAJDU, ESQ., ATTORNEY FOR
THE CHILD, APPELLANT.

MARY S. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-APPELLANT.

BRIAN R. WELSH, PLLC, WILLIAMSVILLE (BRIAN R. WELSH OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Erie County (Mary G. Carney, J.), entered April 10, 2018 in a proceeding pursuant to Family Court Act article 6. The order granted petitioner sole legal and physical custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the tenth provision of the second ordering paragraph insofar as it relates to the suspension of maintenance payments, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother and the Attorney for the Child (AFC) appeal from an order that, inter alia, modified a prior custody and visitation order by awarding sole custody of the subject child to petitioner father. At the hearing, Family Court heard the testimony of the mother, the father, the three adult siblings of the child, and two expert witnesses. The court also conducted a *Lincoln* hearing. The subject child had refused to have any contact with the father in the four years since the parties' divorce, and the parties offered conflicting lay and expert testimony whether the mother had caused the child's alienation from the father.

Contrary to the contention of the mother and the AFC, we conclude that the father established a sufficient "change in circumstances to warrant an inquiry into the best interests of the child" (*Matter of Poromon v Evans*, 176 AD3d 1642, 1643 [4th Dept 2019]), based on both the expert testimony that the child was demonstrating elements of parental alienation (*see Matter of Angela N. v Guy O.*, 144 AD3d 1343, 1345 [3d Dept 2016]) and " 'the continued deterioration of the parties' relationship' " (*Lauzonis v Lauzonis*, 120 AD3d 922, 924 [4th Dept 2014]; *see Matter of Gaudette v Gaudette*, 262 AD2d 804, 804-805 [3d Dept 1999], *lv denied* 94 NY2d 790 [1999]; *see also Matter of Ingersoll v Platt*, 72 AD3d 1560, 1561 [4th Dept 2010]).

Furthermore, we reject the contention of the mother and the AFC that the determination to award sole custody to the father is not supported by the requisite "sound and substantial basis in the record" (*Matter of Russell v Russell*, 173 AD3d 1607, 1608 [4th Dept 2019]). "The court's determination in a custody matter is entitled to great deference and will not be disturbed where . . . it is based on a careful weighing of appropriate factors" (*Matter of Stanton v Kelso*, 148 AD3d 1809, 1810 [4th Dept 2017] [internal quotation marks omitted]; *see generally Fox v Fox*, 177 AD2d 209, 210-211 [4th Dept 1992]). Those factors include: (1) the continuity and stability of the existing custodial arrangement, including the relative fitness of the parents and the length of time the present custodial arrangement has continued; (2) the relative quality of each parent's home environment; (3) each parent's ability to provide for the child's emotional and intellectual development; (4) the parents' relative financial status and ability to provide for the child; (5) the child's wishes; and (6) the need of the child to live with siblings (*see Fox*, 177 AD2d at 210).

Here, upon consideration of the testimony, the court properly weighed those factors and found that all weighed in favor of placement with the father except the child's wishes. Although the subject child was 15 years old at the time of the hearing, the court properly determined that his wishes were not entitled to great weight inasmuch as the child was so profoundly influenced by his mother "that he cannot perceive a difference between" the father's abandonment of the marriage and the father's abandonment of him and that it was in the child's best interests to reside with the father despite his wishes to the contrary (*cf. Matter of Miosky v Miosky*, 33 AD3d 1163, 1167 [3d Dept 2006]; *see also Matter of Marino v Marino*, 90 AD3d 1694, 1695-1696 [4th Dept 2011]). Contrary to the contention of the mother and the AFC, the court did not improperly rely on the presence of "parental alienation syndrome" (PAS) in making its custody determination. Indeed, the father's expert did not conclude that PAS, as a diagnosis, existed in this case and rather testified that the type of conduct in which the mother engaged resulted in the subject child becoming alienated from the father. Although PAS is not routinely accepted as a scientific theory by New York courts (*see Matter of Montoya v Davis*, 156 AD3d 132, 135 n 5 [3d Dept 2017]), this Court has repeatedly recognized the effects of alienating behaviors by a parent on children in custody and visitation determinations (*see Russell*, 173 AD3d at 1608-1609; *Matter of Nwawka v Yamutuale*, 107 AD3d 1456, 1457 [4th Dept 2013], *lv denied* 21 NY3d 865 [2013]; *Matter of Carter v Work*, 100 AD3d 1557, 1557-1558 [4th Dept 2012]). We thus conclude that there is a sound and substantial basis for the determination that an award of sole custody to the father was in the child’s best interests, and we therefore decline to disturb that determination (*see generally Russell*, 173 AD3d at 1609; *Matter of Thayer v Ennis*, 292 AD2d 824, 825 [4th Dept 2002]).

Contrary to the further contention of the mother and the AFC, the court did not err in including a directive that the mother obtain counseling as a component of the order on appeal inasmuch as the court did not “order such counseling as a prerequisite to custody or visitation” (*Matter of Avdic v Avdic*, 125 AD3d 1534, 1535 [4th Dept 2015]).

However, we agree with the mother and the AFC that the court exceeded its jurisdiction in suspending maintenance payments to the mother inasmuch as the parties’ separation agreement setting forth that obligation is an independent contract (*see Makarchuk v Makarchuk*, 59 AD3d 1094, 1094 [4th Dept 2009]). Family Court is a court of limited jurisdiction and cannot exercise powers beyond those granted to it by statute (*see Matter of Johna M.S. v Russell E.S.*, 10 NY3d 364, 366 [2008]; *Matter of Howard v Janowski*, 226 AD2d 1087, 1087 [4th Dept 1996]; *see also Kleila v Kleila*, 50 NY2d 277, 282 [1980]), and “[i]t generally has no subject matter jurisdiction to reform, set aside or modify the terms of a valid separation agreement” (*Johna M.S.*, 10 NY3d at 366). We therefore modify the order by vacating the tenth provision of the second ordering paragraph insofar as it relates to the suspension of maintenance payments, and we remit the matter to Family Court for a determination of the amount of any maintenance arrears.

The contention of the mother and the AFC that the court erred in prohibiting contact between the subject child and his adult siblings is moot inasmuch as that provision of the order expired by its own terms (*see generally Matter of Mickle v Mickle*, 143 AD3d 1289, 1290 [4th Dept 2016]; *Matter of Whitney v Judge*, 138 AD3d 1381, 1382 [4th Dept 2016], *lv denied* 27 NY3d 911 [2016]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

993
CA 18-02154
PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

CANANDAIGUA NATIONAL BANK AND TRUST COMPANY,
PLAINTIFF,

V — MEMORANDUM AND ORDER

ACQUEST SOUTH PARK, LLC, ET AL., DEFENDANTS,
AND KINGSBURY CORPORATION, DEFENDANT-APPELLANT.

KINGSBURY CORPORATION, THIRD-PARTY PLAINTIFF-
APPELLANT,

V

WILLIAM L. HUNTRESS, THIRD-PARTY DEFENDANT-
RESPONDENT.

UNDERBERG & KESSLER LLP, ROCHESTER (THOMAS F. KNAB OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 7, 2018. The order, insofar as appealed from, granted in part the motion of third-party defendant for summary judgment dismissing the cross claims of defendant-third-party plaintiff against him.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety, and the first cross claim of defendant-third-party plaintiff is reinstated against third-party defendant.

Memorandum: Defendant-third-party plaintiff, Kingsbury Corporation (Kingsbury), appeals from an order insofar as it granted that part of the motion of third-party defendant, William L. Huntress, seeking summary judgment dismissing Kingsbury’s first cross claim, for wrongful eviction under RPAPL 853, against him. Insofar as the order is appealed from, we reverse.

The sole contention raised by Huntress in support of his motion with respect to the first cross claim was that he could not be personally liable inasmuch as he was acting as an agent of a disclosed principal. We conclude that Huntress failed to establish his entitlement to judgment as a matter of law with respect to that cross claim and, as a result, the burden never shifted to Kingsbury to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"It is well established that '[a] corporate officer may be held personally liable for a tort of the corporation if he or she committed or participated in its commission, whether or not his or her acts are also by or for the corporation' " (*Villafrank v David N. Ross, Inc*., 120 AD3d 935, 938 [4th Dept 2014]; *see Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 211 [1st Dept 2005]). A cause of action under RPAPL 853 sounds in tort (*see Gold v Schuster*, 264 AD2d 547, 549 [1st Dept 1999]; *Kolomensky v Wiener*, 135 AD2d 505, 507 [2d Dept 1987], *lv denied in part and dismissed in part* 72 NY2d 873 [1988]; *Chapman v Johnson*, 39 AD2d 629, 629 [4th Dept 1972]). Here, Huntress failed to establish that he did not participate in the eviction of Kingsbury, and he therefore failed to establish as a matter of law that he cannot be held personally liable if the eviction violated RPAPL 853 (*see Suprunchik v Viti*, 139 AD3d 1389, 1390-1391 [4th Dept 2016]; *see also Retropolis, Inc.*, 17 AD3d at 211).

Huntress nevertheless contends that the order insofar as it granted the motion with respect to the first cross claim should be affirmed because Kingsbury was not unlawfully evicted under RPAPL 853. That alternative ground for affirmance, however, was not raised before the trial court and thus is not properly before us (*see Lots 4 Less Stores, Inc. v Integrated Props., Inc*., 152 AD3d 1181, 1182 [4th Dept 2017]; *see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]). Again, the only contention advanced by Huntress in support of the motion with respect to the first cross claim was that he could not be personally liable for the alleged wrongful eviction because he was acting as an agent of a disclosed principal.

Entered: December 20, 2019 Mark W. Bennett
Clerk of the Court

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

999
KA 18-00202
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

KIM SORIANO, DEFENDANT-APPELLANT.

BELLETIER LAW OFFICE, SYRACUSE (ANTHONY BELLETIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered September 15, 2017. The judgment convicted defendant upon his plea of guilty of course of sexual conduct against a child in the first degree, rape in the first degree and sexual abuse in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), rape in the first degree (§ 130.35 [4]), and two counts of sexual abuse in the first degree (§ 130.65 [3]). Initially, we agree with the People and defendant that the waiver of the right to appeal is invalid because County Court "conflated the right to appeal with those rights automatically forfeited by the guilty plea" (*People v Rogers*, 159 AD3d 1558, 1558 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]). The record therefore does not establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez,* 6 NY3d 248, 256 [2006]).

Contrary to defendant's contention, by pleading guilty defendant waived his contention that the indictment was defective for failing to give sufficient specificity with respect to the time frames for the alleged crimes (*see People v Sims*, 129 AD3d 1509, 1510 [4th Dept 2015], *lv denied* 26 NY3d 935 [2015]; *People v Riley*, 267 AD2d 1072, 1073 [4th Dept 1999]).

The further contention of defendant that he was denied effective assistance of counsel "does not survive his guilty plea . . . because there was no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney[’s] allegedly poor performance” (*People v Dean*, 48 AD3d 1244, 1245 [4th Dept 2008], *lv denied* 10 NY3d 839 [2008] [internal quotation marks omitted]). To the extent that defendant’s contention survives his guilty plea, it is well settled that, “[i]n the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel” (*People v Ford*, 86 NY2d 397, 404 [1995]). We conclude on the record before us that defendant was afforded meaningful representation (*see generally id.*).

Finally, we reject defendant’s contention that the court erred in denying without an evidentiary hearing his pro se motion to withdraw his guilty plea. “The decision to permit a defendant to withdraw a guilty plea rests in the sound discretion of the court . . . and where . . . a defendant’s motion to withdraw is patently insufficient on its face, the court may summarily deny the motion” (*People v Smith*, 122 AD3d 1300, 1301-1302 [4th Dept 2014], *lv denied* 25 NY3d 1172 [2015] [internal quotation marks omitted]). Furthermore, “[o]nly in the rare instance will a defendant be entitled to an evidentiary hearing; often a limited interrogation by the court will suffice. The defendant should be afforded [a] reasonable opportunity to present his contentions and the court should be enabled to make an informed determination” (*People v Tinsley*, 35 NY2d 926, 927 [1974]). The record establishes that defendant was afforded such an opportunity and that the court was able to make an informed determination of the motion. Contrary to defendant’s related contention, defense counsel did not take an adverse position on defendant’s pro se motion to withdraw the guilty plea and therefore the court did not abuse its discretion in failing to substitute new counsel (*see People v Weinstock*, 129 AD3d 1663, 1664 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1000
KA 15-01860
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES E. COLEMAN, II, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON 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 June 4, 2015. 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 [4]). We affirm.

Defendant contends that County Court failed to make an appropriate inquiry into his two requests for a substitution of counsel. Initially, we note that his contention “ ‘is encompassed by the plea and the [valid] waiver of the right to appeal except to the extent that the contention implicates the voluntariness of the plea’ ” (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]). Regardless, we conclude that “defendant abandoned his request for new counsel when he ‘decid[ed] . . . to plead guilty while still being represented by the same attorney’ ” (*People v Guantero*, 100 AD3d 1386, 1387 [4th Dept 2012], *lv denied* 21 NY3d 1004 [2013]; *see People v Barr*, 169 AD3d 1427, 1427-1428 [4th Dept 2019], *lv denied* 33 NY3d 1028 [2019]; *People v Kates*, 162 AD3d 1627, 1629 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018]).

To the extent that defendant contends that he was denied effective assistance of counsel, that contention also does not survive the plea of guilty because defendant has not established that any deficiencies in defense counsel’s performance infected the plea bargaining process or that defendant ultimately decided to enter the plea based on defense counsel’s allegedly poor performance (*see People v Ware*, 159 AD3d 1401, 1402 [4th Dept 2018], *lv denied* 31 NY3d 112

[2018]; *Morris*, 94 AD3d at 1451). We note that defense counsel secured for defendant a favorable plea deal (*see People v Booth*, 158 AD3d 1253, 1255 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]), and that there is no reasonable probability that, “but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial” (*People v Yates*, 173 AD3d 1849, 1850 [4th Dept 2019] [internal quotation marks omitted]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1003
KA 18-00465
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VIRGIL BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Erie County Court (Kenneth F. Case, J.), rendered February 2, 2018. Defendant was resentenced upon his conviction of predatory sexual assault against a child.

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

Memorandum: Defendant was convicted upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96). On a prior appeal, we rejected the majority of defendant's contentions, but we also concluded that defendant was deprived of effective assistance of counsel at sentencing, and we therefore modified the judgment of conviction by vacating the sentence and remitted the matter to County Court for assignment of new counsel and resentencing (*People v Brown*, 152 AD3d 1209, 1212 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017]). He now appeals from the resentence.

Contrary to defendant's contention, the court did not abuse its discretion in denying defendant's recusal motion upon remittal (*see People v Hazzard*, 129 AD3d 1598, 1598 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015]; *People v Weekes*, 46 AD3d 583, 585 [2d Dept 2007], *lv denied* 10 NY3d 845 [2008]). Where, as here, "recusal is sought based upon 'impropriety as distinguished from legal disqualification, the judge . . . is the sole arbiter' " of whether to grant such a motion (*People v Moreno*, 70 NY2d 403, 406 [1987]). Contrary to his further contentions, defendant failed to demonstrate that the court displayed actual bias (*see People v McCray*, 121 AD3d 1549, 1551 [4th Dept 2014], *lv denied* 25 NY3d 1204 [2015]), or that the court's rulings were indicative of bias against defendant (*see generally People v Walker*, 100 AD3d 1522, 1523 [4th Dept 2012], *lv denied* 20 NY3d 1104 [2013]).

We have reviewed defendant's contention that he was deprived of effective assistance of counsel at resentencing, and we conclude that it lacks merit (*see generally People v Caban*, 5 NY3d 143, 152 [2005]; *People v Baldi*, 54 NY2d 137, 147 [1981]). Finally, the resentence is not unduly harsh or severe.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1017
KA 18-00258
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVANTE A. BUMPARS, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered April 21, 2017. The judgment convicted defendant upon his plea of guilty of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of assault in the first degree (Penal Law § 120.10 [4]), defendant contends, inter alia, that his waiver of the right to appeal is invalid. We agree inasmuch as the record fails to " 'establish that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Weir*, 174 AD3d 1465, 1466 [4th Dept 2019], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]) and County Court failed to inquire whether defendant read the written waiver of the right to appeal or whether he understood that written waiver (*see id.* at 1466-1467; *People v Sanford*, 138 AD3d 1435, 1436 [4th Dept 2016]).

Contrary to defendant's further contention, however, the court did not err in refusing to suppress statements defendant made to law enforcement officers subsequent to an initial statement that was suppressed. Before defendant invoked his right to counsel, he asked a detective located near the holding cell to inform him of the charges on which he was being held. The detective did not answer the question, explaining that another detective would be interviewing defendant shortly.

Defendant was thereafter taken by the second detective to an interview room where defendant invoked his right to counsel before making any incriminating statements. Upon his return to the holding cell, the first detective, unprompted, informed defendant that he was being held on a "murder investigation." In response, defendant said, among other things, “[h]ow can it be murder when I was trying to defend myself” and “[h]e pulled the gun on me and I took the gun away.” The court suppressed those statements.

After a gap of several minutes (*see People v White*, 10 NY3d 286, 292 [2008], *cert denied* 555 US 897 [2008]), defendant made various statements to himself in the holding cell, essentially repeating what he had said to the detective and adding “I’m not going to let anybody just kill me.” We conclude that the court did not err in refusing to suppress the statements defendant made to himself in the cell. As the court determined, those statements were spontaneous and “not the result of inducement, provocation, encouragement or acquiescence” (*People v Maerling*, 46 NY2d 289, 302-303 [1978]), and we see no basis to disturb the court’s factual determination that the statements defendant made to himself were “ ‘made without apparent external cause’ ” (*People v Rivers*, 56 NY2d 476, 480 [1982], *rearg denied* 57 NY2d 775 [1982]; *see People v Lynes*, 49 NY2d 286, 295 [1980]; *see generally People v Paulman*, 5 NY3d 122, 130-131 [2005]).

We further conclude that the court did not err in refusing to suppress statements defendant subsequently made to yet another detective. After defendant asked to speak with someone, that detective asked to whom he wished to speak and what he wanted to talk about. In response, defendant said “I need to talk to someone, I didn’t commit no murder. I can’t be going to prison.” The detective then attempted, unsuccessfully, to secure an attorney for defendant. When the detective returned to inform defendant of the results of his efforts, defendant reiterated that he did not kill anyone, adding that he “just went there to buy weed” and that he did not even have a knife.

We agree with the People that the detective’s question, in which he asked defendant to whom he wanted to speak and what he wanted to talk about, was “neither intended nor objectively likely to elicit an inculpatory statement from defendant” (*People v Gonzales*, 75 NY2d 938, 940 [1990], *cert denied* 498 US 833 [1990]; *see Rivers*, 56 NY2d at 480). In fact, the question did not elicit an incriminating response. Moreover, it cannot be said that the detective, by merely informing defendant that the detective was unable to secure an attorney for him, intended to elicit an incriminating response. Additionally, contrary to defendant’s contention, there was “no proof that defendant’s state of mind was such that his single . . . statement committed him to the subsequent [statements]” (*People v McGriff*, 149 AD2d 952, 953 [4th Dept 1989], *lv denied* 74 NY2d 814 [1989]).

Defendant contends that his plea was not knowingly, intelligently or voluntarily entered. Although defendant correctly concedes that his contention is not preserved for our review (*see People v White*, 156 AD3d 1489, 1490 [4th Dept 2017], *lv denied* 31 NY3d 988 [2018]), he nevertheless contends that this case falls within the exception to the preservation doctrine (*see generally People v Lopez*, 71 NY2d 662, 666 [1988]). We reject that contention (*see White*, 156 AD3d at 1490). In any event, defendant’s contention that he lacked the ability to understand the proceedings due to his use of medication and his mental state “is belied by the record of the plea proceeding, which establishes that defendant’s factual allocution was lucid and detailed and that defendant understood both the nature of the proceedings and that he was waiving various rights” (*People v Hayes*, 39 AD3d 1173, 1175 [4th Dept 2007], *lv denied* 9 NY3d 923 [2007]).

We conclude that the negotiated sentence is not unduly harsh or severe.

Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted under Penal Law § 120.10 (1), and it must therefore be amended to reflect that he was charged and convicted under section 120.10 (4).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1024
CA 19-00454
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

KELLI J. TAYLOR, PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

JOYCE B. KELLY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered November 30, 2018. The order, insofar as appealed from, denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when the vehicle she was driving was rear-ended by a vehicle operated by defendant. Plaintiff alleged that, as a result of the motor vehicle accident, she sustained injuries to, inter alia, her cervical spine under the significant limitation of use and permanent consequential limitation of use categories of serious injury as defined in Insurance Law § 5102 (d).

Supreme Court properly denied defendant's motion seeking summary judgment dismissing the complaint on the ground that plaintiff's alleged injuries were not causally related to the accident. Defendant met her initial burden on the motion by offering " 'persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition' " rather than the subject motor vehicle accident (*Kwitek v Seier*, 105 AD3d 1419, 1420 [4th Dept 2013], quoting *Pommells v Perez*, 4 NY3d 566, 580 [2005]), i.e., the affirmed report of the physician who conducted an independent medical examination (IME) of plaintiff on defendant's behalf. The IME physician reviewed medical records of plaintiff, who had been involved in 15 prior motor vehicle accidents, and concluded that imaging studies performed after the accident did not show any new pathology.

Contrary to defendant's contention, however, we conclude that plaintiff's submissions in opposition to the motion raised an issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 326-327 [1986]). Plaintiff submitted, inter alia, the affirmation of her treating neurosurgeon, who opined that the accident caused plaintiff to suffer a disc herniation at the C6-7 level, which resulted in two surgeries. According to plaintiff’s neurosurgeon, that disc herniation was not present in imaging studies performed prior to the accident. Thus, the record contains a triable issue of fact with respect to whether plaintiff suffered a new injury as a result of the accident (*see Mays v Green*, 165 AD3d 1619, 1620-1621 [4th Dept 2018]; *Lawrence v McClary*, 125 AD3d 1502, 1503 [4th Dept 2015]; *cf. Overhoff v Perfetto*, 92 AD3d 1255, 1256 [4th Dept 2012], *lv denied* 19 NY3d 804 [2012]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1026
CA 19-00747
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

JASON WOOD AND JANEL WOOD,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

THE BUFFALO AND FORT ERIE PUBLIC BRIDGE
AUTHORITY, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (SARAH N. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered April 11, 2019. The order denied defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Jason Wood (plaintiff) when he allegedly slipped on blacktop at defendant's premises, causing him to strike his head on the doorframe of the vehicle he was entering. Defendant appeals from an order denying its motion for summary judgment dismissing the complaint. We affirm.

Contrary to defendant's contention, it failed to meet its initial burden on the motion of establishing that plaintiffs cannot identify the cause of plaintiff's fall without engaging in speculation (*see Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364-1365 [4th Dept 2012]). "Although [m]ere conclusions based upon surmise, conjecture, speculation or assertions are without probative value . . . , a case of negligence based wholly on circumstantial evidence may be established if the plaintiffs show[ ] facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may reasonably be inferred" (*id.* [internal quotation marks omitted]). Here, defendant submitted the deposition testimony of plaintiff in which he testified that the night was cold, that he observed prior to his fall that the blacktop was "glossy" and "shiny," and that the glossiness was the sole explanation for his fall. Although plaintiff did not definitively identify the glossiness or shininess as ice, “the fact that plaintiff did not observe ice does not establish that [his] fall was not caused by ice” (*Smith v United Ref. Co. of Pennsylvania*, 148 AD3d 1733, 1733 [4th Dept 2017]). We reject defendant’s contention that its maintenance log established as a matter of law that plaintiff did not fall on ice. The log was insufficient to establish the condition of the blacktop at the time of the accident inasmuch as the employee who entered the data in the log stated in her deposition testimony, which was submitted by defendant in support of its motion, that the log did not reflect the actual time she inspected the relevant area, that she did not specifically record information regarding the condition of the area, and that she could not independently recall the inspection she actually performed (*see generally Santiago v Weisheng Enters. LLC*, 134 AD3d 570, 571 [1st Dept 2015]; *Webb v Salvation Army*, 83 AD3d 1453, 1454 [4th Dept 2011]).

We likewise conclude that defendant failed to meet its initial burden on the motion of establishing that it lacked actual or constructive notice of the alleged icy condition. As an initial matter, we note that plaintiffs did not allege that defendant created the icy condition, and thus we are concerned only with whether defendant possessed actual or constructive notice (*see generally Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469 [4th Dept 2013]). With respect to constructive notice, defendant “had the initial burden of establishing as a matter of law that the alleged icy condition was not visible and apparent or that the ice formed so close in time to the accident that [defendant] could not reasonably have been expected to notice and remedy the condition” (*Waters v Ciminelli Dev. Co., Inc.*, 147 AD3d 1396, 1397 [4th Dept 2017] [internal quotation marks omitted]; *see Gwitt v Denny’s, Inc.*, 92 AD3d 1231, 1231-1232 [4th Dept 2012]). Contrary to defendant’s contention, plaintiff’s deposition testimony does not establish that the condition was not visible and apparent inasmuch as plaintiff testified that he observed that the blacktop was glossy and shiny. Moreover, the mere fact that plaintiff may have fallen on “black ice” does not, as a matter of law, establish that the condition was not visible and apparent (*see generally Fuller v Armor Volunteer Fire Co., Inc.*, 169 AD3d 1471, 1472 [4th Dept 2019]; *Rogers v Niagara Falls Bridge Commn.*, 79 AD3d 1637, 1637-1638 [4th Dept 2010]). We likewise reject defendant’s contention that it demonstrated the absence of constructive notice by offering evidence, in the form of its inspection log, of regularly recurring maintenance or inspection of the premises. As noted above, the employee who entered the data could not independently recall the inspection she performed and conceded that the log did not reflect the actual time she inspected the area or precisely what was done upon inspection. Thus, the log does not reflect when the relevant area was actually inspected and cannot establish “that the ice formed so close in time to the accident that [defendant] could not reasonably have been expected to notice and remedy the condition” (*Waters*, 147 AD3d at 1398 [internal quotation marks omitted]; *see Sodhi v Dollar Tree Stores, Inc.*, 175 AD3d 914, 916 [4th Dept 2019]; *see generally Roy v City of New York*, 65 AD3d 1030, 1031 [2d Dept 2009]). Defendant likewise failed to meet its initial burden of establishing that it had no actual notice of the alleged icy condition (*see Lewis v Carrols LLC*, 158 AD3d 1055, 1056

[4th Dept 2018]).

Inasmuch as defendant failed to meet its initial burden, the court properly denied its motion without regard to the sufficiency of plaintiffs' opposing papers (*see Schult v Pyramid Walden Co., L.P.*, 167 AD3d 1577, 1577 [4th Dept 2018]; *Bailey v Curry*, 1 AD3d 1059, 1060 [4th Dept 2003]; *see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1029
CA 19-00455
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

MICHELE HOOSIER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOYCE B. KELLY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered March 1, 2019. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when the vehicle in which she was a passenger was rear-ended by a vehicle operated by defendant. Plaintiff alleged that, as a result of the motor vehicle accident, she sustained injuries to, inter alia, her cervical and lumbar spine under the significant limitation of use and permanent consequential limitation of use categories of serious injury as defined in Insurance Law § 5102 (d). Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not, as a result of the accident, sustain a serious injury within the meaning of section 5102 (d). Defendant now appeals from an order insofar as it denied her motion with respect to plaintiff’s claim of serious injuries to her cervical and lumbar spine.

We agree with defendant that Supreme Court erred in denying her motion with respect to that claim inasmuch as defendant established as a matter of law that plaintiff did not sustain a serious injury to her cervical or lumbar spine as a result of the subject accident and, in opposition to the motion, plaintiff failed to raise a triable issue of fact. Defendant met her initial burden on the motion by offering “ ‘persuasive evidence that plaintiff’s alleged pain and injuries were related to a preexisting condition’ ” rather than the subject motor vehicle accident (*Kwitek v Seier*, 105 AD3d 1419, 1420 [4th Dept 2013], quoting *Pommells v Perez*, 4 NY3d 566, 580 [2005]). In addition to other evidence, defendant submitted the affirmed report of the physician who conducted a medical examination of plaintiff on behalf of defendant. That physician reviewed medical records of plaintiff and concluded, inter alia, that plaintiff had a diffuse preexisting, symptomatic degenerative disease of her entire spine prior to the subject accident and that the multiple surgeries performed on plaintiff’s cervical and lumbar spine after the date of the accident were not required as a result of the accident.

We further conclude that, in opposition to the motion, plaintiff failed to “ ‘come forward with evidence addressing defendant’s claimed lack of causation’ ” (*Hartman-Jweid v Overbaugh*, 70 AD3d 1399, 1400 [4th Dept 2010], quoting *Pommells*, 4 NY3d at 580). Plaintiff submitted the affidavit of her treating surgeon, but the surgeon failed to refute the opinion of defendant’s examining physician by, “for example, comparing plaintiff’s pre- and post-accident range of motion restrictions” (*Boroszko v Zylinski*, 140 AD3d 1742, 1745 [4th Dept 2016] [internal quotation marks omitted]). To the extent that the surgeon opined that the accident aggravated or exacerbated plaintiff’s preexisting conditions, we conclude that the surgeon “failed to provide any basis for determining the extent of any exacerbation of plaintiff’s prior injuries” (*id.* [internal quotation marks omitted]). Plaintiff offered no “factually based medical opinions ruling out . . . degenerative conditions as the cause of [her] limitations” (*Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 557 [1st Dept 2009]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1035
KA 16-02153
PRESENT: CENTRA, J.P., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON LOGAN, DEFENDANT-APPELLANT.

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

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered June 7, 2016. The judgment convicted defendant, upon a jury verdict, of forgery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of forgery in the second degree (Penal Law § 170.10 [1]), defendant contends that County Court erred in allowing evidence of a prior uncharged crime to be introduced. We reject that contention inasmuch as no such evidence was introduced at trial. Rather, the prosecutor made a remark during her opening statement that was immediately objected to by defense counsel, and the court sustained the objection and issued a curative instruction. In addition, prior to that remark, the court had instructed the jury that opening statements did not constitute evidence, and the jury is presumed to have followed the court's instruction (*see People v Rivers*, 18 NY3d 222, 226 [2011]; *People v Martinez*, 59 AD3d 361, 362 [1st Dept 2009], *lv denied* 12 NY3d 917 [2009]). Moreover, defendant's speculation that the jury would infer from the prosecutor's remark that a prior uncharged crime occurred is insufficient to establish a *Molineux* violation (*see People v Miles*, 49 AD3d 446, 447 [1st Dept 2008], *lv denied* 10 NY3d 867 [2008]).

We reject defendant's contention that the court erred in refusing to suppress identification testimony based on allegedly suggestive photo array identification procedures conducted by the police. The People met their initial burden of establishing the reasonableness of the police conduct at issue, and defendant failed to meet his ultimate burden of proving that the photo array procedures were unduly suggestive (*see People v Alston*, 101 AD3d 1672, 1672-1673 [4th Dept

2012]; *see generally People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]). Two witnesses, who were brothers, viewed the same photo array but on separate occasions (*see People v Hakeem*, 210 AD2d 16, 17 [1st Dept 1994], *lv denied* 85 NY2d 973 [1995], *reconsideration denied* 87 NY2d 902 [1995], *cert denied* 517 US 1201 [1996]), and there was no evidence that the two witnesses communicated with each other between those procedures (*see People v Seymour*, 77 AD3d 976, 978 [2d Dept 2010]; *People v Cummings*, 109 AD2d 748, 748-749 [2d Dept 1985]).

Defendant also contends that the court erred in allowing testimony regarding the photo array procedures and abused its discretion in failing, sua sponte, to order a mistrial based on that testimony. We reject those contentions. The court sustained defense counsel's objections to that testimony, and defense counsel expressly stated that he was not requesting any curative instructions or a mistrial with respect to that testimony (*see People v O'Neil*, 38 AD3d 1305, 1307 [4th Dept 2007], *lv denied* 9 NY3d 848 [2007]). Moreover, the references to the photo array procedures were both brief and inadvertent (*see People v Proctor*, 104 AD3d 1290, 1291 [4th Dept 2013], *lv denied* 21 NY3d 1008 [2013]), and the jury already knew that there was at least one photo array procedure through defense counsel's cross-examination of one of the brothers (*see generally People v Williams*, 273 AD2d 824, 826 [4th Dept 2000], *lv denied* 95 NY2d 893 [2000]).

Defendant contends that the evidence is legally insufficient to support the conviction because the testimony of an accomplice, i.e., one of the brothers, was not sufficiently corroborated. We reject that contention. Accomplice testimony must be corroborated by evidence "tending to connect the defendant with the commission of [an] offense" (CPL 60.22 [1]). Here, several witnesses provided testimony that " 'tend[ed] to connect . . . defendant with the commission of the crime in such a way as [could] reasonably satisfy the jury that the accomplice [was] telling the truth' " (*People v Reome*, 15 NY3d 188, 192 [2010]; *see People v Lipford*, 129 AD3d 1528, 1529 [4th Dept 2015], *lv denied* 26 NY3d 1041 [2015]). Furthermore, 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 contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends that he was denied a fair trial by prosecutorial misconduct when the prosecutor referenced an uncharged crime during her opening statement, when she elicited testimony regarding the photo array procedures, and when she made remarks in summation allegedly vouching for the credibility of the People's witnesses. After defendant's objections to the testimony regarding the photo array procedures were sustained, he did not request a curative instruction or move for a mistrial, and thus that aspect of his contention is not preserved for our review (*see People v Heide*, 84 NY2d 943, 944 [1994]). In addition, defendant did not object to the prosecutor's remarks in summation that he now challenges on appeal, and thus that aspect of his contention is also not preserved (*see People v Maxey*, 129 AD3d 1664, 1666 [4th Dept 2015], *lv denied* 27 NY3d 1002 [2016], *reconsideration denied* 28 NY3d 933 [2016]). In any event, those remarks were fair response to defense counsel's summation (*see People v Lewis*, 154 AD3d 1329, 1331 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]). Additionally, we conclude that the remaining instance of alleged error by the prosecutor was not so egregious as to deprive defendant of a fair trial (*see People v Garner*, 145 AD3d 1573, 1574 [4th Dept 2016], *lv denied* 29 NY3d 1031 [2017]). Reversal for prosecutorial misconduct is mandated " 'only when the conduct [complained of] has caused such substantial prejudice to the defendant that he [or she] has been denied due process of law' " (*People v Jacobson*, 60 AD3d 1326, 1328 [4th Dept 2009], *lv denied* 12 NY3d 916 [2009]), and there was no such prejudice here.

We reject defendant's contention that he was denied a fair trial based on the cumulative effect of the errors alleged herein (*see People v Tuff*, 156 AD3d 1372, 1378 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]). Finally, the sentence is not unduly harsh or severe.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1036
KA 15-00568
PRESENT: CENTRA, J.P., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUINCY LUNDY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

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

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). In appeal No. 2, defendant appeals by permission of this Court from an order that denied his motion pursuant to CPL 440.10 seeking to vacate the judgment of conviction. We affirm in both appeals.

We reject defendant's contention in appeal No. 1 that County Court abused its discretion in denying his motion to sever his trial from that of his codefendant (*see generally* CPL 200.40 [1]). Defendant failed to establish good cause for severance inasmuch as he failed to demonstrate "that the core of his codefendant's alibi defense was in irreconcilable conflict with his own defense, and that there was a significant danger that the conflict would lead the jury to infer his guilt" (*People Campbell*, 118 AD3d 1464, 1466 [4th Dept 2014], *lv denied* 24 NY3d 959 [2014], *reconsideration denied* 24 NY3d 1218 [2015]; *see People v Cardwell*, 78 NY2d 996, 997-998 [1991]).

We further reject defendant's contention in appeal No. 1 that he was deprived of a fair trial based on prosecutorial misconduct during summation. Defendant's contention is largely unpreserved and, in any event, lacks merit. " '[T]he prosecutor's closing statement must be evaluated in light of the defense summation, which put into issue the [witnesses'] character and credibility and justified the People's response' " (*People v Lundy*, 165 AD3d 1626, 1628 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]; *see People v Halm*, 81 NY2d 819, 821 [1993]). Even assuming, arguendo, that any of the prosecutor's comments during summation exceeded the bounds of propriety, we conclude that they were "not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Jackson*, 108 AD3d 1079, 1080 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013] [internal quotation marks omitted]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention in appeal No. 1 that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "[R]esolution of issues of credibility and the weight to be accorded to the evidence are primarily questions to be determined by the jury" (*People v Reed*, 163 AD3d 1446, 1448-1449 [4th Dept 2018], *lv denied* 32 NY3d 1067 [2018]; *see People v Tuszynski*, 120 AD3d 1568, 1568-1569 [4th Dept 2014], *lv denied* 25 NY3d 954 [2015]), and we perceive no basis for disturbing the jury's credibility determinations in this case.

Defendant failed to preserve for our review his contention in appeal No. 1 that the photo array from which a witness identified him was unduly suggestive based on defendant's shirt color, thereby tainting that witness's subsequent in-court identification of defendant (*see People v Evans*, 137 AD3d 1683, 1683 [4th Dept 2016], *lv denied* 27 NY3d 1131 [2016]). In any event, the contention lacks merit. Although defendant was the only person in the photo array wearing a red shirt, it was "not so distinctive as to be conspicuous, particularly since the other individuals [in the photo array] were dressed in varying, nondescript apparel" (*Lundy*, 165 AD3d at 1627 [internal quotation marks omitted]; *see People v Sullivan*, 300 AD2d 689, 690 [3d Dept 2002], *lv denied* 100 NY2d 587 [2003]).

We also reject defendant's contention in appeal No. 1 that he received ineffective assistance of counsel based on defense counsel's failure to preserve for our review defendant's contentions regarding alleged prosecutorial misconduct and the photo array. As noted above, those contentions lack merit, and thus defense counsel was not ineffective for failing to raise them (*see Reed*, 163 AD3d at 1448). Furthermore, contrary to defendant's contention in appeal No. 2, the court properly denied defendant's motion pursuant to CPL 440.10 insofar as the motion was based on those allegations of ineffective assistance because there were sufficient record facts to review them on direct appeal (*see* CPL 440.10 [2] [b]). We have considered defendant's remaining allegations of ineffective assistance of counsel in appeal Nos. 1 and 2, and we conclude that he failed to meet his burden of demonstrating "the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*Reed*, 163 AD3d at 1448 [internal quotation marks omitted]; *see People v Pavone*, 26 NY3d 629, 646-647 [2015]).

Finally, we reject defendant’s contention in appeal No. 2 that two posttrial affidavits of the surviving victim constitute newly discovered evidence. It is well settled that, in order to establish entitlement to a new trial on the ground of newly discovered evidence, “a defendant must prove that there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and[] (6) which does not merely impeach or contradict the record evidence” (*People v Bryant*, 117 AD3d 1586, 1587 [4th Dept 2014] [internal quotation marks omitted]). Here, we conclude that defendant failed to meet his burden inasmuch as the surviving victim’s posttrial affidavits would be unlikely to change the result if a new trial were granted, the affidavits merely impeach or contradict the record evidence, and the information therein could have been discovered prior to trial.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1037
KA 17-01643
PRESENT: CENTRA, J.P., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUINCY LUNDY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Thomas J. Miller, J.), entered August 3, 2017. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL article 440.

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

Same memorandum as in *People v Lundy* ([appeal No. 1] — AD3d — [Dec. 20, 2019] [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1058
KA 17-01866
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ENRIQUE TANTAO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered May 8, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to suppress all evidence arising from his allegedly improper gunpoint stop by the police. We conclude that the court properly refused to suppress the evidence inasmuch as the police had reasonable suspicion to forcibly detain defendant at gunpoint, and the subsequent search of a parked vehicle was lawful.

The evidence at the suppression hearing established that, on the date of the incident, police were dispatched to the 200 block of Ash Street based on a 911 call reporting a menacing with a handgun in progress. The suspect was described as a white male; approximately 6 feet 4 inches tall; weighing between 180 and 220 pounds; wearing a red shirt, red hat, and sunglasses; and operating a silver Mazda with a specific license plate number. The responding officer testified that he arrived at the scene less than one minute after being dispatched and observed a silver Mazda with a matching license plate number parked in front of 207 Ash Street, and that the person sitting in the driver’s seat of the vehicle, later identified as defendant, matched the description given by the 911 caller. The responding officer parked approximately one car length away from the Mazda, activated his vehicle’s emergency lights, and took a position of cover while pointing his M4 rifle at the Mazda. A few seconds later, two more police officers arrived and removed defendant from the driver’s seat. The police later learned that the Mazda was registered to another person, who consented to a search of the vehicle. Officers recovered a handgun and a loaded magazine from under the driver’s seat of the Mazda. Following his arrest and the issuance of *Miranda* warnings, defendant made inculpatory statements to the police.

The court refused to suppress the handgun and magazine and the statements made by defendant, finding that the 911 caller was “a citizen who identified herself to police” and further finding that the responding officer had reasonable suspicion to forcibly detain defendant based on his observations of defendant at the scene, which corroborated the description provided by the 911 caller.

On appeal, defendant contends that the court erred in determining that the 911 caller was an identified citizen informant and that the court therefore erred in determining that the responding officer was justified in forcibly detaining defendant at gunpoint. Although we agree with defendant that the police did not learn the identity of the 911 caller until after defendant’s arrest and that, therefore, the 911 caller was an anonymous caller at the time defendant was removed from the Mazda (*see People v Bailey*, 164 AD3d 815, 818 [2d Dept 2018]; *People v Williams*, 136 AD3d 1280, 1282 [4th Dept 2016], *lv denied* 27 NY3d 1141 [2016], *lv denied* 29 NY3d 954 [2017]; *cf. People v Van Every*, 1 AD3d 977, 978 [4th Dept 2003], *lv denied* 1 NY3d 602 [2004]), and that defendant was seized within the meaning of the Fourth Amendment at that time (*see People v Moore*, 6 NY3d 496, 499 [2006]), we nevertheless conclude that the police had reasonable suspicion justifying the forcible detention of defendant “based on the contents of a 911 call from an anonymous individual and the confirmatory observations of the police” (*People v Argyris*, 24 NY3d 1138, 1140 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* 577 US —, 136 S Ct 793 [2016]; *see People v Pruitt*, 158 AD3d 1138, 1139 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]; *see generally Navarette v California*, 572 US 393, 396 [2014]).

Furthermore, even assuming, arguendo, that defendant established that he had standing to challenge the subsequent search of the Mazda, we conclude that the police lawfully searched the vehicle after receiving the owner’s voluntary consent (*see People v Smith*, 54 NY2d 954, 956 [1981]; *People v Rivera*, 83 AD3d 1370, 1372 [4th Dept 2011], *lv denied* 17 NY3d 904 [2011]; *People v Luciano*, 213 AD2d 729, 731 [3d Dept 1995]).

Finally, we note that the uniform sentence and commitment form incorrectly reflects that defendant was sentenced as a second felony offender, and it must therefore be amended to reflect that he was sentenced as a second violent felony offender (*see People v Smith*, 145 AD3d 1628, 1631 [4th Dept 2016], *lv denied* 31 NY3d 1017 [2018]).

Entered: December 20, 2019 Mark W. Bennett
Clerk of the Court

1064
CAF 18-00733
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF HASSINA SULTANI,
PETITIONER-RESPONDENT,

V ORDER

NADIA SULTANI, RESPONDENT,
AND AHMAD SULTANI, RESPONDENT-APPELLANT.

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

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER, FOR PETITIONER-RESPONDENT.

FREDERICK P. LESTER, PITTSFORD, ATTORNEY FOR THE CHILDREN.

Appeal from an amended order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered February 28, 2018 in a proceeding pursuant to Family Court Act article 6. The amended order, inter alia, granted sole custody of the subject children to petitioner.

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

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1069
CA 19-00786
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

EARL RAINEY, PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

PAUL BONANNO, DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JEFFREY F. BAASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF ROBERT D. BERKUN, BUFFALO (PHILIP A. MILCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered October 9, 2018. The order denied the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he slipped and fell on snow and ice that had accumulated on a walkway at a rental property owned by defendant. Defendant appeals from an order denying his pre-answer motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). Defendant contends that Supreme Court erred in denying the motion because he conclusively established that Celeste Rainey, as the lessee of the property, was solely responsible for snow and ice removal on the walkway. We disagree.

"Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition" (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011], *rearg denied* 19 NY3d 856 [2012]). However, "an out-of-possession landlord who relinquishes control of the premises and is not contractually obligated to repair unsafe conditions is not liable . . . for personal injuries caused by an unsafe condition existing on the premises" (*Balash v Melrod*, 167 AD3d 1442, 1442 [4th Dept 2018] [internal quotation marks omitted]).

In support of his motion, defendant submitted his own affidavit, in which he averred that he never shoveled or salted the walkway, and a lease agreement between Celeste Rainey and defendant's rental agent that expired prior to the date of plaintiff's accident, which included a provision delegating responsibility for snow and ice removal to Celeste Rainey. Contrary to defendant's contention, the documentary evidence that he submitted does not conclusively establish that he was not contractually obligated to keep the walkway clear of snow and ice. Indeed, the expired lease agreement, signed by neither plaintiff nor defendant, does not conclusively establish that there was a holdover tenancy when plaintiff was injured and, therefore, that the provision delegating snow and ice removal to Celeste Rainey was in effect at that time (*see* Real Property Law § 232-c; *cf. City of New York v Pennsylvania R.R. Co.*, 37 NY2d 298, 300 [1975]; *Henderson v Gyrodyne Co. of Am., Inc.*, 123 AD3d 1091, 1093 [2d Dept 2014]). Moreover, defendant’s evidentiary submissions, including his own affidavit, do not “establish conclusively that plaintiff has no cause of action” (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1080
KA 15-01400
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD NELSON, ALSO KNOWN AS RONALD K. NELSON,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 16, 2015. The judgment convicted defendant upon a jury verdict of gang assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of gang assault in the first degree (Penal Law § 120.07) to gang assault in the second degree (§ 120.06) and vacating the sentence imposed thereon and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Monroe County, for sentencing on the conviction of gang assault in the second degree.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of gang assault in the first degree (Penal Law § 120.07), defendant contends that the evidence is legally insufficient to establish his guilt as either a principal or an accessory. We agree. A conviction of gang assault in the first degree requires proof that the defendant participated in the gang assault “with intent to cause serious physical injury to another person” and that he or she caused “serious physical injury to such person or to a third person” (*id.*). Although the People established beyond a reasonable doubt that defendant participated in the assault of the victim while aided by two or more other persons and that the victim sustained serious physical injuries, the People failed to establish that defendant caused serious physical injury to the victim or that he acted with the requisite intent.

The evidence at trial established that defendant, the codefendant, and a third party (testifying witness) approached the victim, who was with a person who had allegedly “jumped” the testifying witness on a prior occasion. The codefendant repeatedly swung at the victim. In addition, defendant kicked the victim once in the head, and the testifying witness punched the victim one time. Unbeknownst to the testifying witness, when the codefendant appeared to be merely punching the victim, the codefendant was actually stabbing him with a knife. The testifying witness pleaded guilty to manslaughter in the second degree and gang assault in the second degree and agreed to testify for the prosecution at trial. The codefendant was convicted of, inter alia, murder in the second degree and gang assault in the first degree.

The medical evidence admitted at trial established that the victim did not sustain any injuries to his head or face and that the only serious physical injuries sustained by the victim were the fatal stab wounds caused by the codefendant. We thus conclude that the People failed to prove defendant's guilt as a principal.

With respect to accessorial liability under Penal Law § 20.00, there can be no dispute that the codefendant, by intentionally stabbing the victim multiple times in the chest, neck and leg, intended to cause serious physical injury to the victim. To establish defendant's guilt as an accessory, the People were required to prove that defendant had "a shared intent, or 'community of purpose' with the principal actor" (*People v Carpenter*, 138 AD3d 1130, 1131 [2d Dept 2016], *lv denied* 28 NY3d 928 [2016], quoting *People v Cabey*, 85 NY2d 417, 421 [1995]), and that he "intentionally aided the principal in bringing forth [the] result" (*People v Kaplan*, 76 NY2d 140, 146 [1990]; *see generally People v Bello*, 92 NY2d 523, 526 [1998]).

In our view, the evidence is legally insufficient to establish that defendant shared the codefendant's intent to cause serious physical injury to the victim (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). According to the testifying witness, the knife used by the codefendant was not visible during the assault, and defendant had given the knife to the codefendant before they knew that the victim was in the area. Moreover, both the testifying witness and defendant asked the codefendant following the assault why he had used the knife against the victim. The evidence further established that defendant specifically told the codefendant immediately after the assault that he had not given the codefendant the knife to be used in such a manner.

We nevertheless conclude that the evidence is legally sufficient to establish the lesser included offense of gang assault in the second degree under a theory of accomplice liability (Penal Law §§ 20.00, 120.06). We therefore modify the judgment by reducing defendant's conviction of gang assault in the first degree to gang assault in the second degree and vacating the sentence imposed on that count (*see* CPL 470.15 [2] [a]), and we remit the matter to Supreme Court for sentencing on the conviction of gang assault in the second degree.

Defendant failed to preserve for our review his contention that he was denied a fair trial by the prosecutor's misstatements of law during summation (*see People v Harper*, 132 AD3d 1230, 1234 [4th Dept

2015], *lv denied* 27 NY3d 998 [2016]). In any event, we conclude that “any prejudice was avoided by [Supreme Court’s] instructions, which the jury is presumed to have followed” (*People v Collins*, 167 AD3d 1493, 1497 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019] [internal quotation marks omitted]; *see People v Hunt*, 172 AD3d 1888, 1889-1890 [4th Dept 2019], *lv denied* 34 NY3d 933 [2019]). We further conclude that defense counsel’s failure to object to the prosecutor’s statements did not deprive defendant of meaningful representation (*see Collins*, 167 AD3d at 1497-1498; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant also failed to preserve for our review his contention regarding the court’s instructions and responses to jury notes (*see People v Clark*, 28 NY3d 556, 566 [2016]; *People v Washington*, 173 AD3d 1644, 1645 [4th Dept 2019], *lv denied* 34 NY3d 985 [2019]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant’s challenge to the severity of his sentence is academic in light of our determination herein.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1085
CAF 18-00252
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF MARY MARGARET BALLARD,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTOPHER JAMES PISTON,
RESPONDENT-PETITIONER-RESPONDENT.

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

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA KONST OF COUNSEL), FOR RESPONDENT-PETITIONER-RESPONDENT.

KIMBERLY M. SEAGER, FULTON, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered January 24, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded respondent-petitioner sole legal and primary 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, petitioner-respondent mother appeals from an order that, inter alia, awarded respondent-petitioner father sole legal and primary physical custody of the parties' children and directed that the mother's parenting time be supervised "at such times and locations as the Petitioner Mother and Respondent Father mutually agree." We reject the mother's contention that Family Court erred in its custody and visitation determinations.

It is well settled that "a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Bryan K.B. v Destiny S.B.* [appeal No. 1], 43 AD3d 1448, 1449 [4th Dept 2007] [internal quotation marks omitted]; *see Graves v Huff* [appeal No. 2], 169 AD3d 1476, 1476 [4th Dept 2019]). Here, the record establishes that the mother made multiple unfounded allegations of sexual abuse against the father, among other people, and that she subjected the parties' oldest child to repeated unnecessary physical examinations by numerous individuals (*see Matter of Howden v Keeler*, 85 AD3d 1561, 1562 [4th Dept 2011]). We thus conclude that the court's custody and visitation determinations, including the requirement that the mother's visitation be supervised until she completes a counseling program, have a sound and substantial basis in the record and should not be disturbed (*see id.*; *see also Matter of Guillermo v Agramonte*, 137 AD3d 1767, 1769 [4th Dept 2016]).

Contrary to the mother's contention, the court properly determined that joint legal and physical custody was not appropriate inasmuch as "the parties have an acrimonious relationship and are unable to communicate with each other in a civil manner" (*Benedict v Benedict*, 169 AD3d 1522, 1523 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Ladd v Krupp*, 136 AD3d 1391, 1392 [4th Dept 2016]). We also reject the mother's contention that she was denied effective assistance of counsel when her attorney failed to request that the mother be granted sole legal and primary physical custody of the children. The mother has failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [4th Dept 2015] [internal quotation marks omitted]; *see Matter of VanSkiver v Clancy*, 128 AD3d 1408, 1408 [4th Dept 2015]). In our view, the mother's attorney "was both competent and zealous" (*Matter of Sullivan v Sullivan*, 90 AD3d 1172, 1175 [3d Dept 2011]), as evidenced by the fact that he called relevant witnesses, vigorously cross-examined other witnesses, and made appropriate objections (*see Matter of Nagi T. v Magdia T.*, 48 AD3d 1061, 1062 [4th Dept 2008]; *see also Matter of Donald G. v Hope H.*, 160 AD3d 1061, 1065 [3d Dept 2018]).

The mother failed to preserve for our review her contention that she was denied a fair hearing due to the court's excessive examination of her (*see Matter of Wright v Perry*, 169 AD3d 910, 912 [2d Dept 2019], *lv denied* 33 NY3d 906 [2019]). In any event, that contention lacks merit (*see Matter of Emily A. [Gina A.]*, 129 AD3d 1473, 1474 [4th Dept 2015]).

Finally, we reject the mother's contention that the court improperly delegated its authority to determine visitation when it failed to set forth a visitation schedule in the order. "Although '[a] court cannot delegate its authority to determine visitation to either a parent or a child' . . . , it may order visitation as the parties may mutually agree so long as such an arrangement is not untenable under the circumstances" (*Matter of Kelley v Fifield*, 159 AD3d 1612, 1613 [4th Dept 2018]). Although the parties have an acrimonious relationship, the evidence at the hearing established the father's commitment to ensuring contact between the children and their maternal relatives, including the mother (*see Matter of Samuel v Sowers*, 162 AD3d 674, 675 [2d Dept 2018]). Inasmuch as the mother's visitation will be supervised, any concerns about future false allegations has been alleviated. We thus conclude that the arrangement was not "untenable under the circumstances" (*Kelley*, 159

AD3d at 1613). Should the mother find that she is unable to obtain visitation pursuant to the order, she “may file a petition seeking to enforce or modify the order” (*Matter of Pierce v Pierce*, 151 AD3d 1610, 1611 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1086
CAF 18-00750
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF TANYA M. SALGADO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JUDITH SANTIAGO, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

CENTER FOR ELDER LAW & JUSTICE, BUFFALO (DAVID A. SHAPIRO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE YOON OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 30, 2017 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: In these proceedings pursuant to Family Court Act article 6, petitioner mother appeals, in appeal Nos. 1 and 2, from two orders granting respondent grandmother's motion to dismiss the mother's petition seeking to modify a prior consent order awarding custody of the subject child to the grandmother. In appeal No. 3, the mother appeals from an order granting respondent father's motion to dismiss the mother's petition against him seeking custody of the child.

We dismiss the appeal from the order in appeal No. 2 because that order is duplicative of the order in appeal No. 1 (*see Matter of Machado v Tanoury*, 142 AD3d 1322, 1322-1323 [4th Dept 2016]; *Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]). Furthermore, while these appeals were pending, Family Court entered a subsequent order that, on consent of the parties, awarded sole custody of the child to the father. The mother has not disputed that fact, and the subsequent order "is a matter of public record of which we may take judicial notice" (*Matter of Kadyn J. [Kelly M.H.]*, 109 AD3d 1158, 1161 [4th Dept 2013] [internal quotation marks omitted]; *see Matter of Chloe Q. [Dawn Q.–Jason Q.]*, 68 AD3d 1370, 1371 [3d Dept 2009]). We therefore conclude that the subsequent custody order renders these appeals moot (*see Matter of Cullop v Miller*, 173 AD3d 1652, 1652-1653 [4th Dept 2019]). We further 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]). Thus, appeal Nos. 1 and 3 must also be dismissed (*see Matter of Nyjeem D. [John D.]*, 174 AD3d 1424, 1425 [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1087
CAF 18-00751
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF TANYA M. SALGADO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JUDITH SANTIAGO, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

CENTER FOR ELDER LAW & JUSTICE, BUFFALO (DAVID A. SHAPIRO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE YOON OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 30, 2017 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Same memorandum as in *Matter of Salgado v Santiago* ([appeal No. 1] — AD3d — [Dec. 20, 2019] [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1088
CAF 18-00752
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF TANYA M. SALGADO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STEVEN R. SANTIAGO, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

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

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

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE YOON OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 30, 2017 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Same memorandum as in *Matter of Salgado v Santiago* ([appeal No. 1] — AD3d — [Dec. 20, 2019] [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1092
CA 19-00903
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

JOEL GONZALEZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOSUE ROMERO, BLACK CREEK FARM, JOSHUA ROMERO,
AND JAMES NEWELL, DEFENDANTS-RESPONDENTS.

LYNN LAW FIRM, LLP, SYRACUSE (PATRICIA A. LYNN-FORD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOZIGIAN, WASHBURN & CLINTON, COOPERSTOWN (EDWARD GOZIGIAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered November 1, 2018. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment and granted in part the cross motion of defendants for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the cross motion is denied in its entirety, the third and fourth causes of action are reinstated, and the motion is granted.

Memorandum: Plaintiff commenced this action to recover damages under, inter alia, Labor Law §§ 240 (1) and 241 (6) for injuries that he sustained after he fell while at a work site. Defendants had hired plaintiff to stain the exterior of a barn in order to prepare it for use as an event center for weddings and other celebrations. On his first day of work, plaintiff set a 20-foot ladder on a scaffold so he could power-wash the barn before staining it. The scaffolding collapsed beneath him, and he fell. After commencing this action, plaintiff moved for partial summary judgment on liability on his Labor Law § 240 (1) cause of action, and defendants cross-moved for summary judgment dismissing the complaint.

We agree with plaintiff that Supreme Court erred in denying the motion and granting the cross motion with respect to the Labor Law §§ 240 (1) and 241 (6) causes of action, and we therefore reverse the order insofar as appealed from. We conclude that “[p]laintiff met his initial burden by establishing that his injury was proximately caused by the failure of a safety device to afford him proper protection from an elevation-related risk” (*Raczka v Nichter Util. Constr. Co.*, 272 AD2d 874, 874 [4th Dept 2000]; *see* § 240 [1]; *Allington v Templeton*

Found., 167 AD3d 1437, 1438 [4th Dept 2018]).

In opposition, defendants failed to raise an issue of fact whether the exemption from liability for owners of a one- or two-family dwelling applies (*see* Labor Law § 240 [1]; *Landon v Austin*, 88 AD3d 1127, 1128-1129 [3d Dept 2011]). Where a structure serves a mixed residential and commercial use purpose, the applicable test is whether the work performed “directly relates to the residential use of the [building], even if the work also serves a commercial purpose” (*Bartoo v Buell*, 87 NY2d 362, 368 [1996]; *see Hale v Meadowood Farms of Cazenovia, LLC*, 104 AD3d 1330, 1331 [4th Dept 2013]). Although defendants submitted the affidavit of defendants Josue Romero and James Newell, who stated that they reside on the property and that they use the barn partly for personal storage, the work that plaintiff was hired to perform related directly to the preparation of the structure for commercial use rather than any incidental residential use (*cf. Bartoo*, 87 NY2d at 368). The fact that commercial use had not yet begun is of no moment because “the use and purpose test must be employed on the basis of the [ ]owners’ intentions at the time of the injury underlying the action” (*Allen v Fiori*, 277 AD2d 674, 675 [3d Dept 2000]; *see Davis v Maloney*, 49 AD3d 385, 386 [1st Dept 2008]).

For the same reasons, we conclude that defendants failed to meet their initial burden on their cross motion with respect to the Labor Law §§ 240 (1) and 241 (6) causes of action (*see Batzin v Ferrone*, 140 AD3d 1102, 1104 [2d Dept 2016]; *Hale*, 104 AD3d at 1332).

Entered: December 20, 2019 Mark W. Bennett
Clerk of the Court

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

1097
KA 18-00305
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON FREY, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (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 (Frederick G. Reed, A.J.), rendered November 8, 2017. The judgment convicted defendant, after a nonjury trial, of assault in the second degree and endangering the welfare of a child (five counts).

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of assault in the second degree (Penal Law § 120.05 [9]) and five counts of endangering the welfare of a child (§ 260.10 [1]), defendant contends that the conviction of assault is not supported by legally sufficient evidence that the five-year-old victim sustained a physical injury within the meaning of Penal Law § 10.00 (9). We reject that contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), including the young age of the victim (*see People v Lashway*, 112 AD3d 1222, 1225 [3d Dept 2013]; *see also Matter of Boua TT. v Quamy UU.*, 66 AD3d 1165, 1166 [3d Dept 2009], *lv denied* 14 NY3d 702 [2010]) and photographs of the resulting injuries, we conclude that the evidence is legally sufficient to establish that the victim suffered substantial pain as a result of what the victim's mother testified was a "full-force slap" by defendant to the victim's face (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Williamson*, 21 AD3d 575, 575-576 [3d Dept 2005], *lv denied* 6 NY3d 761 [2005]; *see also People v Smith*, 45 AD3d 1483, 1483 [4th Dept 2007], *lv denied* 10 NY3d 771 [2008]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). County Court, sitting as the trier of fact, could have reasonably concluded that defendant's striking of the victim with an open hand in such a forceful manner was not a mere " 'petty slap[]' " (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that it caused "more than slight or trivial pain" (*Chiddick*, 8 NY3d at 447).

Furthermore, viewing the evidence in light of the elements of the crime of assault in the second degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495). Contrary to defendant's contention, the testimony of the victim's mother that the victim "constantly complained about pain" after the incident and that she gave him over-the-counter pain medication "for quite a few weeks" because "[h]e would cry that his face hurt" was not incredible as a matter of law, 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]; *see People v Johnson*, 153 AD3d 1606, 1607 [4th Dept 2017], *lv denied* 30 NY3d 1020 [2017]).

Finally, we conclude that any error in the court's refusal to suppress defendant's statements is harmless beyond a reasonable doubt (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1099
KA 17-01484
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN AVENT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered June 21, 2017. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment that convicted him after a jury trial of murder in the second degree (Penal Law § 125.25 [1]). Defendant's contention that the evidence is legally insufficient to establish his intent to kill the victim is unpreserved because his motion for a trial order of dismissal was not " 'specifically directed' at the error being urged" on appeal (*People v Hawkins*, 11 NY3d 484, 492 [2008]; *see People v Sanders*, 171 AD3d 1460, 1461 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019]). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude " 'that the jury failed to give the evidence the weight it should be accorded' " (*People v Ray*, 159 AD3d 1429, 1430 [4th Dept 2018], *lv denied* 31 NY3d 1086 [2018]). Indeed, defendant "stabbed the victim in the neck with a knife, and the jury was permitted to infer the requisite intent from the facts and circumstance of the killing itself" (*People v Marzug*, 280 AD2d 974, 974 [4th Dept 2001], *lv denied* 96 NY2d 904 [2001]; *see People v Massey*, 61 AD3d 1433, 1433-1434 [4th Dept 2009], *lv denied* 13 NY3d 746 [2009]; *People v Dones*, 279 AD2d 366, 366 [1st Dept 2001], *lv denied* 96 NY2d 799 [2001]).

We reject defendant's contention that County Court erred in denying his alleged request for substitution of counsel. Even assuming, arguendo, that defendant's complaints regarding a purported disagreement he had with defense counsel could be construed as a request for substitute counsel, we conclude that defendant "did not establish a serious complaint concerning defense counsel's representation and thus did not suggest a serious possibility of good cause for substitution [of counsel]" (*People v Bennett*, 94 AD3d 1570, 1571 [4th Dept 2012], *lv denied* 19 NY3d 994 [2012], *reconsideration denied* 19 NY3d 1101 [2012] [internal quotation marks omitted]). Moreover, defendant abandoned any purported request for substitution of counsel inasmuch as he repeatedly stated in response to questioning by the court that he was ready to proceed to trial with defense counsel, notwithstanding the court's offer to grant a 24-hour adjournment to allow defendant to discuss the situation with defense counsel (*see id.*; *People v Clark*, 24 AD3d 1225, 1226 [4th Dept 2005], *lv denied* 6 NY3d 832 [2006]).

We also reject defendant's contention that defense counsel took an adverse position to defendant and became a witness against him by explaining his performance in response to defendant's general complaints about defense counsel. Defense counsel's explanations did not create a conflict of interest requiring the court to appoint new counsel (*see People v Nelson*, 7 NY3d 883, 884 [2006]; *People v Gutek*, 151 AD3d 1281, 1282 [3d Dept 2017]), and defendant otherwise failed to articulate any "specific conflict of interest or actual irreconcilable conflict with counsel that affected counsel's representation so as to warrant assigning new counsel" (*Gutek*, 151 AD3d at 1282).

Defendant further contends that the court erred in denying his motion for a mistrial based on a juror's alleged failure to disclose a medical condition during voir dire. We reject that contention. During the trial, one of the impaneled jurors had a seizure and was taken to a nearby hospital. The court adjourned the trial for the remainder of the day. The next morning, the court contacted the juror via telephone and, after the juror informed the court that his doctors had advised him against returning to jury duty, replaced him with an alternate juror (*see* CPL 270.35). Contrary to defendant's contention, there was no evidence that the juror was aware of his medical condition during voir dire, and therefore there was no basis for concluding that he withheld his condition from the court and parties (*cf. People v Southall*, 156 AD3d 111, 119-121 [1st Dept 2017], *lv denied* 30 NY3d 1120 [2018]; *see generally People v Rodriguez*, 100 NY2d 30, 34 [2003]).

We reject defendant's contention that he was denied effective assistance of counsel based on the alleged inadequacy of defendant's CPL 330.30 motion papers. "A defendant is not denied effective assistance of . . . counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *see People v Joslyn*, 103 AD3d 1254, 1256 [4th Dept 2013], *lv denied* 21 NY3d 944 [2013]). Contrary to defendant's further contention, we conclude that defendant was not deprived of effective assistance of counsel at sentencing. “In general, a defense counsel’s inability to persuade a sentencing court to impose a lighter sentence does not constitute ineffective assistance of counsel” (*People v Smith*, 300 AD2d 745, 746 [3d Dept 2002], *lv denied* 99 NY2d 620 [2003]). Here, defense counsel reviewed the presentence report, reiterated defendant’s position that he was innocent, asked the court to consider the allegations raised in defendant’s CPL 330.30 motion in considering its sentence, and asked the court “to consider the lower end of the scale.” “Because defendant continued to deny all knowledge and responsibility related to the crime, he left counsel with little choice other than to reiterate defendant’s position at trial” (*People v Carver*, 27 NY3d 418, 421 [2016]).

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

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1112
CA 19-00940
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND WINSLOW, JJ.

LOIS REID, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

UNIVERA HEALTHCARE, EXCELLUS HEALTH PLAN, INC.,
AND LIFETIME HEALTHCARE, INC.,
DEFENDANTS-RESPONDENTS.

LAW OFFICES OF KENNETH HILLER PLLC, AMHERST (KENNETH R. HILLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, BUFFALO (STEPHEN A. SHARKEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 23, 2018. The order granted defendants' motion to dismiss certain causes of action.

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

Memorandum: Plaintiff commenced this breach of contract action in April 2018 alleging that defendant Excellus Health Plan, Inc., doing business as Univera Healthcare (Univera), improperly sued as Univera Healthcare and Excellus Health Plan, Inc., erroneously denied her Medicare Part D prescription drug coverage under the health insurance agreement (the Plan) between plaintiff and Univera. Specifically, plaintiff alleged that she was prescribed a compounded drug that Univera initially covered, but that Univera improperly refused to provide coverage for that compounded drug during certain periods of time between 2013 and 2017. Defendants moved, inter alia, to dismiss the first and third causes of action against Univera, as well as the claims for punitive and nonpecuniary damages. Plaintiff responded by filing an amended complaint, asserting the same causes of action and seeking the same relief, and the parties agreed that defendants' motion would be directed at the amended complaint. Supreme Court granted the motion, and we affirm.

Contrary to plaintiff's contention, the court properly dismissed the first cause of action, for violation of General Business Law § 349. "A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Stutman v*

Chemical Bank, 95 NY2d 24, 29 [2000]; *see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25-26 [1995]). We conclude that plaintiff's allegations did not state a cause of action for a violation of General Business Law § 349 inasmuch as Univera's conduct was not consumer-oriented. Rather, "this is merely a private contract dispute over [insurance] policy coverage, which does not affect[] the consuming public at large, and therefore falls outside the purview of General Business Law § 349" (*Ullman v Medical Liab. Mut. Ins. Co.*, 159 AD3d 1498, 1499 [4th Dept 2018] [internal quotation marks omitted]; *see Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 309-310 [2017]; *JD&K Assoc., LLC v Selective Ins. Group, Inc.*, 143 AD3d 1232, 1233 [4th Dept 2016]; *see generally New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]). Furthermore, the amended complaint failed to allege that Univera engaged in a deceptive or misleading practice (*see generally Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 [2002]; *Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 25). Plaintiff's reliance on statements made by Univera during the administrative appeals process is misplaced inasmuch as those statements were not made to plaintiff. In any event, those statements merely demonstrated Univera's interpretation of drug coverage under the Plan.

We reject plaintiff's further contention that the court erred in dismissing her third cause of action, for tortious breach of duty of reasonable care and fraud. A breach of contract "is not to be considered a tort unless a legal duty independent of the contract itself has been violated . . . This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). Here, plaintiff alleged in the amended complaint that "Univera owed [her] a duty of care stemming from the nature of the services it provided." We conclude that plaintiff's allegation does not constitute a tort cause of action inasmuch as it simply refers to Univera's obligation to provide health insurance coverage to plaintiff under the Plan. "Merely charging a breach of a 'duty of due care', employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim" (*id.* at 390; *see New York Univ.*, 87 NY2d at 316; *Sommer v Federal Signal Corp.*, 79 NY2d 540, 552 [1992]). Plaintiff's claim for fraud also fails inasmuch as "[i]t is well settled that a cause of action for fraud does not arise where the only fraud alleged merely relates to a party's alleged intent to breach a contractual obligation" (*767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 [1st Dept 2004]; *see Tra-Lin Corp. v Empire Beef Co., Inc.*, 113 AD3d 1141, 1141-1142 [4th Dept 2014]; *Makuch v New York Cent. Mut. Fire Ins. Co.*, 12 AD3d 1110, 1111 [4th Dept 2004]).

Inasmuch as Univera's denial of drug coverage pursuant to the Plan was specific to plaintiff, it follows that punitive damages were unavailable to plaintiff and, thus, the court properly dismissed that claim for damages (*see generally Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]). Moreover, plaintiff did not allege such egregious conduct by Univera that would warrant punitive damages (*see generally id.*).

Finally, we reject plaintiff's contention that the court erred in dismissing the claim for nonpecuniary damages based on emotional distress. "[A]bsent a duty upon which liability can be based, there is no right of recovery for mental distress resulting from the breach of a contract-related duty" (*Wehringer v Standard Sec. Life Ins. Co. of N.Y.*, 57 NY2d 757, 759 [1982]; *see Brown v Government Empls. Ins. Co.*, 156 AD3d 1087, 1090-1091 [3d Dept 2017]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1121
KA 17-01814
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN RAMOS, DEFENDANT-APPELLANT.

ROBERT J. GALLAMORE, OSWEGO, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Oswego County Court (Donald E. Todd, J.), dated March 27, 2017. The order determined that defendant is a level one 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 determination that defendant is a sex offender is annulled, and defendant's risk level determination pursuant to the Sex Offender Registration Act is vacated.

Memorandum: Defendant appeals from an order determining that he is a level one risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Defendant contends that the Board of Examiners of Sex Offenders (Board) erred in determining that he is a sex offender. We agree and therefore conclude that the Board's determination must be annulled and the risk level determination must be vacated (*see People v Diaz*, 32 NY3d 538, 544 [2018]; *People v Millan*, 295 AD2d 267, 268 [1st Dept 2002]).

A "sex offender" is a person who is convicted of an offense described in Correction Law § 168-a (2) or (3) (*see* §§ 168-a [1]; 168-d [1] [a]). As relevant here, the definition of "sex offender" includes a person convicted of "a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred" (§ 168-a [2] [d] [ii]; *see Diaz*, 32 NY3d at 542). In its case summary, the Board determined that defendant, who had recently moved to New York State, is a sex offender inasmuch as he was convicted of a felony sex offense in Puerto Rico for which he was required to register in Puerto Rico, and that defendant was therefore required to register in New York. During the SORA proceeding to determine his risk level designation, defendant challenged the Board's determination that he is a sex offender (*see generally People v Liden*, 19 NY3d 271, 273 [2012]).

We agree with defendant that, in making its determination that defendant is a sex offender, the Board erred in relying on documents in Spanish that were not accompanied by an English translation (*see generally* CPLR 2101 [b]). Upon defendant's objection during the SORA hearing to the Board's determination, no additional documents were submitted to support the Board's determination. Thus, there is no English-translated document stating the offense of which defendant was convicted in Puerto Rico, and therefore there is no competent evidence to support the Board's determination that defendant was convicted of a felony offense in another jurisdiction (*cf. Matter of Board of Examiners of Sex Offenders of the State of N.Y. v D'Agostino*, 130 AD3d 1449, 1449 [4th Dept 2015]; *see generally* Correction Law § 168-a [2] [d] [ii]). In addition, the purported sex offender registration form showing that defendant was required to register in Puerto Rico is entirely in Spanish, and thus there is no competent evidence to support the Board's determination that defendant was required to register as a sex offender in Puerto Rico (*see generally People v Kennedy*, 7 NY3d 87, 92 [2006]).

Mark W. Bennett

Entered: December 20, 2019

Clerk of the Court

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

1132
KA 17-00976
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN CLARK, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered March 6, 2017. The judgment convicted defendant upon his plea of guilty of burglary in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of burglary in the second degree (Penal Law § 140.25 [2]). As the People correctly concede, defendant did not validly waive his right to appeal because County Court "conflated the appeal waiver with the rights automatically waived by the guilty plea . . . and thus the record fails to establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Walker*, 171 AD3d 1501, 1502 [4th Dept 2019], *lv denied* 33 NY3d 1074 [2019] [internal quotation marks omitted]; *see generally People v Martinez*, 166 AD3d 1558, 1558 [4th Dept 2018]).

Defendant's challenges to the restitution order are unpreserved for appellate review (*see People v Briggs*, 169 AD3d 1369, 1369-1370 [4th Dept 2019], *lv denied* 33 NY3d 974 [2019]; *People v Sapetko*, 158 AD3d 1315, 1315-1316 [4th Dept 2018], *lv denied* 31 NY3d 1017 [2018]; *People v Jones*, 108 AD3d 1206, 1207 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see Jones*, 108 AD3d at 1207). Defendant's contention that defense counsel was ineffective for agreeing to the restitution amount and not raising an objection thereto " 'cannot be resolved without reference to matter outside the record' " and must therefore be raised in a motion pursuant to CPL article 440 (*Briggs*, 169 AD3d at 1370).

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

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1135
CAF 18-00105
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND DEJOSEPH, JJ.

IN THE MATTER OF VANESSA A. VACCARO,
PETITIONER-RESPONDENT,

V   MEMORANDUM AND ORDER

MATTHEW J. VACCARO, RESPONDENT-APPELLANT.

IN THE MATTER OF VANESSA A. VACCARO,
PETITIONER-RESPONDENT,

V

MATTHEW J. VACCARO, RESPONDENT-APPELLANT.

IN THE MATTER OF MATTHEW J. VACCARO,
PETITIONER-APPELLANT,

V

VANESSA A. VACCARO, RESPONDENT-RESPONDENT.

BRUCE C. ENTELISANO, ROME, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

RHEINHARDT & BRAY, P.C., ROME (JAMES S. RIZZO OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

SHARON P. O’HANLON, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia M. Brouillette, J.), entered December 8, 2017 in proceedings pursuant to Family Court Act articles 6 and 8. The order, among other things, continued the joint custody arrangement with primary physical residence to petitioner-respondent Vanessa A. Vaccaro.

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

Memorandum: In these proceedings pursuant to Family Court Act articles 6 and 8, respondent-petitioner father appeals from an order that, inter alia, granted the petitions of petitioner-respondent mother insofar as they sought to modify the visitation provisions of the judgment of divorce order by eliminating the father’s morning visits with the child.

Initially, we note that, contrary to the father’s contention, the gaps in the trial transcript resulting from inaudible parts of the audio recording “are not so significant as to preclude meaningful review of the order on appeal” (*Matter of Van Court v Wadsworth*, 122 AD3d 1339, 1340 [4th Dept 2014], *lv denied* 24 NY3d 916 [2015]; *cf. Matter of Alessio v Burch*, 78 AD3d 1620, 1620 [4th Dept 2010]; *Matter of Jordal v Jordal*, 193 AD2d 1102, 1102 [4th Dept 1993]).

We reject the father’s further contention that Family Court erred in failing to apply the extraordinary circumstances standard when evaluating the mother’s modification petitions. “Once a visitation order is entered, it may be modified only ‘upon a showing that there has been a subsequent change of circumstances and modification is required’ . . . Extraordinary circumstances are not a prerequisite to obtaining a modification; rather, the ‘standard ultimately to be applied remains the best interests of the child when all of the applicable factors are considered’ ” (*Matter of Wilson v McGlinchey*, 2 NY3d 375, 380-381 [2004]; *see Matter of Macri v Brown*, 133 AD3d 1333, 1333-1334 [4th Dept 2015]; *Matter of Rivera v Fowler*, 112 AD3d 835, 835-836 [2d Dept 2013]; *Matter of Grunwald v Grunwald*, 108 AD3d 537, 539 [2d Dept 2013]). It is well settled that “ ‘the continued deterioration of the parties’ relationship is a significant change in circumstances’ ” warranting an inquiry into whether a modification of visitation is in the child’s best interests (*Matter of Noble v Gigon*, 165 AD3d 1640, 1640 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]), and we agree with the court that such a further deterioration occurred here after the entry of the judgment of divorce.

Contrary to the father’s contention, we conclude that the court conducted a proper best interests analysis and that a sound and substantial basis in the record supports its determination that it is in the child’s best interests to eliminate the father’s morning visits (*see generally Matter of Shaffer v Woodworth*, 175 AD3d 1803, 1804 [4th Dept 2019]; *Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]).

We have considered the father’s remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: December 20, 2019 Mark W. Bennett
Clerk of the Court

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

1138
CA 19-00096
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND DEJOSEPH, JJ.

UPSTATE FORESTRY AND DEVELOPMENT, LLC AND
CHARLES NOWACK, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MCDONOUGH HARDWOODS LTD., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

LAW OFFICE OF FRANCES E. BLAZER, ESQ., VERNON (WILLARD R. PRATT, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUSQUET HOLSTEIN, PLLC, SYRACUSE (RYAN S. SUSER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oswego County (James W. McCarthy, J.), entered June 12, 2018. The judgment awarded plaintiff Upstate Forestry and Development, LLC the sum of $24,639.89 as against defendant McDonough Hardwoods Ltd.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the first decretal paragraph and awarding damages to defendant McDonough Hardwoods Ltd. as against plaintiff Upstate Forestry and Development, LLC in the amount of $5,360.11 together with interest at the rate of 9% per annum, and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Oswego County, for further proceedings in accordance with the following memorandum: In this action, plaintiffs and McDonough Hardwoods Ltd. (defendant) assert claims and counterclaims, respectively, for breaches of various timber reassignment contracts into which Upstate Forestry and Development, LLC (plaintiff) and defendant entered over the course of several years. Defendant appeals from a judgment entered after a nonjury trial that, inter alia, awarded plaintiff $24,639.89 against defendant. In its decision, Supreme Court determined that defendant was entitled to recover $5,360.11 from plaintiff as a result of defendant’s overpayment on certain contracts, but further concluded that plaintiff was entitled to recover $30,000 from defendant as a result of defendant’s underpayment on another contract denominated the Russin timber reassignment contract. The court calculated the amount of plaintiff’s damages by subtracting the $5,360.11 owed by plaintiff to defendant from the $30,000 owed to plaintiff.

We agree with defendant that the court erred in concluding that defendant breached the Russin contract by failing to pay all amounts owed. “Following a nonjury trial, the Appellate Division has ‘authority . . . as broad as that of the trial court . . . and . . . may render the judgment it finds warranted by the facts’ ” (*Sweetman v Suhr*, 159 AD3d 1614, 1615 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018], quoting *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]). Here, in calculating the payments defendant made to plaintiff in connection with that contract, the court declined to credit defendant for a $30,000 check numbered 15471 that, although admitted in evidence, was unaccompanied by a check stub establishing for what contract that check was intended as payment. Plaintiff’s owner, however, testified that he personally recorded payments from defendant as they were received, including payments made on the Russin contract. Plaintiff’s owner further testified that the notes on the copy of the Russin contract entered in evidence, on which check number 15471 is marked as received, were in his handwriting. Thus, we conclude that defendant did not breach the Russin contract, and we therefore modify the judgment by vacating the first decretal paragraph awarding judgment in favor of plaintiff. Our decision leaves undisturbed the court’s determination that defendant is entitled to recover $5,360.11, inasmuch as plaintiff did not cross-appeal from the judgment. However, because the court did not award judgment to defendant and instead reduced the amount of plaintiff’s damages by the amount plaintiff owed to defendant, we further modify the judgment by awarding damages to defendant in that amount together with interest at the statutory rate, and we remit the matter to Supreme Court to determine the date from which that interest must be awarded (*see* CPLR 5001 [a]; 5004).

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

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1139
CA 18-02030
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND DEJOSEPH, JJ.

JOHN MEZZALINGUA ASSOCIATES, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE TRAVELERS INDEMNITY COMPANY,
THE PHOENIX INSURANCE COMPANY,
CAMPANY ROOFING COMPANY, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

ROBINSON & COLE, LLP, HARTFORD, CONNECTICUT (GREGORY P. VARGA OF COUNSEL) AND HANCOCK ESTABROOK, LLP, SYRACUSE, FOR DEFENDANTS-APPELLANTS THE TRAVELERS INDEMNITY COMPANY AND THE PHOENIX INSURANCE COMPANY.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (BRADY J. O'MALLEY OF COUNSEL), FOR DEFENDANT-APPELLANT CAMPANY ROOFING COMPANY, INC.

LYNN LAW FIRM, LLP, SYRACUSE (PATRICIA A. LYNN-FORD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered October 24, 2018. The order denied the motion of defendants the Travelers Indemnity Company and the Phoenix Insurance Company to compel document production from plaintiff, denied that part of the motion of Campany Roofing Company, Inc., to compel document production from plaintiff and granted plaintiff's motion to set parameters for discovery.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's motion in part, vacating subparagraphs B and C of the second ordering paragraph, and granting the motions of defendant Campany Roofing Company, Inc. and defendants the Travelers Indemnity Company and the Phoenix Insurance Company insofar as they sought an in camera review of the documents created on or after October 24, 2016, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Plaintiff, the owner of an engineering and manufacturing facility, commenced this action after rainfall entered and caused damage to the facility in October 2016. Plaintiff asserted a negligence cause of action against defendant Campany Roofing Company, Inc. (Campany) stemming from certain roofing work that Campany performed at the facility and asserted a breach of contract cause of action against defendants the Travelers Indemnity Company and the Phoenix Insurance Company (collectively, Travelers defendants) based upon the Travelers defendants' disclaimer of coverage for the loss. Plaintiff had filed a claim with the Travelers defendants for the loss and, on October 24, 2016, the Travelers defendants sent plaintiff a letter reserving their rights under the insurance contract and noting an exclusion in the policy for rain damage. Consequently, plaintiff hired litigation counsel and other consultants. On January 5, 2017, the Travelers defendants disclaimed coverage.

During discovery, a dispute arose over allegedly privileged documents that plaintiff withheld or redacted. In its privilege logs, plaintiff asserted that many of the documents were protected from disclosure on three grounds, i.e., that they were material prepared in anticipation of litigation (*see* CPLR 3101 [d] [2]), attorney work product (*see* CPLR 3101 [c]), or protected by the attorney-client privilege (*see* CPLR 4503 [a] [1]). Plaintiff asserted that a few documents were not discoverable on the sole basis that they were materials prepared in anticipation of litigation. Campany and the Travelers defendants separately moved, inter alia, to compel plaintiff's disclosure of various documents or, in the alternative, for an in camera review of the documents. Plaintiff moved for, among other things, a protective order, contending that all communications involving attorneys or litigation experts on and after October 24, 2016 were presumptively privileged because the Travelers defendants and plaintiff contemplated litigation at that time. Supreme Court denied the Travelers defendants' motion, denied in part Campany's motion, and granted plaintiff's motion by, as relevant here, ordering that all documents of plaintiff created on and after October 24, 2016 were not discoverable because they were material prepared in anticipation of litigation. Campany and the Travelers defendants appeal.

Initially, we reject plaintiff's contention that the order is not appealable. CPLR 5701 (a) (2) (v) provides that, with limited exceptions, which are not applicable here, an appeal may be taken to this Court as of right from an order where the motion it decided was made upon notice and it "affects a substantial right." An order granting a protective order and precluding discovery of numerous documents affects a substantial right of Campany and the Travelers defendants, and the order is thus appealable as of right (*see Surgical Design Corp. v Correa*, 21 AD3d 409, 410 [2d Dept 2005]; *Bristol v Evans*, 210 AD2d 850, 850-851 [3d Dept 1994]; *cf. Marriott Intl. v Lonny's Hacking Corp.*, 262 AD2d 10, 11 [1st Dept 1999]; *see generally Neuman v Frank*, 82 AD3d 1642, 1644 [4th Dept 2011]).

With respect to the merits, we conclude that Campany and the Travelers defendants met their initial burden on their respective motions of establishing that the documents withheld by plaintiff were material and necessary to their case (*see* CPLR 3101 [a]; *see generally Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). We further agree with Campany and the Travelers defendants that the court erred in issuing a blanket rule that all documents created on or after October 24, 2016 were not discoverable.

CPLR 3101 " 'establishes three categories of protected materials . . . : privileged matter, absolutely immune from discovery (CPLR 3101 [b]); attorney's work product, also absolutely immune (CPLR 3101 [c]); and trial preparation materials [CPLR 3101 (d) (2)], which are subject to disclosure only on a showing of substantial need and undue hardship' " (*Forman v Henkin*, 30 NY3d 656, 661-662 [2018]). "The burden of establishing a right to protection under these provisions is with the party asserting it—'the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity' " (*id.* at 662; *see Rickard v New York Cent. Mut. Fire Ins. Co.*, 164 AD3d 1590, 1591-1592 [4th Dept 2018]). "[A] court is not required to accept a party's characterization of material as privileged or confidential" (*Rickard*, 164 AD3d at 1592 [internal quotation marks omitted]). "Ultimately, resolution of the issue whether a particular document is . . . protected is necessarily a fact-specific determination . . . , most often requiring in camera review" (*id.* [internal quotation marks omitted]).

Here, plaintiff failed to meet its burden of establishing the applicability of any of the categories of protected materials (*see id.*). With respect to those documents that plaintiff contends were not discoverable because they were material prepared in anticipation of litigation, "[t]o fall within the conditional privilege of CPLR 3101 (subd [d], par 2), the material sought must be prepared *soley* in anticipation of litigation . . . 'Mixed purpose reports are not exempt from disclosure under CPLR 3101 (subd [d], par 2)' " (*Zampatori v United Parcel Serv.*, 94 AD2d 974, 975 [4th Dept 1983]; *see Madison Mut. Ins. Co. v Expert Chimney Servs., Inc.*, 103 AD3d 995, 996 [3d Dept 2013]; *Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647, 648 [2d Dept 2004]). The materials here that were prepared by third parties were mixed purpose reports, and plaintiff failed to establish that they were prepared solely in anticipation of litigation (*see Ural v Encompass Ins. Co. of Am.*, 97 AD3d 562, 566-567 [2d Dept 2012]; *see also Ligoure v City of New York*, 128 AD3d 1027, 1028-1029 [2d Dept 2015]; *Madison Mut. Ins. Co.*, 103 AD3d at 996). Because plaintiff "did not establish that the requested material was protected by the qualified immunity privilege set forth in CPLR 3101 (d) for material prepared exclusively in anticipation of litigation, the burden did not shift to [Campany and the Travelers defendants] to establish that they had 'substantial need' for the material and could not obtain it without 'undue hardship' " (*Peralta v New York City Hous. Auth.*, 169 AD3d 1071, 1074-1075 [2d Dept 2019]; *see Cascade Bldrs. Corp. v Rugar*, 154 AD3d 1152, 1155 [3d Dept 2017]). We therefore modify the order by denying that part of plaintiff's motion seeking a protective order with respect to those documents created on or after October 24, 2016 that plaintiff alleged were not discoverable on the basis of only CPLR 3101 (d) (2). Under the circumstances of this case, we further modify the order by granting the motions of Campany and the Travelers defendants insofar as they sought in camera review of those documents, and we remit the matter to Supreme Court for an in camera review and for the redaction of any opinions contained in those documents (*see Donohue v Fokas*, 112 AD3d 665, 667 [2d Dept 2013]; *Ural*, 97 AD3d at 566-567; *see generally Rickard*, 164 AD3d at 1592).

With respect to those documents that plaintiff contends were attorney work product or protected by the attorney-client privilege, as Campany and the Travelers defendants note, many of the documents were shared with or prepared by third parties. Communications made in the presence of third parties ordinarily are not subject to the attorney-client privilege (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]). Where, however, the third party is an agent of the attorney or the client, and his or her presence is deemed necessary to enable the attorney-client communications and the client has a reasonable expectation of confidentiality, the attorney-client privilege is not waived (*see id.*; *Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co.*, 64 AD3d 1234, 1236 [4th Dept 2009], *lv dismissed* 13 NY3d 893 [2009]). Likewise, the attorney work product privilege " 'extends to experts retained as consultants to assist in analyzing or preparing the case' " (*Beach v Touradji Capital Mgt., LP*, 99 AD3d 167, 170 [1st Dept 2012]). We conclude that the court must review these materials in camera to determine if the privileges were actually applicable (*see Rickard*, 164 AD3d at 1592; *Ural*, 97 AD3d at 566-567). We therefore further modify the order by vacating subparagraphs B and C of the second ordering paragraph and granting the motions of Campany and the Travelers defendants insofar as they sought in camera review of the documents created on or after October 24, 2016 that plaintiff alleged were attorney work product or protected by the attorney-client privilege, and we remit the matter to Supreme Court to determine the motions with respect to those documents following an in camera review thereof.

Mark W. Bennett

Entered: December 20, 2019

Clerk of the Court

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

1141
CA 18-01987
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND DEJOSEPH, JJ.

IN THE MATTER OF THE APPLICATION OF JON Z. AND VICTOR Z. FOR THE APPOINTMENT OF A GUARDIAN OF THE PROPERTY AND/OR PERSON OF MARGARET Z., AN ALLEGED INCAPACITATED PERSON.

JON Z., PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

THERESA M. GIROUARD, ESQ., APPOINTED GUARDIAN FOR MARGARET Z., AN ALLEGED INCAPACITATED PERSON, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

JON Z., PETITIONER-APPELLANT PRO SE.

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

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered August 6, 2018. The order granted that part of the motion of respondent seeking payment for services rendered, in the amount of $5,552.97.

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

Memorandum: In this guardianship proceeding, petitioner appeals from three orders of Supreme Court. In appeal No. 1, the court granted that part of respondent’s motion seeking payment for her services as the guardian of petitioner’s incapacitated mother. In appeal No. 2, the court granted that part of respondent’s motion seeking payment to a nursing home for services rendered to the mother. In appeal No. 3, the court denied petitioner’s motion pursuant to CPLR 5015 (a) (3) to vacate a prior order of the court, which had denied petitioner’s prior motion for, among other relief, removal of respondent as guardian.

As an initial matter, we note that our review on these appeals is limited to the record on appeal as settled by the court (*see generally Matter of Salder v Wahl*, 227 AD2d 995, 995 [4th Dept 1996]). Petitioner’s self-titled “Complete Record” is not properly before us (*see* 22 NYCRR 1250.7 [g] [3]).

With respect to appeal Nos. 1 and 2, we note that petitioner does not specifically challenge the amount requested by respondent for her fees or the amount due to the nursing home. Instead, petitioner contends that neither respondent nor the nursing home should receive the requested amounts because respondent engaged in fraud and was wasting the mother’s assets. In his opposition to respondent’s motion, however, petitioner offered no evidence of fraud aside from his conclusory statements, which are insufficient to establish either fraud or the unreasonableness of the requested amounts (*see generally Matter of Helen [H.]O. v Mark L.O.*, 281 AD2d 937, 938 [4th Dept 2001], *lv denied in part and dismissed in part* 98 NY2d 666 [2002]; *Matter of Coniglio*, 242 AD2d 901, 902 [4th Dept 1997]). Further, the record contains undisputed invoices from the nursing home regarding the services provided to the mother during the relevant time frame. We therefore conclude that the court properly granted that part of respondent’s motion seeking payment for those services. Likewise, the court properly granted that part of respondent’s motion seeking an award of her fees, which were supported by itemized records (*see generally Matter of Goldstein v Zabel*, 146 AD3d 624, 630-631 [1st Dept 2017], *lv denied* 29 NY3d 918 [2017]; *Matter of Joshua H. [Grace N.]*, 80 AD3d 698, 699 [2d Dept 2011], *lv denied* 16 NY3d 711 [2011]).

With respect to appeal No. 3, we reject petitioner’s contention that the court’s prior order should be vacated on the ground that it was procured by fraudulent means (*see* CPLR 5015 [a] [3]) inasmuch as petitioner’s broad, unsubstantiated allegations did not entitle him to such relief (*see Miller v Lanzisera*, 273 AD2d 866, 868 [4th Dept 2000], *appeal dismissed* 95 NY2d 887 [2000], *reconsideration denied* 96 NY2d 731 [2001]; *see generally Abbott v Crown Mill Restoration Dev., LLC*, 109 AD3d 1097, 1100 [4th Dept 2013]).

Petitioner’s remaining contentions regarding the sale of certain real property are not properly before us on these appeals (*see generally Matter of Bullard v Bullard*, 185 AD2d 411, 412 n [3d Dept 1992]; *Matter of Bligen v Kelly*, 126 AD2d 989, 989 [4th Dept 1987]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1142
CA 18-01988
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND DEJOSEPH, JJ.

IN THE MATTER OF THE APPLICATION OF JON Z.
AND VICTOR Z. FOR THE APPOINTMENT OF A
GUARDIAN OF THE PROPERTY AND/OR PERSON OF
MARGARET Z., AN ALLEGED INCAPACITATED PERSON.
---   MEMORANDUM AND ORDER
JON Z., PETITIONER-APPELLANT;

THERESA M. GIROUARD, ESQ., APPOINTED GUARDIAN
FOR MARGARET Z., AN ALLEGED INCAPACITATED
PERSON, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

JON Z., PETITIONER-APPELLANT PRO SE.

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

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered August 6, 2018. The order granted that part of the motion of respondent seeking payment to Heritage Health Care Center.

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

Same memorandum as in *Matter of Jon Z.* ([appeal No. 1] — AD3d — [Dec. 20, 2019] [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1143
CA 18-01989
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND DEJOSEPH, JJ.

IN THE MATTER OF THE APPLICATION OF JON Z.
AND VICTOR Z. FOR THE APPOINTMENT OF A
GUARDIAN OF THE PROPERTY AND/OR PERSON OF
MARGARET Z., AN ALLEGED INCAPACITATED PERSON.
--- MEMORANDUM AND ORDER
JON Z., PETITIONER-APPELLANT;

THERESA M. GIROUARD, ESQ., APPOINTED GUARDIAN
FOR MARGARET Z., AN ALLEGED INCAPACITATED
PERSON, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

JON Z., PETITIONER-APPELLANT PRO SE.

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

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered August 6, 2018. The order denied the motion of petitioner to vacate a prior order.

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

Same memorandum as in *Matter of Jon Z.* ([appeal No. 1] — AD3d — [Dec. 20, 2019] [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1145
TP 19-01191
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF MAURICE BURGESS, PETITIONER,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, 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 June 21, 2019) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination following a tier III hearing that he violated certain inmate rules. Petitioner’s contention that the Hearing Officer denied him his right to present a retaliation defense is not preserved for our review (*see Matter of Reeves v Goord*, 248 AD2d 994, 995 [4th Dept 1998], *lv denied* 92 NY2d 804 [1998]). We have reviewed petitioner’s remaining contentions and conclude that they lack merit.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1146
KA 18-01558
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID P. DAOUST, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 (Mark A. Violante, A.J.), rendered April 25, 2018. The judgment convicted defendant upon his plea of guilty of burglary in the third degree and petit larceny.

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

Memorandum: In both of these appeals, defendant appeals from judgments convicting him upon his pleas of guilty of burglary in the third degree (Penal Law § 140.20) and petit larceny (§ 155.25). Contrary to defendant’s contention in both appeals, the waivers of the right to appeal were knowingly, voluntarily, and intelligently entered. The record establishes that County Court “engaged defendant in an adequate colloquy to ensure that the waiver[s] of the right to appeal w[ere] a knowing and voluntary choice . . . , and did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea” (*People v Lamagna*, 173 AD3d 1772, 1772 [4th Dept 2019], *lv denied* 34 NY3d 934 [2019] [internal quotation marks omitted]; *see People v Carr*, 147 AD3d 1506, 1506 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]; *see also People v Sanders*, 25 NY3d 337, 341 [2015]). The valid waivers of the right to appeal foreclose review of defendant’s challenges to the severity of the sentences (*see People v Lopez*, 6 NY3d 248, 256 [2006]). Indeed, contrary to defendant’s contentions, inasmuch as he was clearly informed of the ramifications on the sentences if he violated the conditions of the plea agreements by failing to complete the judicial diversion program, the waivers of the right to appeal encompass defendant’s challenges to the severity of the sentences he received upon failing to complete that program (*see People v Savage*, 158 AD3d 854, 855-856 [3d Dept 2018]; *see generally Lopez*, 6 NY3d at 256). The valid waivers of the right to appeal also foreclose review of the court's discretionary decision to deny youthful offender status (*see People v Pacherille*, 25 NY3d 1021, 1024 [2015]; *People v Allen*, 174 AD3d 1456, 1457-1458 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]; *Lamagna*, 173 AD3d at 1773), as well as defendant's requests that this Court exercise its interest of justice jurisdiction to adjudicate him a youthful offender (*see Allen*, 174 AD3d at 1458; *People v Castaneda*, 173 AD3d 1791, 1792 [4th Dept 2019], *lv denied* 34 NY3d 929 [2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1148
KA 17-00953
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

JOHN A. RATHBURN, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO 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 (Frederick G. Reed, A.J.), rendered April 5, 2017. The judgment convicted defendant, upon a plea of guilty, of course of sexual conduct against a child in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and endangering the welfare of a child (§ 260.10 [1]). We affirm.

Defendant's challenges to the voluntariness of his plea are unpreserved for appellate review because he never moved to withdraw his plea or to vacate the judgment of conviction on that ground (*see People v Gardner*, 101 AD3d 1634, 1634 [4th Dept 2012]). Although defendant's initial factual allocution may have negated an essential element of course of sexual conduct against a child in the first degree, the exception to the preservation rule does not apply because the matter was adjourned, defendant consulted with his lawyer, the prosecutor conducted the requisite further inquiry, and defendant did not thereafter raise any further objections (*see id.* at 1634-1635; *People v Jennings*, 8 AD3d 1067, 1068 [4th Dept 2004], *lv denied* 3 NY3d 676 [2004]). In any event, it is well established that defendant's "monosyllabic . . . responses to questioning by County Court do not render his plea unknowing and involuntary" (*People v Dunham*, 83 AD3d 1423, 1424 [4th Dept 2011], *lv denied* 17 NY3d 794 [2011]; *see People v VanDeViver*, 56 AD3d 1118, 1118 [4th Dept 2008], *lv denied* 11 NY3d 931 [2009], *reconsideration denied* 12 NY3d 788 [2009]). Moreover, defendant's assertion that his allocution failed to affirmatively establish each element of the crimes "is not a recognized ground for vacating a guilty plea” (*People v Gulbin*, 165 AD3d 1611, 1612 [4th Dept 2018], *lv denied* 32 NY3d 1172 [2019]; *see People v Goldstein*, 12 NY3d 295, 300-301 [2009]). Indeed, “[i]t is well established that a defendant who pleads guilty need not ‘acknowledge[] committing every element of the pleaded-to offense . . . or provide[] a factual exposition for each element of the pleaded-to offense’ ” (*People v Madden*, 148 AD3d 1576, 1578 [4th Dept 2017], *lv denied* 29 NY3d 1034 [2017], quoting *People v Seeber*, 4 NY3d 780, 781 [2005]). Finally, the negotiated sentence is not unduly harsh or severe.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1149
KA 18-02097
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LOIRMUS DESIUS, ALSO KNOWN AS BABOO,
DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS, DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered July 26, 2018. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Wayne County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of two counts of assault in the second degree (Penal Law § 120.05 [1] [intentional assault], [4] [reckless assault]), arising from an altercation during which he punched the victim in the face approximately three times, causing the victim to fall and hit his head on the concrete sidewalk. Defendant continued to punch the victim while the victim was lying on the ground unconscious, and he died as a result of his injuries. Defendant contends, inter alia, that County Court’s verdict is inconsistent insofar as the court found him guilty of both recklessly and intentionally causing serious physical injury. Although defendant raised that issue at sentencing, the record “ ‘does not reflect that the court ever ruled on . . . defendant’s motion, and a failure to rule on a motion cannot be deemed a denial thereof’ ” (*People v Stewart*, 111 AD3d 1395, 1396 [4th Dept 2013]; *see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]). We therefore hold the case, reserve decision and remit the matter to County Court to determine defendant’s motion.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1150
KA 17-01371
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

RICHARD E. VANGORDEN, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Steuben County Court (Joseph W. Latham, J.), rendered April 26, 2017. Defendant was resentenced upon his conviction of attempted murder in the second degree (two counts), tampering with physical evidence (two counts), criminal mischief in the second degree, criminal use of a firearm in the first degree, criminal possession of a weapon in the fourth degree and reckless endangerment in the second degree.

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

Memorandum: Defendant was convicted following a jury trial of, inter alia, two counts of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]; [b]). The conviction arises from incidents that occurred after two State Police officers attempted to stop defendant's truck for a traffic violation. Defendant fled from the officers at high speeds and, at some point in the ensuing chase, slowed his truck down, held a rifle out the rear window of the truck, and fired at least two shots, one of which struck the police vehicle near its driver's seat from an estimated distance of 36 feet. On a prior appeal, we, inter alia, reduced the conviction on the two counts of attempted murder in the first degree to attempted murder in the second degree (§§ 110.00, 125.25 [1]), vacated the sentence, and remitted the matter to County Court for resentencing (*People v VanGorden*, 147 AD3d 1436, 1436-1437 [4th Dept 2017], *lv denied* 29 NY3d 1037 [2017]). Defendant now appeals from the resentence.

Defendant contends that the court erred in imposing at resentencing consecutive sentences for the two counts of attempted murder in the second degree. We reject that contention inasmuch as the record establishes that, although the shots were fired closely together in time, "[t]he attempts to shoot each officer were separate and distinct” (*People v Rudolph*, 16 AD3d 1151, 1152 [4th Dept 2005], *lv denied* 5 NY3d 809 [2005]; *see* Penal Law § 70.25 [2]; *People v McCullough*, 283 AD2d 988, 988-989 [4th Dept 2001], *lv denied* 96 NY2d 941 [2001]; *see generally People v Brown*, 80 NY2d 361, 365 [1992]). In view of defendant’s extensive prior criminal history and the serious nature of the offenses, we further conclude that the resentence is not unduly harsh or severe.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1151
KA 18-01559
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID P. DAOUST, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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 (Mark A. Violante, A.J.), rendered April 25, 2018. The judgment convicted defendant upon his plea of guilty of burglary in the third degree and petit larceny.

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

Same memorandum as in *People v Daoust* ([appeal No. 1] — AD3d — [Dec. 20, 2019] [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1153
KA 16-02111
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

RAHKEIM K. SCARLETT, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN 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 September 17, 2015. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a forged instrument in the second degree, attempted grand larceny in the third degree, identity theft in the first degree and criminal possession of stolen property in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a forged instrument in the second degree (Penal Law § 170.25), attempted grand larceny in the third degree (§§ 110.00, 155.35 [1]), identity theft in the first degree (§ 190.80), and two counts of criminal possession of stolen property in the third degree (§ 165.50). We affirm. Even assuming, arguendo, that defendant did not validly waive his right to appeal, we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: December 20, 2019   Mark W. Bennett
                                              Clerk of the Court

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

1154
KA 18-00698
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DANIEL S. SERRANO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 (Stephen T. Miller, A.J.), entered January 12, 2018. 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: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1155
CAF 18-00626
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF KRISTA FAITH LAPOINT,
PETITIONER-APPELLANT,

V ORDER

STEPHEN M. LAPOINT, SR., RESPONDENT-RESPONDENT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR PETITIONER-APPELLANT.

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

CASEY E. JORDAN, CLAY, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered February 16, 2018 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1156
CAF 18-01010
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF NICHOLAS PALIANI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHANIE SELAPACK, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

BRIDGET L. FIELD, ROCHESTER, FOR PETITIONER-RESPONDENT.

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered April 25, 2018 in a proceeding pursuant to Family Court Act article 8. The order granted an order of protection.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order of protection issued in a proceeding pursuant to Family Court Act article 8 upon a finding that she committed a family offense. In appeal No. 2, the mother appeals from an order entered in a custody proceeding pursuant to Family Court Act article 6 determining that she willfully violated an order of custody. Both orders provided that the mother would have only supervised visitation with the subject child.

With respect to appeal No. 1, we reject the mother's contention that petitioner father failed to establish by a preponderance of the evidence that the mother committed the family offense of aggravated harassment in the second degree (*see Matter of Clausell v Salame*, 156 AD3d 1401, 1402 [4th Dept 2017]; *Matter of Parameswar v Parameswar*, 109 AD3d 473, 474 [2d Dept 2013]; *see also* Family Ct Act § 832; Penal Law § 240.30 [1] [a]). The father testified that, after Family Court issued a decision granting him sole custody of the child, the mother called him and told him that if he took the child away from her, she would kill herself and the child. While the mother denied the allegation, the court found that her testimony was not credible and credited the testimony of the father. The court's "assessment of the credibility of the witnesses is entitled to great weight" (*Matter of Danielle S. v Larry R.S.*, 41 AD3d 1188, 1189 [4th Dept 2007]), and we conclude that the record supports the court's credibility determinations and its determination that the father met his burden on the family offense petition (*see Matter of Martin v Flynn*, 133 AD3d 1369, 1370 [4th Dept 2015]).

Contrary to the mother's contention in appeal No. 2, we conclude that the father established by clear and convincing evidence that the mother willfully violated the custody order by failing to notify the father of medical issues involving the child "as soon as reasonably possible," as provided in the custody order (*see Matter of Tarrant v Ostrowski*, 96 AD3d 1580, 1580-1581 [4th Dept 2012], *lv denied* 20 NY3d 855 [2013]; *see generally Matter of Palazzolo v Giresi-Palazzolo*, 138 AD3d 866, 867 [2d Dept 2016]). As in appeal No. 1, there is a sound and substantial basis to support the court's credibility determinations (*see Tarrant*, 96 AD3d at 1580-1581; *Matter of Wojcik v Newton* [appeal No. 2], 11 AD3d 1011, 1012 [4th Dept 2004]).

With respect to both appeals, we reject the mother's contention that the court erred in directing that her visitation be supervised. The determination "whether visitation should be supervised is a matter left to [the c]ourt's sound discretion and it will not be disturbed as long as there is a sound and substantial basis in the record to support it" (*Matter of Chilbert v Soler*, 77 AD3d 1405, 1406 [4th Dept 2010], *lv denied* 16 NY3d 701 [2011] [internal quotation marks omitted]; *see Matter of Talbot v Edick*, 159 AD3d 1406, 1407 [4th Dept 2018]). The court's determination has the requisite support in the record inasmuch as the record establishes that the mother's behavior, including threatening and making disparaging remarks about the father and attempting to limit his involvement with the child, was harmful to the child's relationship with the father and thus that supervised visitation with the mother was in the best interests of the child (*see Matter of Watson v Maragh*, 156 AD3d 801, 802-803 [2d Dept 2017]; *Matter of Stewart v Stewart*, 56 AD3d 1218, 1218-1219 [4th Dept 2008]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1157
CAF 18-01009
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF NICHOLAS PALIANI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHANIE SELAPACK, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

BRIDGET L. FIELD, ROCHESTER, FOR PETITIONER-RESPONDENT.

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 8, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, determined that respondent willfully violated a court order and directed that respondent's visitation with the child be supervised.

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

Same memorandum as in *Matter of Paliani v Selapack* ([appeal No. 1] — AD3d — [Dec. 20, 2019] [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1158
CAF 18-00540
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF DEANDRE GRAYSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KARINA LOPEZ, RESPONDENT-RESPONDENT.

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

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

JAMIE L. CODJOVI, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered February 21, 2018 in a proceeding pursuant to Family Court Act article 6. The order confirmed the report of the Referee.

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

Memorandum: Petitioner father commenced this proceeding pursuant to Family Court Act article 6 seeking to modify a prior custody and visitation order by awarding him visitation with the subject children at the correctional facility in which he is currently incarcerated. Family Court referred the petition to a referee to hear and report (*see* CPLR 4212). The Referee conducted an evidentiary hearing and issued a written report on January 30, 2018 determining that visitation was not in the children's best interests, but allowing the father to exchange letters with the children. The court, acting on its own initiative, confirmed the Referee's report on February 21, 2018. The father now appeals.

Preliminarily, we reject the father's challenges to the order of reference. The father's " 'argument that the court erred when it referred this matter to a referee in the absence of exceptional circumstances (*see* CPLR 4212) is waived, since the record established that [he] participated in the proceeding before the [R]eferee without objection' " (*Matter of McDuffie v Reddick*, 154 AD3d 1308, 1309 [4th Dept 2017]; *see Matter of Wolf v Assessors of Town of Hanover*, 308 NY 416, 420 [1955]; *Matter of Nilda S. v Dawn K.*, 302 AD2d 237, 238 [1st Dept 2003], *lv denied* 100 NY2d 512 [2003]). Contrary to the father's further contention, the alleged failure of the order of reference to comply with 22 NYCRR 202.43 (d) and 22 NYCRR 202.44 (a) does not affect its validity because, with one exception not applicable here (*see* 22 NYCRR 202.16), "the provisions of 22 NYCRR part 202 apply only to 'civil actions and proceedings in the Supreme Court and the County Court,' not to proceedings in the Family Court" (*McDuffie*, 154 AD3d at 1309, quoting 22 NYCRR 202.1 [a]; *see Matter of McDermott v Berolzheimer*, 210 AD2d 559, 559-560 [3d Dept 1994]). We also reject the father's contention that the order on appeal must be reversed because the court confirmed the Referee's report before the expiration of the 15-day period set forth in CPLR 4403.

Contrary to the father's additional contention, we conclude that " 'a sound and substantial basis exist[s] in the record for the court's determination that the visitation requested by [the father] would not be in the . . . child[ren]'s best interest[s] under the present circumstances' " (*Matter of Bloom v Mancuso*, 175 AD3d 924, 926 [4th Dept 2019]). Although visitation with a noncustodial parent is presumed to be in the best interests of the child, even when the parent seeking visitation is incarcerated (*see Matter of Granger v Misercola*, 21 NY3d 86, 89 [2013]; *Matter of Kelley v Fifield*, 159 AD3d 1612, 1614 [4th Dept 2018]), that presumption is rebuttable, and "a demonstration 'that such visitation would be harmful to the child will justify denying such a request' " (*Granger*, 21 NY3d at 91; *see Bloom*, 175 AD3d at 926). Contrary to the father's assertion, "[t]he presumption in favor of visitation may be rebutted through demonstration by a *preponderance of the evidence*" (*Granger*, 21 NY3d at 92), and the "substantial proof" language frequently used in that context "should not be interpreted in such a way as to heighten the burden . . . to rebut the presumption of visitation" (*id.*).

"[W]here, as here, domestic violence is alleged, the [Referee] must consider the effect of such domestic violence upon the best interests of the child[ren]" (*Matter of Smith v Stewart*, 145 AD3d 1534, 1535 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017] [internal quotation marks omitted]; *see Bloom*, 175 AD3d at 926). The record establishes that the father committed acts of domestic violence against respondent mother in the presence of the children, and the Referee noted that the father expressed no remorse or understanding that his actions were harmful to the children. Although the father had communication with the children over the telephone and thus was not a stranger to them (*cf. Bloom*, 175 AD3d at 926), the record establishes that the father's telephone communication occurred in violation of an order of protection prohibiting him from engaging in any form of communication with the children (*see generally Matter of Carroll v Carroll*, 125 AD3d 1485, 1487 [4th Dept 2015], *lv denied* 25 NY3d 907 [2015]; *Matter of Abare v St. Louis*, 51 AD3d 1069, 1071 [3d Dept 2008]). Furthermore, although the father had a "plan to accomplish the requested visitation" (*Smith*, 145 AD3d at 1535), the plan entailed having the children's paternal grandmother transport them to the prison. The Referee found that the paternal grandmother was ill-suited for that responsibility inasmuch as she permitted the children to speak on the telephone with the father in violation of the order of protection and, because she never testified, the Referee had no assurance that she would abide by the order that would be entered.

Thus, we find no basis to disturb the court's determination denying the father's request for visitation with the subject children at the prison (*see Bloom*, 175 AD3d at 926-927; *see generally Smith*, 145 AD3d at 1535; *Matter of Chilbert v Soler*, 77 AD3d 1405, 1406 [4th Dept 2010], *lv denied* 16 NY3d 701 [2011]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1166
OP 19-01241

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

IN THE MATTER OF JANET JACOB, PETITIONER,

V ORDER

HON. PATRICK F. MCALLISTER, AS ACTING SUPREME
COURT JUSTICE, RESPONDENT.

ZEV GOLDSTEIN, MONSEY, FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) for an order directing respondent to grant petitioner’s motion to compel.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 7 and 11, 2019,

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

Entered: December 20, 2019 Mark W. Bennett
Clerk of the Court

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

1167
CAF 18-00745
PRESENT: SMITH, J.P., CARNI, LINDLEY, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF JESSICA W. BENSON,
PETITIONER-RESPONDENT,

V   MEMORANDUM AND ORDER

JAMES T. SMITH, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

RAYMOND P. KOT, II, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered April 2, 2018 in a proceeding pursuant to Family Court Act article 8. The appeal was held by this Court by order entered March 22, 2019, decision was reserved and the matter was remitted to Family Court, Steuben County, for further proceedings (170 AD3d 1640 [4th Dept 2019]). The proceedings were held and completed.

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

Memorandum: Respondent appeals from an order of protection issued upon a finding that he committed an unspecified family offense against petitioner. We previously held this case, reserved decision, and remitted the matter to Family Court to make the requisite factual findings (*Matter of Benson v Smith*, 170 AD3d 1640, 1641 [4th Dept 2019]). Upon remittal, the court clarified that its order of protection was based on respondent’s commission of harassment in the second degree under Penal Law § 240.26 (1), which provides that “[a] person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person: . . . [h]e or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same.” We now reverse.

In our interpretation, and as the court itself noted following the fact-finding hearing, the petition alleged that respondent committed a family offense against petitioner only during an extended argument that began on April 30, 2017. At the fact-finding hearing, however, petitioner conceded that respondent did not strike, shove, kick or otherwise subject her to physical contact during that particular incident, and there was no evidence that respondent attempted or threatened to subject petitioner to any such contact during that incident. Thus, we agree with respondent that the evidence presented at the fact-finding hearing failed to establish by a fair preponderance of the evidence that he committed the family offense of harassment in the second degree under Penal Law § 240.26 (1) during that incident (*see Matter of Kim Yvette W. v Leola Patricia W.*, 140 AD3d 495, 495 [1st Dept 2016]). The court's reliance on respondent's conduct during other incidents as the basis for finding that he committed that particular family offense was improper because the petition did not accuse respondent of committing a family offense against petitioner in connection with any incident other than the argument that began on April 30, 2017 (*see generally id.*; *Matter of Ebony J. v Clarence D.*, 46 AD3d 309, 309 [1st Dept 2007]).

Respondent's remaining contention is academic in light of our determination.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1168
CAF 18-00746
PRESENT: SMITH, J.P., CARNI, LINDLEY, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF JESSICA W. BENSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES T. SMITH, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

RAYMOND P. KOT, II, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered April 12, 2018 in a proceeding pursuant to Family Court Act article 6. The appeal was held by this Court by order entered March 22, 2019, decision was reserved and the matter was remitted to Family Court, Steuben County, for further proceedings (170 AD3d 1641 [4th Dept 2019]). The proceedings were held and completed.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating those parts denying respondent visitation or contact with the child and imposing conditions on any future application by respondent to modify his visitation, and granting respondent supervised visitation, and as modified the order is affirmed without costs and the matter remitted to Family Court, Steuben County, to set an appropriate visitation schedule in accordance with the following memorandum: Respondent father appeals from an order that, inter alia, granted petitioner mother's petition for sole custody of the subject child and denied the father any visitation or contact. We previously held this case, reserved decision, and remitted the matter to Family Court to set forth the factual findings supporting its determination (*Matter* of Benson *v Smith*, 170 AD3d 1640, 1641 [4th Dept 2019]). Upon remittal, the court issued an oral and a written decision setting forth those findings.

We reject the father's contention that the court erred in awarding the mother sole custody of the child. "A custody determination by the trial court must be accorded great deference . . . and should not be disturbed where . . . it is supported by a sound and substantial basis in the record" (*Matter of Abdo v Ahmed*, 162 AD3d

1742, 1743 [4th Dept 2018] [internal quotation marks omitted]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]). Here, the court's determination is supported by a sound and substantial basis in the record (*see Matter of Buckley v Kleinahans*, 162 AD3d 1561, 1562 [4th Dept 2018]; *see also Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 33 NY3d 903 [2019]). Contrary to the father's assertion, the parties' acrimonious relationship demonstrated that joint custody was not appropriate (*see Matter of Kleinbach v Cullerton*, 151 AD3d 1686, 1687 [4th Dept 2017]), and there is no basis to disturb the court's credibility determinations (*see generally Matter of Belcher v Morgado*, 147 AD3d 1335, 1336 [4th Dept 2017]).

We agree with the father, however, that the court erred in denying him any visitation or contact with the child (*see Kleinbach*, 151 AD3d at 1687; *see also Guy v Guy*, 147 AD3d 1305, 1306 [4th Dept 2017]). It is well established that "visitation with a noncustodial parent is generally presumed to be in a child's best interests . . . and denial of such visitation is a drastic remedy to be employed only where there are compelling reasons for doing so and substantial evidence that visitation will be harmful to the child[ ]'s welfare" (*Matter of Diedrich v Vandermallie*, 90 AD3d 1511, 1511 [4th Dept 2011] [internal quotation marks omitted]). Here, the court did not make the requisite threshold finding that visitation would be harmful to the child, and the record would not support such a finding in any event. We therefore modify the order accordingly, and we remit the matter to Family Court to fashion an appropriate visitation schedule granting the father not less than two hours of supervised visitation per week.

We further agree with the father that the court erred in conditioning his right to file a future modification petition on his release from custody, his "successfully engag[ing]" in mental health treatment, and his prospective waiver of his right to confidentiality with respect to his mental health records. It is well established that a court lacks authority to condition any future application for modification of a parent's visitation on his or her participation in mental health treatment (*see Matter of Allen v Boswell*, 149 AD3d 1528, 1529 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]; *Matter of Ordona v Cothern*, 126 AD3d 1544, 1546 [4th Dept 2015]), much less on his or her release from custody (*see generally Matter of Granger v Misercola*, 21 NY3d 86, 91 [2013]) and waiver of statutory confidentiality rights (*see generally* Mental Hygiene Law § 33.13 [c], [e], [f]). We therefore further modify the order by vacating the conditions imposed on any future application by the father to modify his visitation (*see Matter of Viera v Huff*, 83 AD3d 1520, 1521 [4th Dept 2011]; *see also Matter of Sanchez v Mercedes*, 172 AD3d 1898, 1899 [4th Dept 2019], *lv denied* 33 NY3d 911 [2019]).

Entered: December 20, 2019 Mark W. Bennett
Clerk of the Court

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

1169
TP 19-01328
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF RONALD PLAZA, PETITIONER,

V ORDER

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

RONALD PLAZA, PETITIONER PRO SE.

LETITIA JAMES, 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, Seneca County [Daniel J. Doyle, J.], entered July 17, 2019) 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1170
KA 16-00531
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN KOSMETATOS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered December 4, 2015. The judgment convicted defendant, upon his plea of guilty, of murder in the first degree, attempted arson in the second degree and burglary in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]), attempted arson in the second degree (§§ 110.00, 150.15), and burglary in the second degree (§ 140.25 [2]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the first degree (§ 140.30 [2]). The two pleas were entered in a single plea proceeding. We affirm in each appeal.

In each appeal, we conclude that defendant “knowingly, intelligently, and voluntarily waived his right to appeal as a condition of the plea” (*People v Alsaifullah*, 162 AD3d 1483, 1484 [4th Dept 2018], *lv denied* 32 NY3d 1062 [2018] [internal quotation marks omitted]; *see generally People v Sanders*, 25 NY3d 337, 340-342 [2015]). Contrary to defendant’s contention, Supreme Court “engage[d] [him] in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice . . . , and the record establishes that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty” (*Alsaifullah*, 162 AD3d at 1484; *see Sanders*, 25 NY3d at 341). Contrary to defendant’s further contention, “the court was not required to specify during the colloquy which specific claims survive the waiver of the right to appeal” (*People v Bizardi*, 130 AD3d 1492, 1492 [4th Dept 2015], *lv denied* 27 NY3d 992 [2016] [internal quotation marks omitted]; *see Alsaifullah*, 162 AD3d at 1484; *People v Rodriguez*, 93 AD3d 1334, 1335 [4th Dept 2012], *lv denied* 19 NY3d 966 [2012]).

Defendant’s contention in each appeal that his plea was not knowing, intelligent, and voluntary because he did not “recite the underlying facts of the crime[s] but simply replied to [the court’s] questions with monosyllabic responses is actually a challenge to the factual sufficiency of the plea allocution, which is encompassed by the valid waiver of the right to appeal” (*People v Tapia*, 158 AD3d 1079, 1079 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018] [internal quotation marks omitted]; *see People v Burtes*, 151 AD3d 1806, 1807 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017]; *People v Simcoe*, 74 AD3d 1858, 1859 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]). Defendant’s further contention that each plea was not knowingly, intelligently, and voluntarily entered because a favorable sentence for the codefendant was conditioned upon his plea of guilty is also unpreserved for our review inasmuch as he failed to move to withdraw either plea or to vacate either judgment of conviction on that ground (*see People v Fulton*, 133 AD3d 1194, 1195 [4th Dept 2015], *lv denied* 26 NY3d 1109 [2016], *reconsideration denied* 27 NY3d 997 [2016]; *cf. People v Fiumefreddo*, 82 NY2d 536, 542 [1993]), and this case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant’s contention that, based on a statement he made during the plea colloquy, the court should not have accepted his pleas without inquiring into his mental competency to plead guilty is also unpreserved (*see People v Reap*, 163 AD3d 1287, 1289 [3d Dept 2018], *lv denied* 32 NY3d 1128 [2018]; *cf. People v Young*, 66 AD3d 1445, 1445-1446 [4th Dept 2009], *lv denied* 13 NY3d 912 [2009]). In any event, we conclude that nothing in the record of the plea proceeding calls into question defendant’s mental capacity; indeed, his responses to the court’s inquiries appeared to be informed, competent, and lucid (*see Young*, 66 AD3d at 1446).

To the extent that defendant’s contention that he received ineffective assistance of counsel is based on matters outside the record on appeal, his contention must be raised by way of a motion pursuant to CPL article 440 (*see People v McClary*, 162 AD3d 1582, 1583 [4th Dept 2018]). To the extent that we are able to review the remaining instances of alleged ineffective assistance on the record before us, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, defendant’s waiver of the right to appeal does not encompass his challenge in appeal No. 1 to the severity of the sentence because “no mention was made on the record during the course of the allocution concerning the waiver of defendant’s right to appeal his conviction that he was also waiving his right to appeal any issue concerning the harshness of his sentence” (*People v Herrington*, 161 AD3d 1562, 1562 [4th Dept 2018] [internal quotation marks omitted]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1171
KA 16-00532
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN KOSMETATOS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered December 4, 2015. 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.

Same memorandum as in *People v Kosmetatos* ([appeal No. 1] — AD3d — [Dec. 20, 2019] [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1172
KA 16-02093
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STACY R. MOSS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered December 7, 2015. The judgment convicted defendant upon his plea of guilty of robbery in the third degree (three counts), grand larceny in the third degree and grand larceny 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 three counts of robbery in the third degree (Penal Law § 160.05), one count of grand larceny in the third degree (§ 155.35 [1]), and one count of grand larceny in the fourth degree (§ 155.30 [1]). We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "[n]o mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the harshness of his sentence" (*People v Morgan*, 149 AD3d 1560, 1560 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017] [internal quotation marks omitted]; *see generally People v Maracle*, 19 NY3d 925, 927-928 [2012]). Moreover, although defendant signed a written waiver of the right to appeal, the written waiver failed to state that defendant was waiving his right to appeal his sentence (*see People v Tomeno*, 141 AD3d 1120, 1121 [4th Dept 2016], *lv denied* 28 NY3d 974 [2016]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1173
KA 17-00044
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMMIE GRINER, III, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered September 14, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of assault in the second degree (§ 120.05 [2]). Upon our independent review of the evidence and viewing such evidence in light of the elements of the crimes as charged to the jury (*see People v Cruz*, 171 AD3d 1509, 1510 [4th Dept 2019], *lv denied* 34 NY3d 929 [2019]; *see generally People v Sanchez*, 32 NY3d 1021, 1023 [2018]; *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence.

Contrary to defendant’s contention, Supreme Court properly overruled his hearsay objection to the admissibility of certain testimony regarding canine tracking. The jury was “pointedly instructed by the court . . . that the testimony [was] not being admitted for [its] truth, and the jury is presumed to have followed such admonition” (*People v Bryant*, 39 AD3d 768, 768 [2d Dept 2007], *lv denied* 9 NY3d 990 [2007] [internal quotation marks omitted]; *see People v Davis*, 58 NY2d 1102, 1103-1104 [1983]). Thus, the challenged testimony was “not hearsay as it was not admitted for its truth” (*People v Cromwell*, 71 AD3d 414, 415 [1st Dept 2010], *lv denied* 15 NY3d 803 [2010]). Defendant failed to preserve his related contention that he was denied his right of confrontation with respect to the challenged testimony, and we decline to exercise our power to review that argument as a matter of discretion in the interest of justice (*see People v Tirado*, 175 AD3d 970, 971 [4th Dept 2019], *lv denied* — NY3d — [Oct. 30, 2019]).

The sentence is not unduly harsh or severe, and the record refutes defendant's assertion that the court penalized him for exercising his right to trial. Contrary to defendant's further contention, resentencing is not required inasmuch as "sentences may run consecutively to each other even though each of those sentences is required to run concurrently with the same third sentence" (*People v Rodriguez*, 112 AD3d 488, 489 [1st Dept 2013], *affd* 25 NY3d 238 [2015]). We cannot review defendant's contention regarding the presentence report because it is based on matters outside the record on appeal (*see generally People v Powell*, 79 AD3d 1791, 1793 [4th Dept 2010], *lv denied* 17 NY3d 799 [2011]).

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

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1174
KA 15-00914
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK BOND, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE 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 (Michael L. Dwyer, J.), rendered February 5, 2015. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the seventh 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, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that the evidence is legally insufficient to establish that he constructively possessed heroin that was recovered from the apartment where he was arrested. We reject that contention. Although “a defendant’s mere presence in the area where drugs are discovered is insufficient to establish constructive possession” (*People v Williams*, 162 AD3d 1544, 1545 [4th Dept 2018]), we conclude that “the evidence in this case ‘went beyond defendant’s mere presence in the residence . . . and established’ a particular set of circumstances from which a jury could infer possession” (*People v Boyd*, 145 AD3d 1481, 1482 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]; *see People v Bundy*, 90 NY2d 918, 920 [1997]). Police investigators, who surveilled the apartment building over a three-week period, saw defendant enter and exit the building approximately five times, thus establishing that he regularly frequented the location where the heroin was recovered (*cf. People v Swain*, 241 AD2d 695, 696 [3d Dept 1997]). In addition, the police officer who arrested defendant at the apartment “testified in detail about men’s underwear and men’s deodorant found in a dresser drawer, men’s work boots piled near the dresser, and men’s sweatshirts hanging over a couch,” and photographic evidence corroborated that testimony (*Williams*, 162 AD3d at 1546). Defendant was the only man in the apartment at the time of the arrest and was the only one there capable of reaching the heroin, which was located on the top shelf of a high cabinet. Viewing the evidence in the light most favorable to the People, we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational jury to conclude that defendant constructively possessed the heroin recovered from the apartment (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]).

Furthermore, the sentence is not unduly harsh or severe.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1176
KA 14-01600
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINH D. PHAM, ALSO KNOWN AS VINH PHAN,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered May 9, 2014. The judgment convicted defendant upon a nonjury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a nonjury trial of murder in the second degree (Penal Law § 125.25 [1]). Defendant failed to object to County Court's questioning of the People's expert witness, and therefore his contention "that the Trial Judge's extensive participation in the questioning of [that] witness[ ] deprived him of a fair trial . . . is not adequately preserved for this court's review" (*People v Charleston*, 56 NY2d 886, 887 [1982]; *see* CPL 470.05 [2]; *People v West*, 129 AD3d 1629, 1630 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]). In any event, that contention lacks merit. The court was "entitled to question [the] witness[ ] to clarify testimony and to facilitate the progress of the trial and to elicit relevant and important facts" (*People v Williams*, 107 AD3d 1516, 1517 [4th Dept 2013], *lv denied* 21 NY3d 1047 [2013] [internal quotation marks omitted]; *see People v Pollard*, 70 AD3d 1403, 1405 [4th Dept 2010], *lv denied* 14 NY3d 891 [2010]; *People v Brown*, 256 AD2d 1109, 1109 [4th Dept 1998], *lv denied* 93 NY2d 851 [1999]), and we conclude that it did not improperly "take[] on either the function or appearance of an advocate" (*People v Arnold*, 98 NY2d 63, 67 [2002]; *see People v Yut Wai Tom*, 53 NY2d 44, 57-58 [1981]).

We reject defendant's contention that the verdict is against the weight of the evidence based on the affirmative defense of extreme emotional disturbance (*see* Penal Law § 125.25 [1] [a]; *see generally*

People v Moye, 66 NY2d 887, 889-890 [1985]) inasmuch as defendant failed to establish that affirmative defense by a preponderance of the evidence (*see People v Smith*, 1 NY3d 610, 612 [2004]; *People v Wylie*, 303 AD2d 993, 994 [4th Dept 2003], *lv denied* 100 NY2d 567 [2003]; *see generally People v White*, 79 NY2d 900, 902-903 [1992]). Where, as here, there was "conflicting expert testimony on the issue of defendant's mental condition, the determination of the trier of fact to accept or reject the opinion of an expert, in whole or in part, is entitled to deference" (*People v Amin*, 294 AD2d 863, 863 [4th Dept 2002], *lv denied* 98 NY2d 672 [2002]; *see People v Coombs*, 56 AD3d 1195, 1196 [4th Dept 2008], *lv denied* 12 NY3d 782 [2009]; *People v Wall*, 48 AD3d 1107, 1107-1108 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]).

The sentence is not unduly harsh or severe.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

1178
KA 19-00027
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMIAH L. MARKWICK, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered June 8, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). We affirm.

As defendant asserted in his brief and acknowledged at oral argument, he pleaded guilty before County Court had finally ruled on that part of his omnibus motion that sought to suppress physical evidence purportedly recovered during the execution of a search warrant. Consequently, defendant “forfeited his contention that [such] evidence . . . must be suppressed” (*People v McIntosh*, 274 AD2d 968, 969 [4th Dept 2000], *lv denied* 95 NY2d 906 [2000]; *see People v Scaccia*, 6 AD3d 1105, 1105 [4th Dept 2004], *lv denied* 3 NY3d 681 [2004]; *People v Mojica*, 291 AD2d 833, 833 [4th Dept 2002], *lv denied* 98 NY2d 653 [2002]). Contrary to defendant’s further contention, the court properly refused to suppress the statement he made at the police station. The court’s determination that defendant “voluntarily waived his *Miranda* rights prior to making [the challenged] statement[] was based upon the credibility of the witnesses at the suppression hearing and thus is entitled to great deference” (*People v Vaughan*, 48 AD3d 1069, 1071 [4th Dept 2008], *lv denied* 10 NY3d 845 [2008], *cert denied* 555 US 910 [2008]), and the minor inconsistencies in the police testimony at the suppression hearing “concerning the precise time when the warnings were provided do[ ] not undermine the court’s [credibility] determination” (*People v Williams*, 118 AD3d 1429, 1429 [4th Dept 2014], *lv denied* 24 NY3d 1222 [2015]).

Defendant also argues that he received ineffective assistance of counsel. To the extent that it concerns matters outside the record, defendant must raise that argument in a CPL article 440 motion (*see People v Partridge*, 173 AD3d 1769, 1771 [4th Dept 2019], *lv denied* 34 NY3d 935 [2019]). To the extent that defendant's argument concerns matters in the record before us and survives his guilty plea (*see generally People v Yates*, 173 AD3d 1849, 1850 [4th Dept 2019]), we reject it because he "has not made the required showing that there was no strategic or other legitimate explanation for counsel's failure to [insist on] a *Darden* hearing . . . , particularly in light of the [suppression] hearing in this case, which explored the identity and reliability of the [police] informant[]" (*People v Smith*, 301 AD2d 671, 673 [3d Dept 2003], *lv denied* 99 NY2d 658 [2003]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1179
CAF 18-00452
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF KARNISE L. BARNEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DARYL E. THOMAS, RESPONDENT-APPELLANT.

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

NEIGHBORHOOD LEGAL SERVICES, INC., BUFFALO (THERESA J. FERRARA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Brenda Freedman, J.), entered January 22, 2018 in a proceeding pursuant to Family Court Act article 4. The order, among other things, committed respondent to the Erie County Correctional Facility for a period of six months.

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

Memorandum: Respondent appeals from an order revoking a suspended sentence imposed for his willful violation of a child support order and committing him to jail for six months. Respondent's sole contention on appeal concerns the sufficiency of the evidence that he violated the conditions of the suspended sentence. Because respondent has already served his sentence, the instant appeal is moot (*see Matter of McGrath v Healey*, 158 AD3d 1069, 1069-1070 [4th Dept 2018]; *Matter of Brookins v McCann*, 137 AD3d 1726, 1727 [4th Dept 2016], *lv denied* 27 NY3d 910 [2016]).

Entered: December 20, 2019 Mark W. Bennett
Clerk of the Court

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

1180
CAF 18-02173
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF RACHEL A. MOVSOVICH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN H. WOOD, RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered January 22, 2019 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, confirmed the order of the Support Magistrate.

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 4, respondent appeals from a decision that, inter alia, denied his objections to the order of the Support Magistrate determining that he willfully violated a prior order of child support, fixing the amount of his child support arrears, and recommending that he be placed on probation. Initially, we note that “[n]o appeal lies from a mere decision” (*Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]; *see* CPLR 5512 [a]). Nevertheless, in the absence of any prejudice, we exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the order entered upon that decision (*see* CPLR 5520 [c]; *Matter of Crystiana M. [Crystal M.-Pamela J.]*, 129 AD3d 1536, 1537 [4th Dept 2015]; *Matter of Kessler v Fancher*, 112 AD3d 1323, 1323 [4th Dept 2013]).

Contrary to respondent’s contention, Family Court did not err in denying his objections to the Support Magistrate’s determination that he willfully violated the prior child support order. It is well settled that “[t]here is a presumption that a respondent has sufficient means to support his or her . . . minor children . . . , and . . . evidence that [a] respondent failed to pay support as ordered constitutes ‘prima facie evidence of a willful violation’ ” (*Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452 [4th Dept 2007], quoting Family Ct Act § 454 [3] [a]; *see Matter of Wayne County Dept. of Social Servs. v Loren*, 159 AD3d 1504, 1504-1505 [4th Dept 2018]; *Matter of Barksdale v Gore*, 101 AD3d 1742, 1742 [4th Dept 2012]). Here, petitioner established that respondent failed to pay the amount directed by the prior order, and the burden thus shifted to respondent to submit “some competent, credible evidence of his inability to make the required payments” (*Matter of Powers v Powers*, 86 NY2d 63, 70 [1995]; *see Matter of Jelks v Wright*, 96 AD3d 1488, 1489 [4th Dept 2012]). Respondent failed to meet that burden inasmuch as he failed to present evidence establishing that he made reasonable efforts to obtain gainful employment to meet his support obligation (*see Matter of Roshia v Thiel*, 110 AD3d 1490, 1492 [4th Dept 2013], *lv dismissed in part and denied in part* 22 NY3d 1037 [2013]; *Matter of Hunt v Hunt*, 30 AD3d 1065, 1065 [4th Dept 2006]). He also failed to offer competent medical evidence in support of his contention that his alleged medical condition prevented him from maintaining employment (*see Matter of Hwang v Tam*, 158 AD3d 1216, 1217 [4th Dept 2018]; *Matter of Commissioner of Cattaraugus County Dept. of Social Servs. v Jordan*, 100 AD3d 1466, 1467 [4th Dept 2012]).

We have considered respondent’s remaining contentions and conclude that none requires modification or reversal of the order.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1184
CA 19-00029
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR THE REGISTERED HOLDERS OF BANC OF AMERICA
COMMERCIAL MORTGAGE INC., COMMERCIAL MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2006-2,
ACTING BY AND THROUGH ITS SPECIAL SERVICER
C-III ASSET MANAGEMENT LLC, PLAINTIFF-APPELLANT,

V ORDER

CCCF RIVER GLEN HOLDINGS, INC., KMART CORPORATION,
CAYUGA COMMUNITY COLLEGE, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

KILPATRICK TOWNSEND & STOCKTON LLP, NEW YORK CITY (KEITH M. BRANDOFINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (ANTHONY R. HANLEY OF COUNSEL), FOR DEFENDANT-RESPONDENT CCCF RIVER GLEN HOLDINGS, INC.

J. GREENBERGER, PLLC, NEW YORK CITY (JORDAN GREENBERGER OF COUNSEL), FOR DEFENDANT-RESPONDENT KMART CORPORATION.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRIAN J. BUTLER OF COUNSEL), FOR DEFENDANT-RESPONDENT CAYUGA COMMUNITY COLLEGE.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered June 14, 2018. The order, among other things, denied those parts of plaintiff’s motion to partially discontinue this action solely as against defendants Kmart Corporation and Cayuga Community College and to amend and modify the judgment of foreclosure and sale by removing Kmart Corporation and Cayuga Community College as defendants.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties,

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

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1185
CA 19-00993
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR THE REGISTERED HOLDERS OF BANC OF AMERICA
COMMERCIAL MORTGAGE INC., COMMERCIAL MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2006-2,
ACTING BY AND THROUGH ITS SPECIAL SERVICER
C-III ASSET MANAGEMENT LLC, PLAINTIFF-APPELLANT,

V ORDER

CCCF RIVER GLEN HOLDINGS, INC., KMART CORPORATION,
CAYUGA COMMUNITY COLLEGE, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

KILPATRICK TOWNSEND & STOCKTON LLP, NEW YORK CITY (KEITH M. BRANDOFINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (ANTHONY R. HANLEY OF COUNSEL), FOR DEFENDANT-RESPONDENT CCCF RIVER GLEN HOLDINGS, INC.

J. GREENBERGER, PLLC, NEW YORK CITY (JORDAN GREENBERGER OF COUNSEL), FOR DEFENDANT-RESPONDENT KMART CORPORATION.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRIAN J. BUTLER OF COUNSEL), FOR DEFENDANT-RESPONDENT CAYUGA COMMUNITY COLLEGE.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered October 29, 2018. The order granted plaintiff's motion for leave to reargue and, upon reargument, adhered to a prior order.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties,

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

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1189
CA 19-00420
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

TRM ARCHITECTURE, DESIGN AND PLANNING, P.C.,
PLAINTIFF-APPELLANT,

V ORDER

DESTINY USA HOLDINGS, LLC, AND CITY OF SYRACUSE
INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (MARK C. DAVIS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, SYRACUSE (MICHAEL J. BALESTRA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered December 13, 2018. The order, among other things, granted the motion of defendants for summary judgment dismissing 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: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1190
CA 19-00421
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

TRM ARCHITECTURE, DESIGN AND PLANNING, P.C.,
PLAINTIFF-APPELLANT,

V ORDER

DESTINY USA HOLDINGS, LLC, AND CITY OF SYRACUSE
INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (MARK C. DAVIS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, SYRACUSE (MICHAEL J. BALESTRA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered January 4, 2019. The order cancelled and vacated a bond filed by defendants on February 10, 2015.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as abandoned (*see Matter of Trombley v Payne* [appeal No. 2], 144 AD3d 1551, 1552 [4th Dept 2016]; *Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1191
TP 19-01327
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, AND TROUTMAN, JJ.

IN THE MATTER OF ESTATE OF VIMAL SABHARWAL,
JENNIFER FLANNERY, ERIE COUNTY ADMINISTRATOR,
AS ADMINISTRATOR, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, AND
AL DIRSCHBERGER, COMMISSIONER, ERIE COUNTY
DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

BROWN CHIARI LLP, BUFFALO (JEFFREY M. SHALKE OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT NEW YORK STATE DEPARTMENT OF HEALTH.

BONNIE A. MCLAUGHLIN, BUFFALO, FOR RESPONDENT AL DIRSCHBERGER, COMMISSIONER, ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES.

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 [Diane Y. Devlin, J.], entered October 15, 2018) to review a determination of respondent New York State Department of Health. The determination affirmed in part a determination of the Erie County Department of Social Services that Vimal Sabharwal was not eligible for Medicaid for a certain period.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul that part of a determination made after a fair hearing that decedent was ineligible for Medicaid for a period of 22.327 months on the ground that she had made uncompensated transfers of assets during the look-back period (*see* 42 USC § 1396p [c] [1] [B]; Social Services Law § 366 [5] [a], [e] [1] [vi]). Petitioner failed to preserve for our review her contention that the transferred real property was an exempt homestead because the issue was not raised at the fair hearing (*see Matter of Sarcinelli v New York State Dept. of Motor Vehs.*, 166 AD3d 1594, 1595 [4th Dept 2018]; *Matter of Schaffer v Zucker*, 165 AD3d 1266, 1267 [2d Dept 2018]). Furthermore, contrary to petitioner's contention, we conclude that substantial evidence supports the determination that decedent failed to make a “satisfactory showing” that “the assets were transferred exclusively for a purpose other than to qualify for medical assistance” (§ 366 [5] [e] [4] [iii] [B]; *see generally Matter of Peterson v Daines*, 77 AD3d 1391, 1392-1393 [4th Dept 2010]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1192
KA 17-00748
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GABRIELE BALLOWE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO 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 December 20, 2016. The appeal was held by this Court by order entered June 7, 2019, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (173 AD3d 1666 [4th Dept 2019]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of leaving the scene of an incident resulting in serious injury without reporting (Vehicle and Traffic Law § 600 [2] [a], [c] [i]). We previously held this case, reserved decision, and remitted the matter to Supreme Court "for a determination whether the People, in fact, presented new evidence to the second grand jury and, if not, whether dismissal of the indictment is warranted on that ground" (*People v Ballowe*, 173 AD3d 1666, 1668 [4th Dept 2019]). We now affirm.

Upon remittal, the court determined that the People satisfied their obligation to present new evidence to the second grand jury (*see People v Dykes*, 86 AD2d 191, 195 [2d Dept 1982]; *People v Martin*, 71 AD2d 928, 929 [2d Dept 1979]). Dismissal of the indictment thus is not warranted on that ground.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1194
KA 17-01353
PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW LOGAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Robert L. Bauer, A.J.), rendered May 15, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1195
KA 14-01414
PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. COLON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered September 3, 2013. The judgment convicted defendant upon his plea of guilty of criminal sexual act in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [3]), defendant contends that his waiver of the right to appeal is not valid. We agree inasmuch as “the purported waiver was obtained at sentencing, and there is no indication that Supreme Court obtained a knowing and voluntary waiver of that right at the time of the plea” (*People v Sims*, 129 AD3d 1509, 1510 [4th Dept 2015], *lv denied* 26 NY3d 935 [2015]). We nevertheless reject defendant’s contention that his sentence is unduly harsh and severe.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1197
KA 17-00611
PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRISTAN M. MAYES, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered March 1, 2017. The judgment convicted defendant upon a plea of guilty of predatory sexual assault against a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of predatory sexual assault against a child (Penal Law § 130.96). Defendant failed to preserve for our review his contention that the plea was not knowingly, intelligently, and voluntarily entered because he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Jones*, 175 AD3d 1845, 1845-1846 [4th Dept 2019]; *People v Rojas*, 147 AD3d 1535, 1536 [4th Dept 2017], *lv denied* 29 NY3d 1036 [2017]). "[T]his case does not fall within the rare exception to the preservation requirement because nothing defendant said during the plea colloquy or the sentencing hearing 'clearly cast[] significant doubt upon the defendant's guilt or otherwise call[ed] into question the voluntariness of the plea' " (*Jones*, 175 AD3d at 1846, quoting *People v Lopez*, 71 NY2d 662, 666 [1988]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Finally, the sentence is not unduly harsh or severe.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1201
KAH 19-00524
PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DANIEL SABINO, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered December 21, 2018 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: Petitioner appeals from a judgment denying his petition for a writ of habeas corpus. Because petitioner was released to parole supervision in October 2019, the appeal has been rendered moot (*see People ex rel. Luck v Squires*, 173 AD3d 1767, 1767 [4th Dept 2019]; *People ex rel. Valentin v Annucci*, 159 AD3d 1391, 1392 [4th Dept 2018], *lv denied* 31 NY3d 911 [2018]). We conclude that the exception to the mootness doctrine does not apply (*see People ex rel. Winters v Crowley*, 166 AD3d 1525, 1525 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1202
CAF 18-01722
PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF TONYA ANNMARIE SERNA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DWIGHT EDWARD JONES, JR., RESPONDENT-APPELLANT.

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

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered August 20, 2018 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 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 sole legal and physical custody of the subject children, with supervised visitation to the father.

The father contends that Family Court abused its discretion by precluding him from introducing evidence at the hearing as a sanction for his willful failure to respond to the mother's interrogatories. According to the father, the sanction prevented the court from fully exploring the issues affecting the children's best interests. We conclude that the father failed to preserve his contention for our review inasmuch as he did not object to the court's ruling or otherwise raise that contention at the hearing (*see Matter of Clark v Hawkins*, 140 AD3d 1753, 1754 [4th Dept 2016]; *see also Matter of Shepherd v Stocker*, 159 AD3d 1441, 1442 [4th Dept 2018]). In any event, we conclude that the contention is without merit. Under the circumstances of this case, the discovery sanction imposed did not "adversely affect the child[ren]'s right to have issues affecting [their] best interest[s] fully explored," including, as particularly relevant here, the father's history of domestic violence (*Matter of Stukes v Ryan*, 289 AD2d 623, 624 [3d Dept 2001]; *see Matter of Landrigen v Landrigen*, 173 AD2d 1011, 1012 [3d Dept 1991]).

Finally, we reject the father’s remaining contention for reasons stated in the decision at Family Court.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1215
KA 16-01905
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

CHARLES C. DEAN, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 21, 2016. The appeal was held by this Court by order entered February 1, 2019, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (169 AD3d 1414 [4th Dept 2019]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*) after a conviction of, inter alia, four counts of sodomy in the first degree. We previously held this case, reserved decision and remitted the matter to Supreme Court to comply with Correction Law § 168-n (3) by setting forth the findings of fact and conclusions of law upon which it based its determination (*People v Dean*, 169 AD3d 1414, 1415 [4th Dept 2019]). Upon remittal, the court held further proceedings and issued an order that fulfilled its obligation under Correction Law § 168-n (3).

Contrary to defendant’s contention, the court did not err in denying his request for a downward departure to a level two risk inasmuch as defendant “failed to establish by a preponderance of the evidence any ground for a downward departure from his risk level” (*People v Gillotti*, 119 AD3d 1390, 1391 [4th Dept 2014]).

Entered: December 20, 2019   Mark W. Bennett
Clerk of the Court

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

1219
KA 18-00615
PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAQUILL JONES, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered December 19, 2017. The judgment convicted defendant upon a plea of guilty of attempted robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]), defendant contends that his waiver of the right to appeal was not knowingly, intelligently, and voluntarily entered. We reject that contention (*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]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1220
KA 17-01807
PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICKEISHA S. LANE, DEFENDANT-APPELLANT.

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

MARK S. SINKIEWICZ, ACTING DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered September 26, 2016. The judgment convicted defendant, upon her plea of guilty, of attempted promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [1]). We agree with defendant that her waiver of the right to appeal does not encompass her challenge to the severity of the sentence (*see People v Maracle*, 19 NY3d 925, 928 [2012]) inasmuch as County Court “failed to advise defendant during the course of the allocution that [she] was waiving [her] right to appeal any issue concerning the severity of the sentence” (*People v Cook*, 147 AD3d 1387, 1387 [4th Dept 2017], *lv denied* 29 NY3d 996 [2017]). Further, although defendant executed a written waiver of the right to appeal, there was no colloquy between the court and defendant regarding the written waiver to ensure that she read and understood it and that she was waiving her right to challenge the severity of the sentence (*see People v Mack*, 124 AD3d 1362, 1363 [4th Dept 2015]). We nevertheless conclude that the negotiated sentence is not unduly harsh or severe.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1234.1
CAF 18-00908
PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF CHARLIE C.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

THOMAS C., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered April 23, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In these two related termination of parental rights proceedings pursuant to Social Services Law § 384-b, respondent father appeals from four separate orders entered April 23, 2018. In the orders in appeal Nos. 1 and 3, Family Court terminated the father's parental rights with respect to the two subject children. In the orders in appeal Nos. 2 and 4, the court freed the two children for adoption.

Initially, we note that the father's contention with respect to the court's May 26, 2017 order granting summary judgment in an abuse and neglect proceeding is not properly before us on any of these four appeals, inasmuch as the May 26, 2017 order was issued in a prior, separate proceeding (*see Matter of Kh'Niayah D. [Niani J.]*, 155 AD3d 1649, 1649-1650 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]; *Matter of Cornelius L.N. [Cornelius N.]*, 117 AD3d 1487, 1488 [4th Dept 2014], *lv denied* 24 NY3d 901 [2014]; *Matter of Ronald O.*, 43 AD3d 1351, 1351 [4th Dept 2007]). Similarly, we conclude that the father's contention with respect to alleged temporary orders of protection are not properly before us inasmuch as they too were issued in a prior proceeding (*see generally Kh'Niayah D.*, 155 AD3d at 1649-1650).

With respect to the four orders at issue in these appeals, we conclude that all four appeals must be dismissed. “It is incumbent upon an appellant to assemble a proper record, including the relevant documents that were before the lower court, and appeals will be dismissed when the record is incomplete” (*Matter of Pratt v Anthony*, 30 AD3d 708, 708 [3d Dept 2006]; *see Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]). Inasmuch as the father failed to include in the record on appeal the transcripts of the combined fact-finding and dispositional hearing, appeal Nos. 1 through 4 must be dismissed based on his failure to provide an adequate record (*see Mergl*, 19 AD3d at 1147; *see also Matter of Lopez v Lugo*, 115 AD3d 1237, 1237 [4th Dept 2014]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1234.2
CAF 18-00909
PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF CHARLIE C.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

THOMAS C., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered April 23, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order freed the subject child for adoption.

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

Same memorandum as in *Matter of Charlie C. (Thomas C.)* ([appeal No. 1] — AD3d — [Dec. 20, 2019] [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1234.3
CAF 18-00910
PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF CULLEN C.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

THOMAS C., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered April 23, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Same memorandum as in *Matter of Charlie C. (Thomas C.)* ([appeal No. 1] — AD3d — [Dec. 20, 2019] [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1234.4
CAF 18-00911
PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF CULLEN C.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

THOMAS C., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered April 23, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order freed the subject child for adoption.

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

Same memorandum as in *Matter of Charlie C. (Thomas C.)* ([appeal No. 1] — AD3d — [Dec. 20, 2019] [4th Dept 2019]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1236
KA 19-00107
PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUIS M. HILL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered May 4, 2018. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). Contrary to defendant's contention, his waiver of the right to appeal is valid (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Supreme Court engaged defendant in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Hicks*, 89 AD3d 1480, 1480 [4th Dept 2011], *lv denied* 18 NY3d 924 [2012] [internal quotation marks omitted]), and the record establishes that he "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Lopez*, 6 NY3d at 256). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of his sentence (*see id.* at 255-256).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1238
KA 18-00500
PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERICK MEIR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered October 11, 2017. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child and predatory sexual assault.

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 predatory sexual assault against a child (Penal Law § 130.96) and predatory sexual assault (§ 130.95 [3]), arising from defendant's sexual assault of a three-year-old child. Defendant contends that the conviction is not based on legally sufficient evidence and that the verdict is against the weight of the evidence because neither his statements to police nor the victim's unsworn testimony was corroborated. We conclude that defendant's contentions lack merit.

Defendant's statements and the unsworn testimony of the victim cross-corroborated each other (*see People v Lane*, 160 AD3d 1363, 1364 [4th Dept 2018]; *People v Bitting*, 224 AD2d 1012, 1013 [4th Dept 1996], *lv denied* 88 NY2d 845 [1996]). Moreover, the testimony from both the victim's pediatrician and aunt provided further corroboration. Thus, we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). 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 Bleakley*, 69 NY2d at 495; *Lane*, 160 AD3d at 1365).

We reject defendant's contention that Supreme Court erred in denying his motion to preclude the People’s expert witness from testifying regarding child sexual abuse accommodation syndrome (CSAAS). Such expert testimony has long been admissible to explain behavior of a victim that might be puzzling to a jury (*see People v Nicholson*, 26 NY3d 813, 828 [2016]; *People v Spicola*, 16 NY3d 441, 465 [2011], *cert denied* 565 US 942 [2011]). Here, the expert testimony was properly admitted to assist the jury in understanding the victim’s response to the sexual abuse and in assessing the victim’s credibility. Contrary to defendant’s contention, the expert did not exceed the bounds of what is permissible inasmuch as the expert’s testimony was “ ‘general in nature and [did] not constitute an opinion that [the] particular alleged victim [was] credible or that the charged crimes in fact occurred’ ” (*People v Graham*, 171 AD3d 1566, 1570 [4th Dept 2019], *lv denied* 33 NY3d 1104 [2019]). Thus, the court did not abuse its discretion in permitting that testimony (*see id.*; *cf. People v Ruiz*, 159 AD3d 1375, 1376 [4th Dept 2018]).

Contrary to defendant’s further contention, his sentence is not unduly harsh or severe. We have reviewed defendant’s remaining contentions and conclude that they do not require reversal or modification of the judgment.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1244
KA 17-02058
PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATIEF JACKSON, DEFENDANT-APPELLANT.

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

LATIEF JACKSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered September 8, 2017. The judgment convicted defendant after a nonjury trial of predatory sexual assault against a child.

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

Memorandum: Defendant appeals from a judgment convicting him after a nonjury trial of predatory sexual assault against a child (Penal Law § 130.96). We affirm.

We conclude that, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In the absence of any physical evidence of the crime, the case turned primarily on the credibility of the victim, and despite minor inconsistencies in her testimony, it was not “so inconsistent or unbelievable as to render it incredible as a matter of law” (*People v Lewis*, 129 AD3d 1546, 1548 [4th Dept 2015], *lv denied* 26 NY3d 969 [2015] [internal quotation marks omitted]). We afford great deference to County Court, which, as factfinder, had the “opportunity to view the witnesses, hear the testimony, and observe demeanor” (*Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that he was deprived of due process and a fair trial as a result of being handcuffed during a large portion of the trial (*see People v German*, 145 AD3d 1550, 1551 [4th Dept 2016], *lv denied* 28 NY3d 1184 [2017]), 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 conclude that the sentence is not unduly harsh or severe.

Finally, we have reviewed the contention in defendant’s pro se supplemental brief and conclude that it does not warrant reversal or modification of the judgment.

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1245
KA 17-01860
PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BERT P. STOCKING, DEFENDANT-APPELLANT.

BELLETIER LAW OFFICE, SYRACUSE (ANTHONY BELLETIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered August 17, 2016. The judgment revoked defendant’s sentence of probation and imposed a sentence of imprisonment.

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

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1246
CAF 18-01125
PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF NICOLE L. JOHNSTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TODD E. DICKES, RESPONDENT-RESPONDENT.

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

FITZGERALD MEDIATION PLLC, ROCHESTER (NICOLE A. FITZGERALD OF COUNSEL), FOR RESPONDENT-RESPONDENT.

ELIZABETH deV. MOELLER, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Julie A. Gordon, R.), entered February 5, 2018 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion to dismiss the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated and the matter is remitted to Family Court, Monroe County, for further proceedings on the petition.

Memorandum: In this proceeding pursuant to Family Court Act article 6, we agree with petitioner mother that Family Court erred in summarily granting respondent father's motion to dismiss her petition to relocate with the parties' child to the Honeoye Falls-Lima Central School District or Livingston County. A prior custody order entered upon the consent of the parties provided that the mother and the father had joint custody of the child with primary physical residence with the mother, and restricted the mother's residency to certain towns within Monroe County. "Generally, '[d]eterminations affecting custody and visitation should be made following a full evidentiary hearing' " (*Lauzonis v Lauzonis*, 120 AD3d 922, 923 [4th Dept 2014]; *see Matter of Naughton-General v Naughton*, 242 AD2d 937, 938 [4th Dept 1997]), and we conclude that the allegations in the mother's petition "established the need for a hearing on the issue whether [her] relocation is in the best interests of the child" (*Matter of Stevens v Stevens*, 286 AD2d 890, 890 [4th Dept 2001]; *see Liverani v Liverani*, 15 AD3d 858, 858-859 [4th Dept 2005]).

On a motion to dismiss a pleading pursuant to CPLR 3211 (a) (7), the court must give the pleading a liberal construction, accept the facts alleged therein as true, accord the nonmoving party the benefit of every favorable inference, and determine only whether the facts as alleged fit within a cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Matter of McBride v Springsteen-El*, 106 AD3d 1402, 1402 [3d Dept 2013]). The mother was not required to demonstrate a change of circumstances inasmuch as she sought permission to relocate with the subject child (*see Matter of Betts v Moore*, 175 AD3d 874, 874-875 [4th Dept 2019]; *Lauzonis*, 120 AD3d at 923; *Matter of Chancer v Stowell*, 5 AD3d 1082, 1083 [4th Dept 2004]). Further, the mother adequately alleged in her petition that relocation was in the best interests of the child inasmuch as she alleged that the cost of housing would be lower in Livingston County, that the child's maternal grandfather would be able to assist the mother with childcare upon her relocation allowing her to return to work, and that the relocation would not interfere with the father's visitation schedule. The court was therefore required to determine whether the proposed relocation was in the child's best interests by analyzing the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 739-741 [1996]; *see generally Matter of Adams v Bracci*, 91 AD3d 1046, 1046-1047 [3d Dept 2012], *lv denied* 18 NY3d 809 [2012]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1247
CAF 18-01670
PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF CARL B., JR.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CRYSTALE L., RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

ELIZABETH deV. MOELLER, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Stacey Romeo, J.), entered August 13, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: Respondent mother appeals from an order adjudicating her child to be permanently neglected and terminating her parental rights with respect to that child. The mother contends that a new fact-finding hearing is required because Family Court erred in admitting in evidence a report by an independent psychiatrist who examined the mother, and visitation notes prepared by the Society for the Protection of Children (SPC) that memorialized the mother’s visitation appointments with the child. We reject that contention. Even assuming, arguendo, that the court erred in admitting the documents in evidence, we conclude that “[a]ny error in the admission of [those documents] is harmless because the result reached herein would have been the same even had such [documents] been excluded” (*Matter of Tyler W. [Stacey S.]*, 121 AD3d 1572, 1572-1573 [4th Dept 2014] [internal quotation marks omitted]; *see Matter of Marino S*., 100 NY2d 361, 372 [2003], *cert denied* 540 US 1059 [2003]; *Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]). “There is no indication that the court considered, credited or relied upon inadmissible hearsay in reaching its determination” (*Matter of Merle C.C.*, 222 AD2d 1061, 1062 [4th Dept 1995], *lv denied* 88 NY2d 802 [1996]), including the psychiatrist’s report and the SPC notes at issue here (*cf. Matter of Chloe W. [Amy*

W.], 137 AD3d 1684, 1685 [4th Dept 2016]). In addition, even without reference to those documents, the clear and convincing proof presented at the fact-finding hearing established the mother's permanent neglect of the child (*see Matter of Chloe W. [Amy W.]*, 148 AD3d 1672, 1674 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]; *see also Matter of Ramel Anthony S. [Canita G.]*, 124 AD3d 445, 445 [1st Dept 2015]).

We further conclude that the court did not abuse its discretion in denying the mother's request for a suspended judgment. Contrary to the mother's contention, we conclude that "the record supports the court's determination that termination of [the mother's] parental rights is in the best interests of the child, and that a suspended judgment was not warranted under the circumstances inasmuch as any progress made by the mother prior to the dispositional determination was insufficient to warrant any further prolongation of the child's unsettled familial status" (*Matter of Kendalle K. [Corin K.]*, 144 AD3d 1670, 1672 [4th Dept 2016]; *see Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1627-1628 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]; *Matter of Valentina M.S. [Darrell W.]*, 154 AD3d 1309, 1311 [4th Dept 2017]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1255
CA 19-00763
PRESENT: WHALEN, P.J., SMITH, CURRAN, AND WINSLOW, JJ.

MICHAEL M., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AMY CUMMISKEY, JULIE CURTIS, MID-ERIE COUNSELING
AND TREATMENT SERVICES, KEN DUSZYNSKI, KEVIN
BURGOYNE, CALLEN FISHMAN, NAOMI J. FREEMAN,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

LOUIS ROSADO, BUFFALO, FOR PLAINTIFF-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AMY CUMMISKEY, KEVIN BURGOYNE, CALLEN FISHMAN, AND NAOMI J. FREEMAN.

BARCLAY DAMON LLP, ROCHESTER (SANJEEV DEVABHAKTHUNI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JULIE CURTIS, MID-ERIE COUNSELING AND TREATMENT SERVICES AND KEN DUSZYNSKI.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered September 24, 2018. The order granted the motion of defendants Amy Cummiskey, Kevin Burgoyne, Callen Fishman and Naomi J. Freeman and the cross motion of defendants Julie Curtis, Mid-Erie Counseling and Treatment Services and Ken Duszynski to dismiss the amended complaint against them.

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

Memorandum: Plaintiff is a sex offender who was civilly confined to a secure treatment facility pursuant to Mental Hygiene Law article 10. In December 2014, the Court of Appeals reversed the determination that plaintiff was a dangerous sex offender requiring confinement, and remitted the matter to Supreme Court for further proceedings (*Matter of State of New York v Michael M.*, 24 NY3d 649, 660 [2014]). Upon remittal, plaintiff was released from confinement, and he commenced this action on January 4, 2018, seeking damages arising from his allegedly unlawfully confinement. He appeals from an order granting the respective motion of defendants Amy Cummiskey, Kevin Burgoyne, Callen Fishman and Naomi J. Freeman and cross motion of defendants Julie Curtis, Mid-Erie Counseling and Treatment Services and Ken Duszynski to dismiss the amended complaint against them. We affirm.

Contrary to plaintiff’s contention, Supreme Court properly dismissed the cause of action for false imprisonment. That cause of action, which has a one-year statute of limitations (*see* CPLR 215 [3]), accrued when plaintiff was released from confinement on January 5, 2015 (*see Brownell v LeClaire*, 96 AD3d 1336, 1337 [3d Dept 2012]; *Dailey v Smiley*, 65 AD2d 915, 915 [4th Dept 1978]). Consequently, that cause of action was untimely commenced on January 4, 2018.

Plaintiff contended in the motion court that the remaining causes of action, all of which had either one-year or three-year statutes of limitations (*see generally* CPLR 214 [5]; 215 [3]; *Owens v Okure*, 488 US 235, 251 [1989]), accrued on December 17, 2014, and thus the court properly concluded that they were untimely as well. Plaintiff’s current contention that those causes of action accrued at a later date within the three-year limitations period is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [1994]). “ ‘An appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had those theories or questions been presented in the court of first instance’ ” (*Nichols v Diocese of Rochester* [appeal No. 2], 42 AD3d 903, 905 [4th Dept 2007]). Plaintiff’s additional contention that the limitations periods were tolled by CPLR 208 is also raised for the first time on appeal, and thus that contention is also not properly before us (*see Ciesinski*, 202 AD2d at 985).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1260
KA 18-00848
PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COLIN BUCKLAND, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 26, 2018. The judgment convicted defendant upon a plea of guilty of attempted robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1261
KA 15-00359
PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. WALTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 11, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree (two counts), criminal possession of a weapon in the second degree (four counts) and prohibited use of weapons.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [1]), four counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), and one count of prohibited use of weapons (§ 265.35 [3]), arising from three separate incidents. We reject the contention of defendant that Supreme Court erred in refusing to sever the counts related to the first incident from the counts related to the third incident. The relevant offenses were joinable under CPL 200.20 (2) (b) and thus, once they were properly joined, the court lacked the statutory authority to sever (*see People v Murphy*, 28 AD3d 1096, 1097 [4th Dept 2006], *lv denied* 7 NY3d 760 [2006]; *People v Cornell*, 17 AD3d 1010, 1011 [4th Dept 2005], *lv denied* 5 NY3d 805 [2005]; *People v Alston*, 264 AD2d 685, 686 [1st Dept 1999], *lv denied* 94 NY2d 876 [2000]).

We further reject defendant's contention that he was deprived of a fair trial when the court admitted allegedly inflammatory photographic and video evidence. Such evidence "should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant" (*People v Pobliner*, 32 NY2d 356, 370 [1973], *rearg denied* 33 NY2d 657 [1973], *cert denied* 416 US 905 [1974]; *see People v Stevens*, 76 NY2d 833, 835 [1990]). When allegedly inflammatory photographs and videos are relevant to a material issue at trial, the court has broad discretion to determine whether their probative value outweighs any prejudice to the defendant (*see Stevens*, 76 NY2d at 835). Here, the disputed evidence was relevant to material issues in the case, and the court did not abuse its discretion in admitting it (*see generally People v Webb*, 60 AD3d 1291, 1293 [4th Dept 2009], *lv denied* 12 NY3d 930 [2009]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1263
KA 17-02219
PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICIA BRAND, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP 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 (Sheila A. DiTullio, J.), rendered October 12, 2017. The judgment convicted defendant upon a plea of guilty of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a plea of guilty of assault in the second degree (Penal Law § 120.05 [3]). Contrary to her contention, she knowingly, intelligently, and voluntarily waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). The record of the plea proceeding establishes that County Court engaged her in “an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice” (*People v Steinbrecher*, 169 AD3d 1462, 1463 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019] [internal quotation marks omitted]). Defendant’s valid waiver of the right to appeal encompasses her challenge to the severity of her sentence (*see Lopez*, 6 NY3d at 255-256).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1266
KA 18-01551
PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT CATALANO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 May 8, 2018. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that he was entitled to a downward departure from his presumptive risk level. Defendant is correct that "[a] court may choose to downwardly depart from the presumptive risk assessment level in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points [for sexual contact with the victim, risk factor 2] results in an over-assessment of the offender's risk to public safety" (*People v Cathy*, 134 AD3d 1579, 1580 [4th Dept 2015] [internal quotation marks omitted]). Here, however, a downward departure is not warranted given the circumstances surrounding the sexual assault, the age disparity between the 25-year-old defendant and the two 15-year-old victims, the absence of any evidence supporting defendant's allegation that the victims willingly engaged in sexual activity with him, and the fact that defendant is only five points below the threshold for a level three risk (*see People v Fryer*, 101 AD3d 835, 836 [2d Dept 2012], *lv denied* 20 NY3d 859 [2013]; *cf. People v George*, 141 AD3d 1177, 1178 [4th Dept 2016]; *People v Carter*, 138 AD3d 706, 707-708 [2d Dept 2016]; *see generally People v Love*, 175 AD3d 1835, 1835 [4th Dept

2019]; *Cathy*, 134 AD3d at 1580).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1268
KA 18-00446
PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAEKWON THOMAS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY 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 (Thomas P. Franczyk, J.), rendered December 4, 2017. The judgment convicted defendant upon a plea of guilty of robbery in the first degree (three counts), robbery in the second degree, and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of, inter alia, robbery in the first degree (Penal Law § 160.15 [3]). Contrary to defendant's contention, " 'the waiver of the right to appeal was not rendered invalid based on [County Court's] failure to require [him] to articulate the waiver in his own words' " (*People v Scheifla*, 166 AD3d 1531, 1532 [4th Dept 2018], *lv denied* 32 NY3d 1177 [2019]; *see People v Bridges*, 144 AD3d 1582, 1582-1583 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]). Moreover, the lack of a written waiver "is of no moment where, as here, the oral waiver was adequate" (*People v Smith*, 164 AD3d 1621, 1621 [4th Dept 2018], *lv denied* 32 NY3d 1177 [2019]). Contrary to defendant's further contention, his valid waiver of the right to appeal encompasses his challenges to the suppression ruling (*see People v Kemp*, 94 NY2d 831, 833 [1999]; *People v Wright*, 158 AD3d 1068, 1069 [4th Dept 2018], *lv denied* 31 NY3d 1019 [2018]), and to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *Scheifla*, 166 AD3d at 1532).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1270
CAF 18-01599
PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF JEREMIAH A. NICKERSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

VICTORIA A. WOODS, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Onondaga County (William W. Rose, R.), entered August 6, 2018 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.

Memorandum: Respondent mother appeals from an order, inter alia, awarding petitioner father sole legal and physical custody of the subject child. We reject the contention of the mother that Family Court abused its discretion in refusing to permit her to testify by telephone from another state during the hearing on the father’s custody petition. Under the circumstances of this case, in which the mother absconded with the child to Georgia without the father’s knowledge or permission, we find no abuse of discretion (*see Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477-1478 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]). Contrary to the mother’s further contention, there is a sound and substantial basis in the record supporting the court’s determination limiting her to supervised visitation in the county of the father’s residence (*see Matter of Shaffer v Woodworth*, 175 AD3d 1803, 1804 [4th Dept 2019]; *Matter of Campbell v January*, 114 AD3d 1176, 1177 [4th Dept 2014], *lv denied* 23 NY3d 902 [2014]).

We reject the mother’s contention that the court erred in awarding custody to the father in the absence of an order of filiation. Under the circumstances here, the court properly determined that the mother was judicially estopped from denying the father’s paternity (*see Matter of Mukuralinda v Kingombe*, 100 AD3d 1431, 1432 [4th Dept 2012]).

The mother's contention that the child was deprived of effective assistance of counsel because the Attorney for the Child improperly substituted her judgment for the wishes of the child is not preserved for our review (*see Matter of Audreanna VV. v Nancy WW.*, 158 AD3d 1007, 1011 [3d Dept 2018]; *Matter of Emmanuel J. [Maximus L.]*, 149 AD3d 1292, 1297 [3d Dept 2017]) and, in any event, it is without merit. Finally, the mother's remaining contention is likewise not preserved for our review (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1279
CA 19-00710
PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

GEORGE A. WENTWORTH AND JAYNE M. WENTWORTH,
PLAINTIFFS-APPELLANTS,

V ORDER

JANICE M. ATWELL, DEFENDANT-RESPONDENT.

JANICE M. ATWELL, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

ROBERT FEURY AND SANDRA L. FEURY, THIRD-PARTY
DEFENDANTS-RESPONDENTS.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

FELT EVANS, LLP, CLINTON (ANTHONY G. HALLAK OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-RESPONDENT.

LAW OFFICES OF GEORGE F. ANEY, HERKIMER (FRANK L. MADIA OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Herkimer County (Charles C. Merrell, J.), dated October 5, 2018. The order granted defendant’s motion for summary judgment dismissing the complaint and for leave to amend the answer to add a counterclaim.

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: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1285
KAH 18-01661
PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
CHARLES B., PETITIONER-APPELLANT,

V ORDER

DEBORAH MCCULLOCH, EXECUTIVE DIRECTOR OF CENTRAL
NEW YORK PSYCHIATRIC CENTER (“CNYPC”),
RESPONDENT-RESPONDENT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (David A. Murad, J.), entered April 26, 2018 in a habeas corpus proceeding. The judgment, among other things, denied petitioner’s application to proceed as a poor person and directed the dismissal of the petition if petitioner failed to reimburse the Oneida County Clerk the filing fees for the habeas corpus petition within 120 days.

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: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1302
KA 17-02145
PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HAROLD OLIVER, DEFENDANT-APPELLANT.

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

MARK S. SINKIEWICZ, ACTING DISTRICT ATTORNEY, WATERLOO (MELISSA K. SWARTZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered August 28, 2017. The judgment convicted defendant upon a plea of guilty of forgery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of forgery in the second degree (Penal Law § 170.10 [1]). Contrary to defendant's contention, we conclude that his waiver of the right to appeal is valid (*see People v Yates*, 173 AD3d 1849, 1849 [4th Dept 2019]; *People v Smith*, 164 AD3d 1621, 1621-1622 [4th Dept 2018], *lv denied* 32 NY3d 1177 [2019]). Here, County Court engaged defendant in a sufficient colloquy to ascertain that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*see People v Lopez*, 6 NY3d 248, 256 [2006]).

We further conclude that, "[a]lthough a valid waiver of the right to appeal would not preclude defendant's challenge to the voluntariness of his plea, defendant failed to preserve that challenge for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction" (*People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *see People v Cruz*, 81 AD3d 1300, 1301 [4th Dept 2011], *lv denied* 17 NY3d 793 [2011]). Contrary to defendant's contention, this is not the "rare case in which the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon [his] guilt or otherwise calls into question the voluntariness of the plea," and thus the exception to the preservation rule does not apply (*Mobayed*, 158 AD3d at 1222 [internal quotation marks omitted]; *see generally People v Lopez*, 71 NY2d 662, 666 [1988]). Insofar as defendant also contests the factual sufficiency of the plea colloquy, that contention is encompassed by his valid waiver of the right to appeal (*see People v Oswold*, 151 AD3d 1756, 1756 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]).

Finally, defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1303
KA 15-01411
PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BILLY J. RIVERA, DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 9, 2015. The judgment convicted defendant upon a plea of guilty of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, Supreme Court "did not abuse its discretion in denying defendant's motion to withdraw the plea on the ground of coercion without conducting a hearing inasmuch as the record is devoid of a genuine question of fact as to the plea's voluntariness" (*People v Ivey*, 98 AD3d 1230, 1231 [4th Dept 2012], *lv denied* 20 NY3d 1012 [2013] [internal quotation marks omitted]).

Defendant's further contention that defense counsel was ineffective because he coerced defendant into pleading guilty is belied by defendant's statements during the plea colloquy (*see People v Dale*, 142 AD3d 1287, 1289 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]; *see also People v Newkirk*, 133 AD3d 1364, 1364 [4th Dept 2015], *lv denied* 26 NY3d 1148 [2016]). Moreover, defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effective assistance of [defense] counsel" (*People v Days*, 150 AD3d 1622, 1625 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017] [internal quotation marks omitted]). To the extent that defendant contends that certain conversations and interactions with defense counsel gave rise to ineffective assistance of counsel and also established that his plea was involuntary, such contentions "are based on matters outside the record and must therefore be raised by way of a motion pursuant to CPL article 440" (*Dale*, 142 AD3d at 1290 [internal quotation marks omitted]; *see People v Spoor*, 148 AD3d 1795, 1797 [4th Dept 2017], *lv denied* 29 NY3d 1134 [2017]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1304
KA 15-00358
PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARIO ALVERADO, ALSO KNOWN AS MARIO
ALVERADO-MATEO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered February 10, 2015. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and sodomy in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of rape in the first degree (Penal Law § 130.35 [1]) and sodomy in the first degree (former § 130.50 [1]), defendant contends that he was denied effective assistance of counsel as a result of defense counsel’s failure to make a motion to dismiss the indictment as time-barred (*see* CPL 30.10 [2] [former (a)], [b]). The record on appeal, however, “is inadequate to enable us to determine whether such a motion would have been successful and whether defense counsel’s failure to make that motion deprived defendant of meaningful representation” (*People v Youngs*, 101 AD3d 1589, 1589 [4th Dept 2012], *lv denied* 20 NY3d 1105 [2013]). Thus, we conclude that “defendant’s contention is appropriately raised by way of a motion pursuant to CPL article 440” (*id*.).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1306
KA 17-01376
PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

JAMES WHITFIELD, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, 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 (John L. Michalski, A.J.), rendered July 12, 2017. The judgment convicted defendant upon his plea of guilty of attempted burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20), defendant contends that his plea was not knowingly, intelligently, or voluntarily entered. We affirm. Although that contention survives the waiver of the right to appeal (*see People v Reinard*, 134 AD3d 1407, 1408 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* — US —, 137 S Ct 392 [2016]; *People v Guantero*, 100 AD3d 1386, 1387 [4th Dept 2012], *lv denied* 21 NY3d 1004 [2013]), defendant failed to preserve his contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Morrow*, 167 AD3d 1516, 1517 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]; *People v Sheppard*, 149 AD3d 1569, 1569 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]). Furthermore, this case does not fall within the rare exception to the preservation doctrine inasmuch as nothing in the plea colloquy “casts significant doubt upon the defendant’s guilt or otherwise calls into question the voluntariness of the plea” (*People v Lopez*, 71 NY2d 662, 666 [1988]; *see Sheppard*, 149 AD3d at 1569).

Entered: December 20, 2019   Mark W. Bennett
                                                             Clerk of the Court

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

1309
KA 14-01614
PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE LAWHORN, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered June 2, 2014. The judgment convicted defendant upon a jury verdict of robbery in the first degree and robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts one and two of the indictment in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' " at the alleged errors asserted on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Cahoon*, 176 AD3d 1610, 1611 [4th Dept 2019]; *People v Boyd*, 153 AD3d 1608, 1609 [4th Dept 2017], *lv denied* 30 NY3d 1103 [2018]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crimes proved beyond a reasonable doubt (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]). Contrary to defendant's further contention, Supreme Court properly refused to suppress evidence recovered during a search of defendant's vehicle (*see People v Arroyo*, 167 AD3d 1537, 1538 [4th Dept 2018], *lv denied* 33 NY3d 945 [2019]; *see generally People v Garcia*, 20 NY3d 317, 322-323 [2012]; *People v De Bour*, 40 NY2d 210, 222-223 [1976]).

However, as the People correctly concede, the court committed reversible error when it "negotiated and entered into a [plea] agreement with a codefendant[,] requiring that individual to testify against defendant in exchange for a more favorable sentence" (*People v Towns*, 33 NY3d 326, 328 [2019]). Here, "by assuming the function of an interested party and deviating from its own role as a neutral arbiter, the trial court denied defendant his due process right to '[a] fair trial in a fair tribunal' " (*id.* at 333). We therefore reverse the judgment and grant a new trial before a different justice on counts one and two of the indictment (*see id*.; *see also People v Warren*, 100 AD3d 1399, 1401 [4th Dept 2012]; *People v Koberstein*, 216 AD2d 868, 868 [4th Dept 1995]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

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

1314
CA 19-01154
PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

JEFF OPDERBECK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PATRICIA BUSH AND RON BUSH,
DEFENDANTS-RESPONDENTS.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR LLP, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered February 6, 2019. The order, insofar as appealed from, granted that part of the motion of defendants seeking summary judgment dismissing the first cause of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, and the first cause of action is reinstated.

Memorandum: Plaintiff, a delivery employee of UPS, commenced this action seeking damages for injuries he allegedly sustained when he was bitten on the wrist by defendants’ dog while delivering a package to their residence. Supreme Court granted defendants’ motion for summary judgment dismissing the complaint. As limited by his brief, plaintiff contends that the court erred in granting the motion with respect to the first cause of action, for strict liability based on the dog’s vicious propensities. We agree with plaintiff and therefore reverse the order insofar as appealed from.

We conclude that defendants failed to meet their initial burden of establishing that they neither knew nor should have known that the dog had any vicious propensities (*see Young v Grizanti*, 164 AD3d 1661, 1662 [4th Dept 2018]). In support of their motion, defendants submitted their deposition testimony. Defendant Ron Bush admitted at his deposition that defendants had purchased the dog in part for protection and that he considered a dog’s bark to act like an “alarm.” Moreover, defendant Patricia Bush testified that, when the dog was running toward plaintiff at the time of the incident, she directed plaintiff to “[s]tand still.” Both defendants admitted that there were three “Beware of Dog” signs posted on their premises. Thus, taken together, defendants’ own submissions raise a triable issue of fact whether defendants had prior knowledge of the dog’s vicious propensities (*see generally Frantz v McGonagle*, 242 AD2d 888, 888 [4th Dept 1997]).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court

MOTION NOS. (296-297/13) KA 11-01643. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD A. SAID, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 11-01644. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD A. SAID, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, TROUTMAN, AND WINSLOW, JJ. (Filed Dec. 20, 2019.)

MOTION NO. (1025/16) KA 14-01504. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RAYSHAWN BETHANY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND CURRAN, JJ. (Filed Dec. 20, 2019.)

MOTION NO. (221/18) KA 12-02145. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEFFREY J. TERBORG, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed Dec. 20, 2019.)

MOTION NO. (327/18) CA 17-01674. -- WILMINGTON SAVINGS FUND SOCIETY, FSB, DOING BUSINESS AS CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST, PLAINTIFF-APPELLANT, V STEVEN E. GUSTAFSON, PAM L. GUSTAFSON, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. -- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ. (Filed Dec. 20, 2019.)

MOTION NO. (370/18) KA 16-00620. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVID M. CAREY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ. (Filed Dec. 20, 2019.)

MOTION NO. (535/19) CA 18-02063. -- RODNEY BARBER, PLAINTIFF-RESPONDENT, V CHARLES SORCE, ET AL., DEFENDANTS, AND VICTOR J. ANZIANO, DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND WINSLOW, JJ. (Filed Dec. 20, 2019.)

MOTION NO. (701/19) CA 18-00550. -- THOMAS H. O’NEILL, JR., PLAINTIFF-APPELLANT-RESPONDENT, V ROSE R. O’NEILL, DEFENDANT-RESPONDENT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ. (Filed Dec. 20, 2019.)

MOTION NO. (823/19) CA 18-01281. -- IN THE MATTER OF BRIAN BROWDER, PETITIONER-APPELLANT, V NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, TROUTMAN, AND WINSLOW, JJ. (Filed Dec. 20, 2019.)

MOTION NO. (896/19) CA 19-00452. -- MICHELE GENTILE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF JESSICA N. GENTILE, DECEASED, PLAINTIFF-RESPONDENT, V MATTHEW MALENICK, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND TROUTMAN, JJ. (Filed Dec. 20, 2019.)

KA 17-01338. -- THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT, V JALEN EVERETT, DEFENDANT-RESPONDENT. Motion to dismiss granted. Memorandum: The matter is remitted to Monroe County Court to vacate the judgment of conviction and dismiss the indictment (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Dec. 20, 2019.)

KA 19-01598. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KAAZIM F. FREEMAN, DEFENDANT-APPELLANT. Motion to dismiss granted. Memorandum: The matter is remitted to Supreme Court, Monroe County, to vacate the judgment of conviction and dismiss the indictment (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Dec. 20, 2019.)