SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 13, 2020

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. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED MARCH 13, 2020

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

913

KA 16-02024

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKIE R. SCOTT, ALSO KNOWN AS "STEPHAN SUMPSSTER," DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), dated August 29, 2016. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the order so appealed from is reversed on the law and the matter is remitted to Supreme Court, Erie County, for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals from an order that summarily denied his CPL 440.10 motion to vacate the judgment convicting him following a jury trial of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). On his direct appeal from the judgment, defendant contended, among other things, that his trial attorney was ineffective for failing to call at trial an alibi witness who, according to defendant, would have testified that defendant was with her in North Carolina at the time the murder was committed in Buffalo. Although we affirmed the judgment, we stated that defendant's claim of ineffective assistance of counsel was "based on matters outside the record on appeal, 'and thus the proper procedural vehicle for raising that contention is by way of a motion pursuant to CPL 440.10' " (*People v Scott*, 107 AD3d 1635, 1637 [4th Dept 2013], *lv denied* 21 NY3d 1077 [2013]).

Defendant thereafter filed the instant CPL article 440 motion, submitting in support thereof an affidavit from a second potential alibi witness in which she stated under oath that she informed defendant's former attorney at defendant's arraignment that defendant had been in North Carolina with her and his then-girlfriend during the

weeks before and after the murder. The alibi witness further stated that she and defendant's former girlfriend were present at the courthouse during defendant's trial and were prepared to testify on his behalf, yet they were never called as witnesses. According to the alibi witness, defendant's attorney told them that they could not be present in the courtroom because they might be called as witnesses. Based on the affidavit, defendant requested a hearing on his motion.

In an affidavit opposing the motion, the People did not contest that defendant was entitled to a hearing based on the alibi witness's affidavit and stated that "defendant has raised an issue of fact as to whether [the alibi witness] was available to testify . . . on his behalf and had favorable testimony to give." The People further stated that defendant bore the burden at the hearing of establishing "(1) that the witness had material, favorable testimony to give, (2) an absence of a legitimate reason for counsel's choice not to call her; and (3) that the failure to call her, in and of itself, rendered counsel's representation less than meaningful." The People asserted that defendant would not be able to meet his burden at the hearing.

Supreme Court nevertheless denied defendant's motion without a hearing, noting that defendant failed to provide "an affidavit from his former attorney attesting to the reasons why these witnesses were not called." The court also stated that defendant "does not allege that he was able to provide to his attorney tangible and credible proof, beyond the proposed testimony of these two witnesses, of his whereabouts at the time of the killing other than at the scene of the crime." We conclude that the court erred in summarily denying the motion.

"It is well established that 'the failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel' " (*People v Dombrowski*, 87 AD3d 1267, 1268 [4th Dept 2011]; *see People v Mosley*, 56 AD3d 1140, 1140-1141 [4th Dept 2008]). Contrary to the court's determination, a "defendant's failure to submit an affidavit from trial counsel is not fatal to [a CPL 440.10] motion" (*People v Washington*, 128 AD3d 1397, 1399 [4th Dept 2015]; *see People v Campbell*, 81 AD3d 1251, 1251-1252 [4th Dept 2011]). Where, as here, the defendant's " 'application is adverse and hostile to his [or her] trial attorney,' it 'is wasteful and unnecessary' to require the defendant to secure an affidavit from counsel, or to explain his [or her] failure to do so" (*People v Bennett*, 139 AD3d 1350, 1351-1352 [4th Dept 2016]; *see People v Pinto*, 133 AD3d 787, 790 [2d Dept 2015], *lv denied* 27 NY3d 1004 [2016]; *People v Stevens*, 64 AD3d 1051, 1053 n [3d Dept 2009], *lv denied* 13 NY3d 839 [2009]). Moreover, to be entitled to a hearing, a defendant is not required to submit with his or her motion evidence corroborating the alibi witness's affidavit (*see generally* CPL 440.30 [1] [a]). Although the lack of corroboration is a factor the court may consider at a hearing, it is not a basis for denying the motion summarily.

While a hearing may ultimately reveal that there was a strategic or legitimate reason for defense counsel's determination not to call the purported alibi witnesses (*see People v Pottinger*, 156 AD3d 1379,

1380 [4th Dept 2017]; *People v Conway*, 118 AD3d 1290, 1291 [4th Dept 2014]), we agree with defendant that "his submissions 'support[] his contention that he was denied effective assistance of counsel . . . and raise[] a factual issue that requires a hearing' " (*People v Frazier*, 87 AD3d 1350, 1351 [4th Dept 2011]; *see Conway*, 118 AD3d at 1291). We thus reverse the order and remit the matter to Supreme Court to conduct a hearing pursuant to CPL 440.30 (5) on defendant's claim of ineffective assistance of counsel.

Finally, we note that defendant's contention regarding defense counsel's failure to file and serve a notice of alibi is not properly before us inasmuch as sufficient facts appear on the record of the proceedings underlying the judgment to have permitted review of the issue had defendant raised it on the prior appeal (*see* CPL 440.10 [2] [c]).

All concur except WINSLOW, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent in part. Although I agree with the majority that defendant's contention concerning defense counsel's alleged failure to file and serve a notice of alibi is not properly before us (*see* CPL 440.10 [2] [c]), I disagree with the conclusion of the majority that defendant's submissions on his CPL 440.10 motion raise a factual issue that requires a hearing on defendant's claim of ineffective assistance of counsel. In my view, defendant's submissions fail to "show that the nonrecord facts sought to be established are material and would entitle him to relief" (*People v Satterfield*, 66 NY2d 796, 799 [1985]). Thus, I conclude that a hearing regarding defense counsel's failure to present the testimony of alibi witnesses is unnecessary, and I would affirm Supreme Court's order denying defendant's motion.

I recognize that "the failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel" (*People v Young*, 167 AD3d 1448, 1449 [4th Dept 2018], *lv denied* 33 NY3d 1036 [2019] [internal quotation marks omitted]). But an attorney also may be deemed ineffective for presenting alibi witnesses who give flawed or unsound testimony (*see People v Jarvis*, 113 AD3d 1058, 1060-1061 [4th Dept 2014], *affd* 25 NY3d 968 [2015]). Thus, a decision not to call an alibi witness is often the product of "sound trial strategy" rather than ineffectiveness (*People v Smith [William]*, 115 AD2d 304, 304 [4th Dept 1985]).

Although the Court of Appeals and this Court have encouraged the factual development of ineffective assistance claims by way of CPL 440.10 motions (*see e.g. People v Konstantinides*, 14 NY3d 1, 12 [2009]; *People v Washington*, 39 AD3d 1228, 1230 [4th Dept 2007], *lv denied* 9 NY3d 870 [2007]), a hearing to develop additional background facts is not "invariably necessary," and a moving defendant "must show that the nonrecord facts sought to be established [at a hearing] are material and would entitle him [or her] to relief" (*Satterfield*, 66 NY2d at 799).

Here, during jury selection, defense counsel alerted the court that defendant had informed him of the existence of a potential alibi

witness. Defense counsel advised the court that his investigator was seeking evidence to corroborate defendant's belated claim that he was out of state with his girlfriend when the homicide occurred. Defense counsel further indicated to the court that he did not anticipate that it would be part of his trial strategy to call the alibi witness and that he would do so only if he and defendant agreed and deemed it to be necessary. Ultimately, defense counsel did not present alibi evidence. The People presented the eyewitness testimony of an informant, a drug dealer, and the drug dealer's two brothers, one of whom testified against defendant under a cooperation agreement in a federal drug trafficking case and the other of whom had been unable to identify the shooter prior to trial. The People's case hinged on the credibility of those witnesses, and defense counsel logically attacked their credibility. Defendant did not challenge counsel's representation at any time prior to sentencing.

After his conviction, defendant moved to vacate the judgment of conviction pursuant to CPL 440.10 on the ground of ineffective assistance of counsel. The basis of the claimed ineffectiveness was, insofar as relevant here, defense counsel's failure to present the testimony of alibi witnesses, and thus the purpose of a hearing would be to probe defense counsel's reasons for not calling the alibi witnesses. Defense counsel's reasoning, however, is clear from defendant's motion submissions, which allege that defense counsel told defendant that he "figured the People's evidence wasn't strong enough to support a conviction, so [there was] no need for him to produce any witnesses."

Viewing the trial record and defendant's postjudgment submissions objectively, I conclude that defendant's right to effective assistance of counsel has been satisfied (*see Satterfield*, 66 NY2d at 799; *People v Baldi*, 54 NY2d 137, 146-147 [1981]). Defense counsel's strategic determination not to present alibi testimony was at most a tactical error, and it is not for this Court to second-guess whether the course chosen by defense counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation (*see Satterfield*, 66 NY2d at 799-800; *People v Delp*, 156 AD3d 1450, 1451 [4th Dept 2017], *lv denied* 31 NY3d 983 [2018]). "It is always easy with the advantage of hindsight to point out where trial counsel went awry in strategy. But trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness" (*Baldi*, 54 NY2d at 146), and counsel's subjective reasons for choosing to pursue one trial strategy over another are immaterial (*see Satterfield*, 66 NY2d at 799).

The motion court was familiar with defense counsel's representation of defendant, having presided over both of his trials and defendant's sentencing. Further, given the nature of the claimed ineffective assistance, defendant's motion could be determined without a hearing based on the trial record and defendant's submissions on the motion, and I thus conclude that the court did not err in summarily denying the motion (*see* CPL 440.30 [2]; *see also Baldi*, 54 NY2d at 146-147; *People v Kates*, 162 AD3d 1627, 1631-1632 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018], *reconsideration denied* 32 NY3d 1173

[2019]; *People v Stewart*, 295 AD2d 249, 249-250 [1st Dept 2002], *lv denied* 99 NY2d 540 [2002], *cert denied* 538 US 1003 [2003]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

915

CAF 18-00060

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

IN THE MATTER OF KENDALL STEENO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HILLARY SZYDLOWSKI, RESPONDENT-APPELLANT.

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

ROSS S. GELBER, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered December 11, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner and the subject child's maternal grandmother joint custody of the subject child.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to article 6 of the Family Court Act, respondent mother appeals from an order that awarded joint custody of the subject child to petitioner father and the child's maternal grandmother, along with parenting access for the mother "as the parties agree or stipulate and if there is no such agreement, then [Family Court] w[ould] make a determination of same after a hearing." Our dissenting colleague concludes that this order is not appealable as of right under Family Court Act § 1112 (a) because it is "non-final by its own terms inasmuch as it expressly reserves a non-ministerial issue—i.e., the mother's visitation—to a future stipulation or order" of the court. Assuming, arguendo, that the order on appeal is not final, we deem the mother's notice of appeal an application for leave to appeal from the "non-final" order and, in the exercise of our discretion, we grant leave to appeal (*see* Family Ct Act § 1112 [a]; *see generally Matter of Erie County Dept. of Social Servs. v Alvin E.*, 231 AD2d 960, 960-961 [4th Dept 1996]; *Matter of Erie County Dept. of Social Servs. v Abdallah*, 187 AD2d 967, 967-968 [4th Dept 1992]; *Matter of Stuckey v Stackpole*, 179 AD2d 1001, 1001 [4th Dept 1992]).

With respect to the merits of the mother's contentions regarding the court's award of joint custody to the father and the maternal

grandmother, we conclude that the court failed to set forth "those facts upon which the rights and liabilities of the parties depend" (*Matter of Valentin v Mendez*, 165 AD3d 1643, 1643-1644 [4th Dept 2018] [internal quotation marks omitted]), specifically its analysis of whether extraordinary circumstances existed to warrant an inquiry into whether an award of joint custody to the maternal grandmother was in the best interests of the child. " 'It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child' " (*Matter of Wolfford v Stephens*, 145 AD3d 1569, 1569-1570 [4th Dept 2016]). Thus, we agree with the mother that the court erred in not determining whether extraordinary circumstances existed before awarding joint custody to the maternal grandmother. The maternal grandmother here had the burden of establishing extraordinary circumstances, which remains the case "whether the nonparent is seeking sole custody or joint custody with one of the parents" (*Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1126 [4th Dept 2004]).

We conclude that " '[t]he absence of the required findings precludes proper appellate review' " (*Matter of Russell v Banfield*, 12 AD3d 1081, 1081 [4th Dept 2004]) and, under the circumstances of this case, we decline to exercise our power to review the record and make our own findings (*cf. Amanda B.*, 13 AD3d at 1127). We therefore hold the case, reserve decision, and remit the matter to Family Court to set forth its findings regarding extraordinary circumstances.

All concur except CURRAN, J., who dissents and votes to dismiss the appeal in the following memorandum: I respectfully dissent and would dismiss respondent mother's appeal because the order on appeal is not appealable as of right under the Family Court Act. Pursuant to Family Court Act § 1112 (a), an "appeal may be taken as of right from any order of disposition." It is well established that "[a]n 'order of disposition' is synonymous with a final order or judgment" (*Firestone v Firestone*, 44 AD2d 671, 672 [1st Dept 1974]; *see Ocasio v Ocasio*, 49 AD2d 801, 801 [4th Dept 1975], *appeal dismissed* 37 NY2d 921 [1975]; Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1112 at 254-255 [2010 ed]). Thus, "the scope of appeals which may be taken as of right under the Family Court Act provision is narrower than those authorized under" CPLR 5701 (a) (2) because the Family Court Act—subject to limited exceptions not relevant here—"requires finality as a prerequisite to appealability as of right" (*Ocasio*, 49 AD2d at 801).

Here, I conclude that the order on appeal is not "final." "[A] final order is one that . . . [, inter alia,] leaves nothing for further judicial action apart from mere ministerial matters" (*Town of Coeymans v Malphrus*, 252 AD2d 874, 875 [3d Dept 1998]; *see generally Abasciano v Dandrea*, 83 AD3d 1542, 1543 [4th Dept 2011]). The order

in this case is non-final by its own terms inasmuch as it expressly reserves a non-ministerial issue—i.e. the mother's visitation—to a future stipulation or order of Family Court. Indeed, while this appeal was pending, the court entered an order resolving issues concerning the mother's visitation with the child. In my view, it is that order which constituted the final order in this proceeding, and our review of the order on appeal would have to be predicated on the familiar principles of CPLR 5501 (a) (1)—made applicable here under Family Court Act § 1118—allowing this Court to review on appeal from a final order any non-final orders necessarily affecting the final order (*see Matter of James L.* [appeal No. 2], 74 AD3d 1775, 1775 [4th Dept 2010]; *Matter of Gentry v Littlewood*, 269 AD2d 846, 847 [4th Dept 2000]). I note that, although the subsequent order was entered upon her default, the mother could have appealed from it and sought review on that appeal of matters that were the "subject of contest," including the order resolving the custody dispute (*James v Powell*, 19 NY2d 249, 256 n 3 [1967], *rearg denied* 19 NY2d 862 [1967]).

By reviewing the merits of the mother's contention with respect to the order on appeal, the majority has tacitly concluded that it is a final order under Family Court Act § 1112, even though that paper " 'did not dispose of *all* the factual and legal issues raised in this action' " (*Abasciano*, 83 AD3d at 1544, quoting *Malphrus*, 252 AD2d at 875 [emphasis added]). Absent a consistent and predictable means of defining and applying what is an "order of disposition" under Family Court Act § 1112 (a), practitioners face traps for the unwary (*see e.g. Matter of Janette G. [Julie G.]* [appeal No. 1], 166 AD3d 1544, 1545 [4th Dept 2018]; *Matter of Jones v Tisdell*, 239 AD2d 966, 966 [4th Dept 1997]; *see generally Abasciano*, 83 AD3d at 1544-1545).

My focus on the procedural aspects of this appeal is not meant to require pristine practice or to ignore the demanding realities of litigation; rather, by concluding that the order on appeal is non-final, I seek only to emphasize my view that provisions such as Family Court Act § 1112 exist to preserve fairness and consistency and give the trial court the first chance to resolve the matter. Here, the plain text of the order on appeal indicates that it is not final. I would not ignore that language even if it demands dismissal of this appeal.

Unlike the majority, I see no reason, under the circumstances of this case, to deem the notice of appeal an application for leave to appeal from the non-final order and to exercise our discretion by granting leave to appeal therefrom (*see generally* Family Ct Act § 1112 [a]). The mother has made no application for leave to appeal (*see Ocasio*, 49 AD2d at 801), and she has not presented any excuse or explanation for her failure to so move or for her failure to follow proper procedure (*see Matter of Manuel P.A. v Emilie B.*, 146 AD3d 697, 698 [1st Dept 2017], *appeal dismissed* 30 NY3d 1096 [2018], *rearg denied* 31 NY3d 1062 [2018]; *cf. Matter of Kahlisha K.J. v Eddie R.*,

167 AD3d 439, 439 [1st Dept 2018]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

997

KA 13-01962

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAVELL FOX, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Oneida County (Barry M. Donalty, A.J.), dated September 20, 2013. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is reversed on the law and the matter is remitted to Supreme Court, Oneida County, for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals from an order that denied without a hearing his CPL 440.10 motion to vacate the judgment convicting him, following a nonjury trial, of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). We affirmed the judgment of conviction on direct appeal (*People v Fox*, 124 AD3d 1252 [4th Dept 2015]). Defendant made the motion herein to vacate the judgment on the ground of, inter alia, ineffective assistance of counsel. We conclude that defendant is entitled to a hearing with respect to that claim.

It is well settled that " '[a] defendant's right to effective assistance of counsel includes defense counsel's reasonable investigation and preparation of defense witnesses' " (*People v Conway*, 118 AD3d 1290, 1291 [4th Dept 2014]; *see People v Mosley*, 56 AD3d 1140, 1140-1141 [4th Dept 2008]). Here, defendant's CPL 440.10 motion was supported by a notarized but unsworn statement of a witness, dated prior to defendant's trial, who asserted that defendant had borrowed the witness's jacket minutes before defendant's arrest, that the controlled substances in the pockets of that jacket belonged to the witness, and that defendant had no prior knowledge of the controlled substances (*see People v Howard*, 175 AD3d 1023, 1025 [4th Dept 2019]). Defendant himself averred in an affidavit submitted in support of his motion that he informed trial counsel prior to trial of

the witness's willingness to testify. Defendant's motion therefore set forth sufficient facts tending to substantiate his claim that he was denied effective assistance of counsel, and we therefore agree with defendant that Supreme Court erred in denying that claim without a hearing (*see* CPL 440.30 [4], [5]).

We further agree with defendant that the court erred in rejecting his contention that trial counsel was ineffective for failing to either secure police surveillance of the traffic stop that led to defendant's arrest or seek sanctions for the prosecution's alleged failure to preserve the same. Contrary to the court's determination, that contention involves matters outside the record on appeal and therefore could not have been addressed on direct appeal (*see Fox*, 124 AD3d at 1253; *see also People v Burdine*, 147 AD3d 1471, 1473 [4th Dept 2017], *lv denied* 29 NY3d 1076 [2017]; *cf.* CPL 440.10 [2] [b]). Contrary to the court's alternative determination, the sworn allegations in defendant's pro se motion tend to substantiate that contention, and thus a hearing is warranted "to afford defendant's trial counsel an opportunity . . . to provide a tactical explanation for the omission[s]" (*People v Dombrowski*, 87 AD3d 1267, 1268 [4th Dept 2011] [internal quotation marks omitted]; *cf.* CPL 440.30 [4] [b]).

We have reviewed the remaining claims in defendant's motion and we conclude that the court did not err in denying them without a hearing (*see* CPL 440.10 [2] [b]; 440.30 [4] [b]).

All concur except CURRAN and WINSLOW, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm because we disagree with the majority's conclusion that defendant adduced sufficient facts to warrant a hearing on his CPL 440.10 motion. In our view, defendant failed to submit the statutorily-required "sworn allegations" of "the existence or occurrence of facts" in support of his motion to warrant such a hearing (CPL 440.30 [1] [a]; *see* CPL 440.30 [4] [b]; [5]). The rule that a CPL 440.10 motion must be predicated on sworn allegations is a fundamental statutory requirement to entitle a defendant to a hearing (*see generally People v Ozuna*, 7 NY3d 913, 915 [2006]; *People v Ford*, 46 NY2d 1021, 1023 [1979]). Absent sworn allegations to substantiate defendant's contentions, Supreme Court did not abuse its discretion in summarily denying the motion (*see People v Friedgood*, 58 NY2d 467, 470 [1983]; *People v Chelley*, 137 AD3d 1720, 1721 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]).

We disagree with the majority to the extent that it concludes that defendant was entitled to a hearing based on defense counsel's purported failure to investigate a potentially exculpatory witness and call that witness to testify. It is well settled that counsel may be ineffective where he or she has failed to conduct a reasonable investigation or preparation of witnesses for the defense (*see generally People v Lostumbo* [appeal No. 1], 175 AD3d 844, 845 [4th Dept 2019], *lv denied* 34 NY3d 1017 [2019]; *People v Kates*, 162 AD3d 1627, 1632 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018], *reconsideration denied* 32 NY3d 1173 [2019]). Here, however,

defendant's showing on the motion was insufficient to raise an issue of fact with respect to whether defense counsel was ineffective in failing to call that witness at trial (*see generally People v Clemmons*, 177 AD3d 899, 900 [2d Dept 2019]; *cf. People v Campbell*, 81 AD3d 1251, 1251-1252 [4th Dept 2011]).

To support his contention with respect to the purportedly exculpatory witness, defendant largely relies on a notarized, *but unsworn*, statement of that witness dated three weeks before the trial. The majority acknowledges that the witness's statement is unsworn, and we note that the mere stamp by a notary public does not change that fact or somehow elevate the statement to the level of proof statutorily required to substantiate a CPL 440.10 motion. Recently, in *People v Howard* (175 AD3d 1023, 1025 [4th Dept 2019]), which is cited by the majority, we concluded that the court erred in summarily denying a CPL 440.10 motion based, in part, on consideration of two unsworn but notarized statements from potentially exculpatory witnesses. These unsworn statements corroborated the accounts of two trial witnesses who testified about the defendant's purported alibi (*see Howard*, 175 AD3d at 1025). In contrast, in this case defendant has not submitted any sworn testimony to support his contention, which he seeks to substantiate based *solely* on unsworn allegations of fact and his own self-serving affidavit in support of the motion. Nothing in *Howard*, however, explicitly abrogated the statutory requirement of sworn allegations of fact to support a CPL 440.10 motion (*see* CPL 440.30 [1] [a]).

Moreover, defendant was not entitled to a hearing with respect to the witness because he did not meet his burden of demonstrating the absence of any strategic or other legitimate explanations for defense counsel's failure to more fully investigate the potentially exculpatory witness and to call him to testify at trial (*see generally People v Caban*, 5 NY3d 143, 152 [2005]; *People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Shevchenko*, 175 AD3d 922, 924 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]; *Kates*, 162 AD3d at 1632). Reasons for not investigating or calling the witness to testify could have included, inter alia, defense counsel's disbelief that the witness would willingly testify at trial in a manner that actually exculpated defendant. Neither the witness nor defendant make a representation that the witness would actually have testified at trial, or was presently available and willing to testify at the time of trial (*see Ford*, 46 NY2d at 1023). Had there been some evidence that the witness would testify at trial if called—at a time when he was potentially in legal jeopardy if he assumed responsibility for the contraband—the witness's statement exculpating defendant may have demonstrated that the decision not to call the witness was not a matter of reasonable trial strategy.

At best, defendant—and the majority—rely on the statement in defendant's affidavit that, "[a]t the bench trial, defense counsel was made aware of [the witness's] willingness to testify." Such a self-serving and conclusory statement, however, is insufficient—by itself—to warrant a hearing (*see generally People v Standsblack*, 162 AD3d 1523, 1528 [4th Dept 2018], *lv denied* 32 NY3d 1008 [2018]; *People*

v Diallo, 132 AD3d 1010, 1011 [2d Dept 2015], *lv denied* 27 NY3d 1150 [2016]; *People v Witkop*, 114 AD3d 1242, 1243 [4th Dept 2014], *lv denied* 23 NY3d 1069 [2014]).

Ultimately, absent a showing of facts to support defendant's ineffectiveness contention with respect to the potentially exculpatory witness, we should presume that the decision not to investigate or call that witness at trial constituted sound strategy (*see People v Cruz*, 272 AD2d 922, 923 [4th Dept 2000], *affd* 96 NY2d 857 [2001]; *People v Smith*, 115 AD2d 304, 304 [4th Dept 1985]). Thus, the court properly exercised its discretion to deny the motion with respect to the witness statement pursuant to CPL 440.30 (4) (b).

We also disagree with the majority's conclusion that a hearing is warranted with respect to counsel's alleged failure to properly investigate a police surveillance video of the underlying traffic stop in this case. Defendant has not provided any evidence, other than his own self-serving affidavit, that the surveillance video existed, was not requested by defense counsel, and was relevant to the extent that a sanction such as a discretionary adverse inference instruction should have been requested at trial (*see generally People v Blake*, 24 NY3d 78, 82 [2014]). In support of his contention, defendant has not submitted any of the discovery demands served by defense counsel to show the absence of a request for the video, and he has not submitted any other evidence to support his assertion that defense counsel did not conduct an investigation into the video's whereabouts. Because defendant did not submit any additional facts to support his contention with respect to the video, and all we have here is his self-serving affidavit, we conclude that he did not meet *his burden* to obtain a hearing regarding defense counsel's ineffectiveness (*see Diallo*, 132 AD3d at 1011; *see also* CPL 440.30 [4] [b]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1078

KA 18-01221

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE SINGLETON, DEFENDANT-APPELLANT.

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

WILLIE SINGLETON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), entered May 30, 2018. The order denied the petition of defendant for a modification of his risk level assessment pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order denying his petition pursuant to Correction Law § 168-o (2) seeking to modify the prior determination that he is a level three risk pursuant to the Sex Offender Registration Act (SORA) (§ 168 *et seq.*). We affirm.

Defendant's contentions in his main brief concerning County Court's initial SORA risk level determination, which occurred in 2006, are not before us inasmuch as "Correction Law § 168-o . . . does not provide a vehicle for reviewing whether defendant's circumstances were properly analyzed in the first instance to arrive at his risk level" (*People v David W.*, 95 NY2d 130, 140 [2000]; *see People v Anthony*, 171 AD3d 1412, 1413 [3d Dept 2019]).

We reject defendant's further contention in his main brief that the court erred in denying the petition. In this proceeding seeking a modification of a SORA risk level determination, defendant bore the "burden of proving the facts supporting the requested modification by clear and convincing evidence" (Correction Law § 168-o [2]; *see People v Williams*, 170 AD3d 1531, 1531 [4th Dept 2019]; *People v Cullen*, 79 AD3d 1677, 1677 [4th Dept 2010], *lv denied* 16 NY3d 709 [2011]), and he failed to meet that burden (*see People v Charles*, 162 AD3d 125, 140 [2d Dept 2018], *lv denied* 32 NY3d 904 [2018]; *People v Johnson*, 124

AD3d 495, 496 [1st Dept 2015]; *see generally People v Lashway*, 25 NY3d 478, 484 [2015]). We have considered defendant's contention in his pro se supplemental brief concerning the hearing and we conclude that it lacks merit.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1083

KA 15-01989

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY L. KING, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (J. SCOTT PORTER 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 (Thomas E. Moran, J.), rendered June 22, 2015. The judgment convicted defendant upon a jury verdict of burglary in the third degree and public lewdness.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the third degree (Penal Law § 140.20) and public lewdness (§ 245.00). Defendant was previously tried on the same charges, but Supreme Court granted his motion to set aside the jury verdict following his first trial due to erroneous jury instructions. We affirm.

Defendant contends that the evidence at the first trial was not legally sufficient to establish his intent at the time he entered the building and that the entry was unlawful. As the People correctly concede, we may review the sufficiency of the evidence at defendant's first trial inasmuch as the Double Jeopardy Clauses of the State and Federal Constitutions preclude a second trial if the evidence from the first trial is determined by the reviewing court to be legally insufficient (*see Burks v United States*, 437 US 1, 18 [1978]; *Matter of Suarez v Byrne*, 10 NY3d 523, 532-533 [2008], *rearg denied* 11 NY3d 753 [2008]; *see generally People v Scerbo*, 74 AD3d 1730, 1731 [4th Dept 2010], *lv denied* 15 NY3d 757 [2010]). After conducting such a review, however, we reject defendant's contention.

A conviction is supported by legally sufficient evidence "when, viewing the facts in [the] light most favorable to the People, 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond

a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, defendant was charged with burglary in the third degree for allegedly entering a library building on a college campus with the intent to commit a crime therein. The People concede that their bill of particulars alleged that defendant intended to commit the crime of public lewdness at the time he unlawfully entered the building at issue. Because defendant "has a fundamental and nonwaivable right to be tried only on the crimes charged . . . [and] because the People specifically narrowed their theory of [the crime] in the bill of particulars, [the court] was obliged to hold the prosecution to this narrower theory alone" (*People v Bradley*, 154 AD3d 1279, 1280 [4th Dept 2017] [internal quotation marks omitted]; *see People v Barnes*, 50 NY2d 375, 379 n 3 [1980]). Thus, the People were required to establish that defendant entered the building unlawfully and that he intended to commit the crime of public lewdness at the time of his unlawful entry.

It is well settled that a defendant's intent to commit a crime "may be inferred from the circumstances of the entry" (*People v Gaines*, 74 NY2d 358, 362 n 1 [1989]). Furthermore, "the jury was entitled to infer [defendant']s intent to commit a crime while unlawfully in the [building] based upon[, inter alia,] his other actions while inside the [building]" (*People v Rivera*, 41 AD3d 1237, 1238 [4th Dept 2007], *lv denied* 10 NY3d 939 [2008]; *see People v Garcia*, 17 AD3d 283, 283 [1st Dept 2005], *lv denied* 5 NY3d 789 [2005]), "as well as from defendant's actions and assertions when confronted" (*People v Maier*, 140 AD3d 1603, 1603-1604 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016] [internal quotation marks omitted]; *see People v Mercado-Ramos*, 161 AD3d 1516, 1516 [4th Dept 2018], *lv denied* 31 NY3d 1150 [2018]; *People v Pendarvis*, 143 AD3d 1275, 1275 [4th Dept 2016], *lv denied* 28 NY3d 1149 [2017]).

Here, the evidence at the first trial, viewed in the light most favorable to the People, established that defendant "knew he had been barred from entering the premises" (*People v Shakur*, 110 AD3d 513, 514 [1st Dept 2013], *lv denied* 22 NY3d 1043 [2013]) and, indeed, that he was banned from the entire college campus. He nevertheless was inside a library building on the campus. Thus, we conclude that the evidence is legally sufficient to establish that defendant unlawfully entered the building (*see People v Magnuson*, 177 AD3d 1089, 1091 [3d Dept 2019]). Further, there is circumstantial evidence that defendant removed a pair of sweatpants after he entered the library, so that when the victim first observed him he was wearing only shorts despite the fact that it was snowing outside at the time. In addition, the People submitted evidence from which the jury could have concluded that defendant then spent more than 40 minutes surreptitiously observing the victim from several concealed or obscured areas as she studied in a secluded part of the library, occasionally moving to a different vantage point or repositioning furniture in the library to afford himself a better view of her. He eventually took a seated position on a stool a few feet from her location, exposed his penis, and began masturbating. When she turned and observed his actions, he immediately apologized, put on his sweatpants, and fled the building.

We conclude that the evidence is also legally sufficient to establish that defendant intended to commit the crime of public lewdness at the time he unlawfully entered the building (*see generally People v Beaty*, 89 AD3d 1414, 1416-1417 [4th Dept 2011], *affd* 22 NY3d 918 [2013]; *People v Stetin*, 167 AD3d 1245, 1248-1249 [3d Dept 2018], *lv denied* 32 NY3d 1178 [2019]).

Contrary to defendant's further contention, the court did not abuse its discretion in the *Molineux* ruling it issued prior to the second trial. The evidence of defendant's prior uncharged crimes and prior bad acts was properly admitted in evidence to establish his motive, intent, and identity (*see People v Wemette*, 285 AD2d 729, 731 [3d Dept 2001], *lv denied* 97 NY2d 689 [2001]; *see generally People v Molineux*, 168 NY 264, 293-294 [1901]), and the evidence established that defendant previously committed "crimes so unique that the mere proof that the defendant had committed [them was] highly probative of the fact that he committed the one charged" (*People v Condon*, 26 NY2d 139, 144 [1970]; *see People v Allweiss*, 48 NY2d 40, 45-49 [1979]; *People v Bonner*, 94 AD3d 1500, 1501 [4th Dept 2012], *lv denied* 19 NY3d 1101 [2012], *reconsideration denied* 20 NY3d 1059 [2013]). In addition, the prejudicial effect of the evidence did not outweigh its probative value (*see People v Goodrell*, 130 AD3d 1502, 1503 [4th Dept 2015]; *Wemette*, 285 AD2d at 731), and the court provided several "limiting instruction[s that] minimized any prejudice to defendant" (*People v Washington*, 122 AD3d 1406, 1408 [4th Dept 2014], *lv denied* 25 NY3d 1173 [2015]; *see Goodrell*, 130 AD3d at 1503). Defendant failed to preserve for our review his further contention that the prosecutor elicited testimony that exceeded the court's *Molineux* ruling (*see People v Bastian*, 83 AD3d 1468, 1469 [4th Dept 2011], *lv denied* 17 NY3d 813 [2011]; *People v Sabb*, 11 AD3d 350, 351 [1st Dept 2004], *lv denied* 4 NY3d 748 [2004]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1162

CA 19-00728

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

IN THE MATTER OF PITTSFORD CANALSIDE
PROPERTIES, LLC, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

VILLAGE OF PITTSFORD ZONING BOARD OF APPEALS,
VILLAGE OF PITTSFORD ARCHITECTURAL PRESERVATION
AND REVIEW BOARD, RESPONDENTS-APPELLANTS,
AND FRIENDS OF PITTSFORD VILLAGE, INC.,
INTERVENOR-APPELLANT.

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

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR INTERVENOR-APPELLANT.

WEAVER MANCUSO FRAME LLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (John J. Ark, J.), entered October 22, 2018 in a CPLR article 78 proceeding. The judgment, among other things, directed respondent Village of Pittsford Architectural Preservation and Review Board to issue a certificate of approval subject to receipt, review and approval of certain items.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, petitioner's motion to enforce the order dated October 4, 2017 is denied in its entirety, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Petitioner Pittsford Canalside Properties, LLC (PCP) is the owner of a parcel of property located in the Village of Pittsford on which it intends to construct a multiple-dwelling building community (Project). PCP commenced this CPLR article 78 proceeding seeking to annul the December 10, 2014 determination of respondent Village of Pittsford Architectural Preservation and Review Board (APRB) denying PCP's application for a certificate of approval for the Project and the August 17, 2015 determination of respondent Village of Pittsford Zoning Board of Appeals (ZBA) that, after a de novo review on appeal of APRB's determination, also denied PCP's application for a certificate of approval. Thereafter, as part of a global settlement discussion, PCP and APRB exchanged correspondence with respect to the

Project's compliance with the mass and scale requirement of section 210-60 (A) (1) (f) of the Pittsford Village Code, one of several factors that was pertinent to APRB's determination whether to grant a certificate of approval. As a result of that correspondence, PCP submitted, among other things, revised project drawings to APRB, but APRB asserted that the revised drawings contained elements that were not in conformance with what APRB had previously agreed were acceptable. PCP then moved for an order determining that it and APRB had entered into a settlement agreement as stated in the "various correspondences and . . . detailed in the [supporting] Affidavits, including those dated April 4, 2017 (and enclosures) and dated April 7, 2017, as well as additional correspondences and enclosures, including . . . that correspondence dated May 30, 2017." PCP also sought enforcement of the settlement agreement. In an order dated October 4, 2017 (prior order), Supreme Court found "that the conditions and parameters as set forth in the April 4, 2017 letter are still viable and available to [PCP] subject to a public meeting before, and vote of, the APRB" and "remanded" PCP's application for a certificate of approval "back to the APRB for reconsideration pursuant to the mass and scale parameters set forth in the April 4, 2017 letter and completion of the [c]ertificate of [a]pproval process."

After APRB failed to issue a certificate of approval and instead referred PCP's proposal for the Project to the Planning Board, PCP moved for, inter alia, an order enforcing the prior order and directing APRB to issue a certificate of approval. Following a hearing, the court, in effect, granted the motion in part and, among other things, remitted the matter to APRB to review PCP's new application for a certificate of approval, which the court deemed complete and "in conformity with the mass and scale parameters of the April 4, 2017 letter." The court also directed APRB to issue a certificate of approval "in accordance with the [c]ourt's Findings of Fact and Conclusions of Law, subject to . . . APRB receiving, reviewing and approving all of the items that it normally reviews in connection with any application that it receives." As a result of that determination, the court never reviewed the determinations challenged in the petition and denied the intervening motions of ZBA and APRB to dismiss the petition against them, PCP's motion to strike certain submissions of APRB, and PCP's cross motion for, inter alia, leave to serve an amended petition (intervening motions). APRB, ZBA, and intervenor Friends of Pittsford Village, Inc. (FOPV) appeal, and we now reverse.

We agree with appellants that the court erred in concluding that PCP and APRB reached an enforceable settlement agreement on the issues of the mass and scale of the Project and in remitting the matter to APRB with specific limitations on its further review. "An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by [the party] or his [or her] attorney or reduced to the form of an order and entered" (CPLR 2104). "[S]ettlement-related writings[, however,] will not be found to have created a binding agreement if they expressly anticipate a subsequent writing that is to officially memorialize the

existence of a settlement agreement and set forth all of its material terms" (*Matter of George W. & Dacie Clements Agric. Research Inst., Inc. v Green*, 130 AD3d 1422, 1423-1424 [3d Dept 2015]; *see Little v County of Nassau*, 148 AD3d 797, 798 [2d Dept 2017]).

Here, the letters that the court found to have memorialized the settlement agreement did not contain all the material terms of the settlement and constituted no more than an agreement to agree (*see Little*, 148 AD3d at 798). APRB stated therein only that it was "now in a position to agree to a settlement of the mass and scale issues," but that first it would "need to receive, review and approve all of the items that it normally reviews in connection with any application it receives." Any agreement was further conditioned on APRB's receipt of additional documentation from PCP, including "an accurate, to-scale site plan" and further roof specifications (*see George W. & Dacie Clements Agric. Research Inst., Inc.*, 130 AD3d at 1423-1424).

We further conclude that, in the absence of an enforceable settlement agreement, the court's hearing on the issues of mass and scale, subsequent decision rendering findings of fact related to PCP's new application for a certificate of approval, and remittal to APRB for consideration of that application with specific directives regarding what APRB could and could not consider were impermissible intrusions into respondents' administrative domain (*see Matter of Concetta T. Cerame Irrevocable Family Trust v Town of Perinton Zoning Bd. of Appeals*, 6 AD3d 1091, 1092 [4th Dept 2004]). We therefore reverse the judgment, deny the motion to enforce the prior order in its entirety, and remit the matter to Supreme Court for further proceedings on the petition, if necessary, after consideration of the intervening motions.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1198

KA 17-01328

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE A. BOX, DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered March 3, 2017. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, assault in the first degree, arson in the second degree, arson in the third degree, reckless endangerment in the first degree, tampering with physical evidence (two counts), grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and the facts by reversing those parts convicting defendant of arson in the third degree, reckless endangerment in the first degree, grand larceny in the fourth degree, and criminal possession of stolen property in the fourth degree and dismissing counts four, five, eight, and nine of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), assault in the first degree (§ 120.10 [1]), arson in the second degree (§ 150.15), arson in the third degree (§ 150.10 [1]), reckless endangerment in the first degree (§ 120.25), grand larceny in the fourth degree (§ 155.30 [8]), criminal possession of stolen property in the fourth degree (§ 165.45 [5]), and two counts of tampering with physical evidence (§ 215.40 [2]). Defendant's conviction stems from his conduct in stabbing the victim 46 times in the victim's home, setting fire to the house, and then stealing the victim's vehicle. Defendant gave a statement to the police admitting that he stabbed the victim, but claimed he did so in self-defense. Defendant also pursued an extreme emotional disturbance (EED) affirmative defense during the trial.

We reject defendant's contention that County Court erred in refusing to suppress his statements to the police. Prior to the

Miranda warnings being given, defendant was not in custody. He voluntarily accompanied the police during their investigation of the crime and then to the police station, and the questioning was primarily investigatory, not accusatory (*see People v Towsley*, 53 AD3d 1083, 1084 [4th Dept 2008], *lv denied* 11 NY3d 795 [2008]; *People v Duda*, 45 AD3d 1464, 1466 [4th Dept 2007], *lv denied* 10 NY3d 764 [2008]). We conclude that a reasonable person, innocent of any crime, would not have believed that he or she was in custody (*see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). Shortly after arriving at the police station, the police learned of evidence connecting defendant to the crime and thus advised defendant of his *Miranda* rights, which defendant waived, prior to interrogating defendant. Contrary to defendant's further contentions, the detective's statements prior to issuing the *Miranda* warnings did not vitiate or neutralize the effect of the warnings (*cf. People v Dunbar*, 24 NY3d 304, 315-316 [2014], *cert denied* — US —, 135 S Ct 2052 [2015]), and the police did not engage in tactics that were so fundamentally unfair as to render the statements involuntary (*see People v Wolfe*, 103 AD3d 1031, 1035 [3d Dept 2013], *lv denied* 21 NY3d 1021 [2013]; *see generally People v Brown*, 111 AD3d 1385, 1386 [4th Dept 2013], *lv denied* 22 NY3d 1155 [2014]).

Defendant contends that the verdict finding him guilty of murder in the second degree, assault in the first degree, arson in the second degree, reckless endangerment in the first degree, grand larceny in the fourth degree, and criminal possession of stolen property in the fourth degree is against the weight of the evidence. Addressing first the counts of murder in the second degree and assault in the first degree, upon our independent review of the evidence in light of the elements of those crimes as charged to the jury, as well as the charge with respect to the defense of justification and the EED affirmative defense (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The jury's rejection of the justification defense with respect to the counts of murder in the second degree and assault in the first degree is not against the weight of the evidence inasmuch as the weight of the evidence supports a determination that defendant lacked a subjective belief that his use of deadly physical force was necessary to protect himself against the victim's use or imminent use of deadly physical force or a forcible criminal sexual act, or that a reasonable person in the same situation would not have perceived that deadly force was necessary (*see generally People v Umali*, 10 NY3d 417, 425 [2008], *rearg denied* 11 NY3d 744 [2008], *cert denied* 556 US 1110 [2009]; *People v Burman*, 173 AD3d 1727, 1730 [4th Dept 2019]; *People v Ford*, 114 AD3d 1273, 1274-1275 [4th Dept 2014], *lv denied* 23 NY3d 962 [2014]). The jury's rejection of the EED affirmative defense is also not contrary to the weight of the evidence (*see People v Steen*, 107 AD3d 1608, 1608 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013]), especially considering defendant's conduct after the stabbing occurred.

We further conclude that the jury's verdict with respect to arson in the second degree is not against the weight of the evidence (*see*

generally Bleakley, 69 NY2d at 495). "A person is guilty of arson in the second degree when he [or she] intentionally damages a building . . . by starting a fire, and when (a) another person who is not a participant in the crime is present in such building . . . at the time, and (b) the defendant knows that fact or the circumstances are such as to render the presence of such a person therein a reasonable possibility" (Penal Law § 150.15). "[T]he definition of person contemplates a living human being," and thus section 150.15 requires that such a person be alive when the fire is started (*People v Taylor*, 158 AD3d 1095, 1103 [4th Dept 2018], *lv denied* 32 NY3d 941 [2018], *reconsideration denied* 32 NY3d 1178 [2019]). Here, the medical examiner testified that the autopsy showed that the victim was still alive when the fire was started and, contrary to defendant's contention, the jury could infer from the evidence that defendant was aware that such was a reasonable possibility.

We agree with defendant, however, that the verdict finding him guilty of reckless endangerment in the first degree is against the weight of the evidence. "A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he [or she] recklessly engages in conduct which creates a grave risk of death to another person" (Penal Law § 120.25). Count five of the indictment alleged that defendant recklessly engaged in conduct creating a grave risk of death to emergency responders when he intentionally started the fire. We agree with defendant that the verdict on that count is against the weight of the evidence because the People did not prove beyond a reasonable doubt that defendant acted with depraved indifference to human life when he set the fire (*see People v Harvin*, 75 AD3d 559, 561 [2d Dept 2010]; *see also People v Jean-Philippe*, 101 AD3d 1582, 1583 [4th Dept 2012]; *see generally People v Williams*, 111 AD3d 1435, 1435-1436 [4th Dept 2013], *affd* 24 NY3d 1129 [2015]; *People v Feingold*, 7 NY3d 288, 296 [2006]). Inasmuch as defendant is challenging only the weight of the evidence with respect to that count and does not challenge the legal sufficiency of the evidence with respect to that count, we cannot reduce the conviction to the lesser included offense of reckless endangerment in the second degree (*see People v Cooney* [appeal No. 2], 137 AD3d 1665, 1668-1669 [4th Dept 2016], *appeal dismissed* 28 NY3d 957 [2016]). We therefore modify the judgment by reversing that part convicting defendant of reckless endangerment in the first degree and dismissing count five of the indictment.

We further agree with defendant that the verdict finding him guilty of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree is against the weight of the evidence. With respect to each of those counts, the People were required to establish that the value of the stolen motor vehicle exceeded $100 (*see* Penal Law §§ 155.30 [8]; 165.45 [5]). It is well settled that a witness "must provide a basis of knowledge for his [or her] statement of value before it can be accepted as legally sufficient evidence of such value" (*People v Lopez*, 79 NY2d 402, 404 [1992]; *see People v Guarnieri*, 122 AD3d 1078, 1079 [3d Dept 2014]). "Conclusory statements and rough estimates of value are not

sufficient" (*People v Loomis*, 56 AD3d 1046, 1047 [3d Dept 2008]; *see People v Slack*, 137 AD3d 1568, 1569 [4th Dept 2016], *lv denied* 27 NY3d 1139 [2016]). Although the monetary element of each crime is quite low, the People did not attempt to meet that threshold through the testimony of any witness. The testimony of a detective that the vehicle was "[d]efinitely worth over probably 10,000" did not satisfy the monetary element of either crime inasmuch as he provided no basis of knowledge for his statement of value. We therefore further modify the judgment by reversing those parts convicting defendant of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree and dismissing counts eight and nine of the indictment.

Defendant contends that a police officer impermissibly usurped the jury's fact-finding role and acted as a summation witness in testifying that the evidence did not match defendant's claim of self-defense. An officer may testify as to his or her observation of the crime scene (*see People v Carducci*, 143 AD3d 1260, 1261 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]). To the extent that the officer offered impermissible opinion testimony, we conclude that any error was harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]; *People v Casanova*, 152 AD3d 875, 878-879 [3d Dept 2017], *lv denied* 30 NY3d 948 [2017]).

Defendant's contention that he received ineffective assistance of counsel because defense counsel pursued the EED affirmative defense against his wishes is based on matters outside the record and must be raised by way of a motion pursuant to CPL article 440 (*see People v Timmons*, 151 AD3d 1682, 1684 [4th Dept 2017], *lv denied* 30 NY3d 984 [2017]; *People v Marshall*, 134 AD3d 486, 486 [1st Dept 2015], *lv denied* 27 NY3d 1002 [2016]; *People v Jones*, 63 AD3d 1582, 1583 [4th Dept 2009], *lv denied* 13 NY3d 797 [2009]). To the extent that defendant alleges that pursuing the defense was a poor strategy, we conclude that the EED affirmative defense was a reasonable and legitimate strategy, and we thus reject that allegation of ineffective assistance of counsel (*see generally People v Benevento*, 91 NY2d 708, 712-713 [1998]). We have reviewed the remaining instances of alleged ineffective assistance set forth by defendant and conclude that he received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

As defendant contends and the People correctly concede, arson in the third degree is an inclusory concurrent count of arson in the second degree (*see People v Piccione*, 78 AD3d 1518, 1519 [4th Dept 2010]). Thus, that part of the judgment convicting defendant of arson in the third degree must be reversed and count four of the indictment dismissed (*see generally People v Hickey*, 171 AD3d 1465, 1466-1467 [4th Dept 2019], *lv denied* 33 NY3d 1105 [2019]). We therefore further modify the judgment accordingly. Contrary to defendant's contention, however, assault in the first degree is not an inclusory concurrent count of murder in the second degree (*see People v Wyant*, 98 AD3d 1277, 1277 [4th Dept 2012]; *People v Alvarez*, 38 AD3d 930, 934 [3d Dept 2007], *lv denied* 8 NY3d 981 [2007]).

Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted of two counts of tampering with physical evidence pursuant to Penal Law § 215.50 (2), and it must therefore be amended to reflect that he was convicted of two counts of tampering with physical evidence pursuant to section 215.40 (2) (*see People v Cruz-Rivera*, 174 AD3d 1512, 1514 [4th Dept 2019]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1199

KA 19-01229

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY R. BAILEY, DEFENDANT-APPELLANT.

MATTHEW ALBERT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Suzanne Maxwell Barnes, J.), rendered May 22, 2019. 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 modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Erie County Court for resentencing in accordance with the following memorandum: Defendant was convicted in 2018 upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [c]) and sentenced, inter alia, to a term of probation. The conditions of defendant's probation required him, as relevant here, to lead a law-abiding life and to pay the imposed mandatory surcharge within 60 days of the sentence. In October 2018, defendant's probation officer filed an affidavit alleging that defendant violated the condition of his probation requiring him to lead a law-abiding life inasmuch as he was rearrested in September 2018 in connection with an apparent dispute with his former girlfriend who, at that time, had an order of protection against him. The probation officer thereafter filed an addendum to her affidavit, in which she alleged that, in addition to committing the above violation, defendant also violated the terms of his probation by failing to pay the mandatory surcharge in full within the requisite time period. Defendant now appeals from a judgment, entered after a violation of probation hearing, revoking the sentence of probation on the 2018 conviction and sentencing him to an indeterminate term of 1 to 3 years' imprisonment.

It is well settled that a "violation of probation proceeding is summary in nature and a sentence of probation may be revoked if the defendant has been afforded an opportunity to be heard" (*People v Travis*, 156 AD3d 1399, 1399 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018] [internal quotation marks omitted]). The People bear the burden of establishing the alleged violation by a preponderance of the

evidence, i.e., "the necessary 'residuum of competent legal evidence' that defendant violated a condition of his probation" (*People v Robinson*, 147 AD3d 1351, 1351 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *see People v Pringle*, 72 AD3d 1629, 1630 [4th Dept 2010], *lv denied* 15 NY3d 855 [2010]). Further, "the decision to revoke [a defendant's] probation will not be disturbed, [absent a] clear abuse of discretion" (*People v Bergman*, 56 AD3d 1225, 1225 [4th Dept 2008], *lv denied* 12 NY3d 756 [2009] [internal quotation marks omitted]). Here, County Court determined that the People established, by a preponderance of the evidence, that defendant violated two conditions of his probation, i.e., he failed to live a law-abiding life inasmuch as he violated the order of protection in favor of his former girlfriend, and he failed to pay the surcharge within the requisite time period.

Under the circumstances of this case, we agree with defendant that the People failed to meet their burden of establishing, by a preponderance of the evidence, that defendant violated the condition of probation requiring him to live a law-abiding life (*see generally* CPL 410.70 [3]; *People v Paris*, 145 AD3d 1530, 1531 [4th Dept 2016]; *People v Braun*, 177 AD2d 981, 981 [4th Dept 1991]) because the evidence presented at the hearing failed to establish that defendant engaged in conduct that was prohibited by the terms of the order of protection (*see Braun*, 177 AD2d at 981; *see also People v Johnson*, 173 AD3d 1446, 1448 [3d Dept 2019]; *Matter of Dennis*, 19 AD2d 579, 579 [4th Dept 1963]). Consequently, we conclude that the court erred insofar as it based its determination to revoke defendant's probation on defendant's alleged violation of that condition.

Contrary to defendant's further contention, however, we conclude that the court did not err in revoking his probation based on his failure to pay the surcharge within the time required by the terms of his probation. As an initial matter, defendant failed to preserve for our review his contention that the court failed to conduct a sufficient inquiry into his ability to pay the surcharge (*see People v Dillon*, 90 AD3d 1468, 1468-1469 [4th Dept 2011], *lv denied* 19 NY3d 1025 [2012]; *see generally People v Swick*, 147 AD3d 1346, 1346 [4th Dept 2017], *lv denied* 29 NY3d 1001 [2017]). Moreover, defendant does not dispute that he failed to pay the surcharge in full within 60 days of the sentence as required by the terms of his probation, and the court was entitled to discredit defendant's allegation that he had been granted additional time to make the required payments (*see People v Fusco*, 91 AD3d 984, 985 [3d Dept 2012]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing based solely on defendant's actions in violating his probation by failing to timely pay the surcharge in full (*see People v Robinson*, 128 AD3d 1464, 1466 [4th Dept 2015]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1210

CA 19-00727

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

ROBERT M. KNAB, JR., PLAINTIFF-RESPONDENT,

V ORDER

DREW ROBERTSON, GRACEANN ROBERTSON, PAUL ROBERTSON, DEFENDANTS-RESPONDENTS, AND FOIT-ALBERT ASSOCIATES, ARCHITECTURE, ENGINEERING AND SURVEYING, P.C., DEFENDANT-APPELLANT.

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

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

BOUVIER PARTNERSHIP LLP, BUFFALO (PAUL F. HAMMOND OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 21, 2018. The order, among other things, denied the motion of defendant Foit-Albert Associates, Architecture, Engineering and Surveying, P.C. for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 12, 2020,

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1212

CA 19-00749

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

DANIEL G. SCHUM, DOING BUSINESS AS KENNEDY AND SCHUM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK A. SPATORICO AND PHETERSON SPATORICO LLP, DEFENDANTS-APPELLANTS.

PHETERSON SPATORICO LLP, ROCHESTER (STEVEN A. LUCIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICES OF PETER K. SKIVINGTON, PLLC, GENESEO (PETER K. SKIVINGTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John B. Nesbitt, A.J.), entered October 11, 2018. The order, among other things, denied defendants' motion for summary judgment dismissing plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendants' motion in part and dismissing the third cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff is an attorney who at one time represented nonparty Homestead NY Properties, Inc. (Homestead) in a real estate transaction involving three pieces of property (subject properties). The subject properties, as well as numerous other properties owned by Homestead, were encumbered by mortgages held by defendants' client as well as a lien held by a third party. Derrick A. Spatorico (defendant) is also an attorney, and he and his law firm, defendant Pheterson Spatorico LLP, represented the mortgagee. A different attorney represented Homestead with respect to the lien, and yet another attorney represented the lienholder.

When Homestead sought to sell the subject properties, the four attorneys entered into a series of negotiations, culminating in an agreement regarding the discharge of the mortgage and the release of the lien related to the subject properties. At the closing for the subject properties, plaintiff executed a guaranty providing that the lien on the subject properties would be released. Plaintiff thereafter forwarded to defendant two checks, one made out to defendant representing the money due to the mortgagee and one made out to the lienholder's law firm in the amount of $1,500, i.e., the amount

due to the lienholder for the release of the lien. In the letter accompanying those checks, plaintiff wrote that he was enclosing them "in accordance with [defendant's] advice," and asked that defendant forward to him the "completed discharge of mortgage" as well as "[t]he originals of the . . . release of judgment releasing the [subject properties] from the lien."

Defendant forwarded the relevant amount of money to the mortgagee and "caused the discharge [of mortgage] to be filed." With respect to the check to be forwarded to the lienholder, defendant let that check "s[i]t on [his] desk" because he believed a different agreement with respect to the lien release would ultimately be negotiated. Several weeks later, defendant, the attorney representing Homestead with respect to the lien and the attorney representing the lienholder reached a separate agreement related to the lien and all properties "owned by Homestead." Defendant then approached plaintiff's law partner and had that partner renegotiate the lien release check to make it payable to defendant's law firm. Defendant later remitted those funds to his client, the mortgagee.

It is undisputed that no lien release was ever recorded for the subject properties, and we previously affirmed an order concluding that the subsequent agreement did not serve to release the lien on those properties (*Maximum Income Partners, Inc. v Webber* [appeal No. 1], 158 AD3d 1090 [4th Dept 2018], *affg* 58 Misc 3d 1218[A], 2016 NY Slip Op 51903[U] [Sup Ct, Monroe County 2016]). Plaintiff, facing liability under the terms of his guaranty, commenced this action asserting causes of action for breach of contract, promissory estoppel and conversion. Defendants now appeal from an order that, inter alia, denied their motion for summary judgment dismissing the complaint.

We agree with defendants that Supreme Court erred in denying the motion to the extent that defendants sought dismissal of the third cause of action for conversion inasmuch as that cause of action is time-barred (*see* CPLR 214 [3]; *Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]; *Barrett v Huff*, 6 AD3d 1164, 1166 [4th Dept 2004]). We therefore modify the order accordingly.

We further conclude, however, that the court properly denied the motion insofar as it sought dismissal of the breach of contract and promissory estoppel causes of action. Defendants failed to establish their entitlement to judgment as a matter of law with respect to those two causes of action (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) because their own submissions raise triable issues of fact whether there was an implied-in-fact contract between plaintiff and defendant requiring defendant to obtain the release for the properties (*see generally Maas v Cornell Univ.*, 94 NY2d 87, 93-94 [1999]) and whether subsequent events modified defendant's obligations under that contract. Defendants' submissions also raise triable issues of fact whether the damages alleged by plaintiff were proximately caused by defendant's purported breach of the implied-in-fact contract (*see Sirles v Harvey*, 256 AD2d 1227, 1228-1229 [4th Dept 1998]; *see generally Niagara Foods, Inc. v Ferguson Elec. Serv. Co.*,

Inc., 111 AD3d 1374, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). Specifically, in support of their motion, defendants submitted an affidavit from the attorney for the lienholder who averred that no release was given, in part, because the $1,500 fee was never received by the lienholder.

We reject defendants' contention that the breach of contract cause of action cannot be maintained due to the fact that plaintiff had not suffered any monetary damages at the time that he commenced this action. "A breach of contract accrues at the time of the breach even if no damage occurs until later" (*Bratge v Simons*, 167 AD3d 1458, 1459-1460 [4th Dept 2018] [internal quotation marks omitted]; *see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). As plaintiff anticipated, he faces liability under the guaranty for any damages sustained by the subsequent owners of the property as a result of the lien that remained on the property.

Defendants further contend that the breach of contract cause of action cannot be maintained inasmuch as any contract would be barred by the statute of frauds (*see* General Obligations Law § 5-1103). We reject that contention. Section 5-1103 provides that an agreement to discharge an obligation in real property must be in writing. Here, however, the actual agreement to release the lien for a certain amount of money is not at issue. Rather, the agreement at issue on this appeal is the alleged agreement between plaintiff and defendant concerning who was responsible for obtaining that written release.

We agree with defendants that, should plaintiff succeed on the breach of contract cause of action, he cannot recover under the quasi contract theory of promissory estoppel (*see generally Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). We nevertheless conclude that, at this juncture, defendants failed to establish as a matter of law that defendant did not clearly or unambiguously promise to obtain the release or that plaintiff's reliance on such a promise was not reasonable or justifiable (*see generally Zuley v Elizabeth Wende Breast Care, LLC*, 126 AD3d 1460, 1461 [4th Dept 2015], *amended on rearg* 129 AD3d 1558 [4th Dept 2015]). Indeed, the issue whether one party's reliance on another party's representations or promises is reasonable or justifiable is "generally one of fact" to be determined by the factfinder at trial (*Braddock v Braddock*, 60 AD3d 84, 88 [1st Dept 2009]; *see Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 797 [3d Dept 2002]).

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1218

KA 17-01348

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES JORDAN, 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 Supreme Court, Erie County (M. William Boller, A.J.), rendered July 7, 2017. The judgment convicted defendant upon a jury verdict of assault in the first degree, assault in the third degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, assault in the first degree (Penal Law § 120.10 [3]). The charges arose after defendant fired a gun into a crowd emerging from a hookah lounge following a fight that had broken out in the lounge. One man was shot in the foot and another man was shot in the neck.

Contrary to defendant's contention, the conviction is supported by legally sufficient evidence of his identity as the shooter (*see People v Danielson*, 9 NY3d 342, 349 [2007]; *see generally People v Contes*, 60 NY2d 620, 621 [1983]). The trial evidence included security camera footage showing defendant and his group arriving at the lounge. The footage depicted the clothing that defendant was wearing, which witnesses were able to identify, as well as the distinctive blue and white shirt worn by one of defendant's friends, who provoked the fight that led to the evacuation of the lounge. Security camera footage did not show the faces of the people leaving the lounge but did show a man wearing the same clothing as defendant discharging a gun and, at the same time, being approached, touched, and led from the scene by a second man. Although the second man was not wearing a shirt, cell phone video footage of the event showed the same man removing a blue and white shirt, and police later collected the distinctive shirt worn by defendant's friend from the scene of the

shooting. Finally, defendant's flight to South Carolina by bus the next day is evidence of consciousness of guilt (*see People v Velazquez*, 100 AD3d 1504, 1506 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]; *see generally People v Yazum*, 13 NY2d 302, 304-305 [1963], *rearg denied* 15 NY2d 679 [1964]). Viewing the evidence in the light most favorable to the People, we conclude that "there is a valid line of reasoning and permissible inferences from which a rational jury could have" determined that defendant was the shooter (*Danielson*, 9 NY3d at 349 [internal quotation marks omitted]; *see generally Contes*, 60 NY2d at 621). Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that certain Facebook images of defendant and other people were not properly authenticated and that Supreme Court therefore erred in admitting them in evidence. The authenticity of each image was established by the testimony of a witness who had personal knowledge of the people in the images and who verified that the images "accurately represented the subject matter depicted" (*People v Byrnes*, 33 NY2d 343, 347 [1974]; *cf. People v Wells*, 161 AD3d 1200, 1200 [2d Dept 2018], *lv denied* 32 NY3d 1009 [2018]; *see generally People v Price*, 29 NY3d 472, 477-480 [2017]).

Defendant further contends that the court erred in permitting a police detective to give testimony identifying defendant as the shooter in the security camera footage and drawing certain inferences from that footage (*see generally People v Graham*, 174 AD3d 1486, 1487-1488 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *People v Carroll*, 300 AD2d 911, 916 [3d Dept 2002], *lv denied* 99 NY2d 626 [2003]). To the extent that defendant's contention is preserved for our review (*see* CPL 470.05 [2]), we conclude that any error in the admission of that testimony is harmless (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]; *Graham*, 174 AD3d at 1488). We note that the court sustained at least one objection from defense counsel after a nonresponsive answer from the police detective and issued a curative instruction with respect to that answer, which the jury is presumed to have followed (*see People v VanDyne*, 63 AD3d 1681, 1682 [4th Dept 2009], *lv denied* 14 NY3d 845 [2010]; *People v Comfort*, 30 AD3d 1069, 1070 [4th Dept 2006], *lv denied* 7 NY3d 787 [2006]; *see also People v Davis*, 58 NY2d 1102, 1104 [1983]). We also note that the court's final instructions to the jury alleviated much of the prejudice of the police detective's testimony of which defendant now complains. The court instructed the jury that they were the sole and exclusive judges of the facts, that the testimony of police officers should not automatically be accepted, and that defendant's identity was a disputed issue in the case. The court also instructed the jury how it should evaluate the accuracy of identification testimony. Again, the jury is presumed to have followed those instructions (*see People v Collins*, 167 AD3d 1493, 1497 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]; *People v Bibbes*, 98 AD3d 1267, 1269-1270 [4th Dept 2012], *amended on rearg* 100 AD3d 1473 [4th Dept 2012], *lv denied* 20 NY3d 931 [2012]; *see also Davis*, 58 NY2d at 1104).

Defendant's contention concerning the violation of his right to confront a witness against him is not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Given the senseless nature of the crimes, we conclude that the sentence is not unduly harsh or severe. We have examined defendant's remaining contention and conclude that it does not warrant reversal or modification of the judgment.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1222

KA 18-00535

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAKIM GRIMES, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 19, 2017. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]), defendant contends that Supreme Court erred in refusing to suppress physical evidence seized from his person as well as statements made to the arresting officer. Contrary to the People's contention, the specific contentions raised by defendant concerning the suppression ruling are preserved for our review inasmuch as they were raised either in the motion papers or "by specifically placing [the contentions] for disposition before the suppression court" (*People v Vasquez*, 66 NY2d 968, 970 [1985], *cert denied* 475 US 1109 [1986]; *cf. People v Claudio*, 64 NY2d 858, 858-859 [1985]). In any event, the issues raised on appeal were "brought to the attention of the [suppression] court at a time and in a way that gave the latter the opportunity to remedy the problem and thereby avert reversible error" (*People v Luperon*, 85 NY2d 71, 78 [1995]). Furthermore, we agree with defendant that the court erred in issuing its suppression ruling without resolving, in the first instance, whether the pat frisk of defendant was lawful.

On the day of defendant's arrest, a police officer observed defendant's vehicle stop at a suspected drug house. An occupant of the vehicle entered the house only to exit moments later and reenter the vehicle, which was then driven away. Based on those observations, the observing officer suspected that a drug transaction had just taken place. The officer therefore instructed a fellow officer (arresting

officer) to follow the vehicle to "try to get a reason to stop it."

The arresting officer, while following defendant's vehicle, observed the driver commit two traffic infractions. The arresting officer thus engaged his emergency lights and stopped the vehicle. Upon approaching the vehicle on foot, the arresting officer "noticed in the driver['s] side mirror that the driver was aggressively moving around in the seat." It appeared to the arresting officer that the driver "was reaching behind him," causing the arresting officer to fear that the driver, later identified as defendant, was reaching for a weapon. Although defendant admitted to the arresting officer that he did not possess a valid license, he produced a nondriver identification card. After ordering defendant to exit the vehicle, the arresting officer conducted a pat frisk during which he felt a hard object in defendant's pants that the arresting officer believed to be narcotics. The arresting officer placed handcuffs on defendant and advised him of his *Miranda* rights. After defendant waived such rights, the arresting officer asked him in sum and substance what was in his pants. In response, defendant said that he had seven grams of crack cocaine. Defendant was then arrested and transported to the police station, where, at the arresting officer's request, defendant removed the cocaine from his underwear.

Following a hearing, the court denied that part of defendant's omnibus motion seeking to suppress the cocaine and his statements to the arresting officer. Although defendant contended that the pat frisk was unlawful, the court declined to resolve that issue, reasoning that the arresting officer had a founded suspicion of criminal activity before the frisk was conducted, thus authorizing the arresting officer to ask defendant whether he had anything on him. We conclude that the court erred in failing to determine whether the frisk was lawful and, if not, whether an exception to the exclusionary rule applied.

It is well settled that courts, in evaluating police conduct, are required to determine if the action was justified at each and every stage of the encounter (*see People v Brown*, 148 AD3d 1562, 1563 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]). Here, if the pat frisk was unlawful, then defendant's subsequent statements and the evidence seized as a result of those statements would have to be suppressed as fruit of the poisonous tree unless an exception to the exclusionary rule applies (*see e.g. People v Mobley*, 120 AD3d 916, 919 [4th Dept 2014]; *People v Randall*, 85 AD2d 754, 754-755 [3d Dept 1981]; *see generally People v Fitzpatrick*, 32 NY2d 499, 505-506 [1973], *cert denied* 414 US 1033, 1050 [1973]). Inasmuch as this Court lacks the "power to review issues . . . not ruled upon[] by the trial court" (*People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]; *see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 195 [2011]), we hold the case, reserve decision, and remit the matter to Supreme Court for a determination whether the arresting officer possessed the requisite justification to conduct the frisk of defendant (*see People v Green*, 173 AD3d 1690, 1692 [4th Dept 2019]) and, if not, whether an exception to the exclusionary rule applies.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1224

KA 17-00925

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEROME WINGFIELD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered May 1, 2017. The judgment convicted defendant upon his plea of guilty of assault in the second degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from judgments convicting him upon his pleas of guilty during a single plea proceeding of, respectively, assault in the second degree (Penal Law § 120.05 [2]) and attempted burglary in the second degree (§§ 110.00, 140.25 [2]). Contrary to defendant's contention with respect to both appeals, the record establishes that he knowingly, intelligently, and voluntarily waived his right to appeal, and that he understood that the right to appeal is separate and distinct from the rights automatically forfeited by pleading guilty (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Moore*, 158 AD3d 1312, 1312 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). Defendant's valid waiver of the right to appeal encompasses his challenge in each appeal to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Defendant further contends in each appeal that he was denied effective assistance of counsel based on defense counsel's failure to seek suppression of certain statements made by defendant following his warrantless arrest at a residence on the ground that they were obtained in violation of *Payton v New York* (445 US 573 [1980]). To the extent that defendant's contention survives his guilty pleas and valid waiver of the right to appeal (*see People v Ware*, 159 AD3d 1401, 1402 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]), we conclude that it lacks merit because an argument for suppression on that ground

would have had "little or no chance of success" (*People v Caban*, 5 NY3d 143, 152 [2005] [internal quotation marks omitted]; *see generally People v Bunce*, 141 AD3d 536, 537 [2d Dept 2016], *lv denied* 28 NY3d 969 [2016]).

Defendant also contends in each appeal that County Court erred in sentencing him as a second felony offender based on his prior felony conviction in the State of Georgia because the Georgia statute under which he was convicted applies to conduct that does not constitute a felony in New York. We conclude, however, that defendant's contention is unpreserved for our review inasmuch as defendant never "raise[d] the issue . . . whether the statute under which he was convicted in [Georgia] is the equivalent of a New York . . . felony" at the plea colloquy or sentencing (*People v Kelly*, 65 AD3d 886, 887 [1st Dept 2009], *lv denied* 13 NY3d 860 [2009], *reconsideration denied* 15 NY3d 775 [2010]; *see generally People v Smith*, 73 NY2d 961, 962-963 [1989]). Although there is a " 'narrow exception to the preservation rule' " permitting appellate review when a sentence's illegality is readily discernible from the record (*People v Nieves*, 2 NY3d 310, 315 [2004], quoting *People v Samms*, 95 NY2d 52, 56 [2000]), this case does not fall within that narrow exception inasmuch as defendant's contention is based on matters outside the record and may not be evaluated simply by comparing the relevant statutes under New York's strict equivalency test (*see generally People v Helms*, 30 NY3d 259, 263-265 [2017]). Finally, because "[a] CPL 440.20 motion is the proper vehicle for raising a challenge to a sentence as 'unauthorized, illegally imposed or otherwise invalid as a matter of law' (CPL 440.20 [1]), and a determination of second felony offender status is an aspect of the sentence" (*People v Jurgins*, 26 NY3d 607, 612 [2015]), we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1225

KA 17-00926

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEROME WINGFIELD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered May 1, 2017. The judgment convicted defendant upon his plea of guilty of attempted burglary in the second degree.

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

Same memorandum as in *People v Wingfield* ([appeal No. 1] — AD3d — [Mar. 13, 2020] [4th Dept 2020]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1232

CA 19-01182

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

V.M. PAOLOZZI IMPORTS, INC., DOING BUSINESS AS DEALMAKER AT DRUM HONDA AND DEALMAKER OF POTSDAM, LLC, DOING BUSINESS AS DEALMAKER HONDA OF POTSDAM, PLAINTIFFS-RESPONDENTS-APPELLANTS,

V ORDER

SCOLARO, SHULMAN, COHEN, FETTER & BURSTEIN, P.C., SCOLARO, FETTER, GRIZANTI, MCGOUGH & KING, P.C, CHAIM J. JAFFE, DEFENDANTS-APPELLANTS-RESPONDENTS, ET AL., DEFENDANT.

LONDON FISCHER LLP, NEW YORK CITY (JASON M. MYERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

DAVID A. JOHNS, ESQ., PULTNEYVILLE (DAVID A. JOHNS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered May 2, 2019. The order denied the motion of defendants Scolaro, Shulman, Cohen, Fetter & Burstein, P.C., Scoloro, Fetter, Grizanti, McGough & King, P.C., and Chaim J. Jaffe, seeking summary judgment dismissing plaintiffs' amended complaint and for summary judgment on their second counterclaim and denied plaintiffs' cross motion for partial summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 8, 2020, and filed in the Jefferson County Clerk's Office on January 14, 2020,

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1233

CA 19-00932

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

HOPE FOR US HOUSING CORP.,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

SYRACUSE HEIGHTS ASSOCIATES, LLC, THE HEIGHTS REAL ESTATE COMPANY AND THE HEIGHTS MANAGEMENT COMPANY, LLC, DEFENDANTS-APPELLANTS-RESPONDENTS.

SPERBER DENENBERG & KAHAN, P.C., NEW YORK CITY (JACQUELINE HANDEL-HARBOUR OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

R. LAWRENCE LAPLANTE, SYRACUSE, FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered February 1, 2019. The order denied defendants' motion for summary judgment and denied plaintiff's cross motion for summary judgment.

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

Memorandum: Defendants appeal and plaintiff cross-appeals from an order that denied defendants' motion for, inter alia, summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment on its cause of action for conversion.

Contrary to defendants' contention on their appeal, we conclude that they failed to establish as a matter of law that the conversion cause of action is merely a damages claim within plaintiff's wrongful eviction cause of action pursuant to RPAPL 853, which Supreme Court previously dismissed as untimely (*cf. Suarez v Axelrod Fingerhut & Dennis*, 142 AD3d 819, 820 [1st Dept 2016]; *Mayes v UVI Holdings*, 280 AD2d 153, 161 [1st Dept 2001]). We therefore reject defendants' related contention that they are entitled to summary judgment dismissing the conversion cause of action because it was commenced outside of the one-year statute of limitations governing causes of action for wrongful eviction (*see Gold v Schuster*, 264 AD2d 547, 549 [1st Dept 1999]; *Chapman v Johnson*, 39 AD2d 629, 629 [4th Dept 1972]; *see generally* CPLR 215 [3]).

Contrary to defendants' further contention, the conversion cause of action is not barred by language in the lease agreement that was

entered into by plaintiff and defendant Syracuse Heights Associates, LLC. Under the lease agreement, plaintiff leased premises that were located in a shopping plaza, and the cause of action for conversion is based on allegations that plaintiff stored personal property in the leased premises and in an adjacent unit of the shopping plaza, and that defendants deprived plaintiff of that personal property by preventing plaintiff from entering the leased premises and the adjacent unit. Even assuming, arguendo, that paragraph 14.2 of the lease limits defendants' liability for plaintiff's loss of property, we conclude that defendants failed to establish as a matter of law that the lease was in force at the time of the alleged conversion. Rather, an issue of fact remains with respect to whether the "lease was terminated as a matter of law upon the issuance of a warrant of eviction" in 2012 (*Weichert v O'Neill*, 245 AD2d 1121, 1122 [4th Dept 1997]; *see* RPAPL 749 [former (3)]; *Rocar Realty Northeast, Inc. v Jefferson Val. Mall Ltd. Partnership*, 38 AD3d 744, 747 [2d Dept 2007]). Although it appears from the record that the 2012 warrant was never executed and plaintiff remained in possession of the leased premises until April 2015, the record is devoid of any support for defendants' contention that the issuing court vacated the warrant (*see* RPAPL 749 [former (3)]). Nevertheless, we note that even if the lease had been in force at the time of the alleged conversion, it would have governed the parties' relationship only with respect to the leased premises and thus it would have no effect on plaintiff's allegations that defendants converted various items stored in the adjacent unit.

With respect to plaintiff's cross appeal, we reject plaintiff's contention that it is entitled to summary judgment on the cause of action for conversion. Rather, we agree with defendants that issues of fact remain with respect to damages, and we therefore conclude that the court properly denied plaintiff's cross motion (*see Five Star Bank v CNH Capital Am., LLC*, 55 AD3d 1279, 1281 [4th Dept 2008]; *see generally Kohn v Hartstein & Hartstein*, 294 AD2d 543, 543 [2d Dept 2002]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1237

KA 15-01398

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVANTE SPENCER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered April 16, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree, assault in the first degree (two counts), criminal use of a firearm in the first degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is modified on the law by reversing those parts convicting defendant of two counts of assault in the first degree and one count of criminal use of a firearm in the first degree and dismissing counts two through four of the indictment against him, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), criminal use of a firearm in the first degree (§ 265.09 [1] [a]), criminal possession of a weapon in the second degree (§ 265.03 [3]), and two counts of assault in the first degree (§ 120.10 [1]). The conviction arises from an incident in which a codefendant shot three men on a street in Rochester, killing one and wounding two. Defendant, who drove the shooter to and from the crime scene and provided the weapon used to shoot the victims, was charged as an accessory to all three shootings. Defendant contends that the evidence is legally insufficient to support the conviction of murder in the second degree and assault in the first degree because the People failed to establish that he possessed the requisite mental state for the commission of those crimes (*see* § 20.00). "Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]; *see People v Delamota*, 18 NY3d 107, 113 [2011]; *People v Perkins*, 160 AD3d 1455, 1455 [4th Dept 2018], *lv denied* 31 NY3d 1151 [2018]), we conclude that the evidence is legally sufficient with

respect to the murder conviction, but it is not legally sufficient with respect to the assault and criminal use of a firearm convictions.

Insofar as relevant here, a person is guilty of murder in the second degree when, "[w]ith intent to cause the death of another person, he [or she] causes the death of such person" (Penal Law § 125.25 [1]). Defendant was convicted of murder under a theory of accessorial liability, and a person is criminally liable for the conduct of another "when, acting with the mental culpability required for the commission thereof, he [or she] solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct" (§ 20.00; *see People v McDonald*, 172 AD3d 1900, 1901 [4th Dept 2019]). A defendant's intent to kill may be inferred from his or her conduct as well as the circumstances surrounding the crime (*see People v Price*, 35 AD3d 1230, 1231 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007]). Here, the People presented evidence establishing that defendant shared his codefendant's intent to kill the victim and intentionally aided the codefendant by, inter alia, planning the shooting beforehand, informing the codefendant where the victim was located, driving the codefendant to that location, providing the weapon used in the shooting, and driving the codefendant away from the scene immediately thereafter (*see People v Cabassa*, 79 NY2d 722, 728 [1992], *cert denied* 506 US 1011 [1992]; *People v Rutledge*, 70 AD3d 1368, 1369 [4th Dept 2010], *lv denied* 15 NY3d 777 [2010]).

We reach a different result with respect to the assault counts, however, and we therefore modify the judgment by reversing those parts convicting defendant of assault in the first degree and dismissing the second and third counts of the indictment against him. Like the count of murder in the second degree, defendant was charged with those crimes as an accessory, but the People alleged that defendant was guilty of the assault charges under the theory of transferred intent. "The doctrine of 'transferred intent' serves to ensure that a person will be prosecuted for the crime he or she intended to commit even when, because of bad aim or some other 'lucky mistake,' the intended target was not the actual victim" (*People v Fernandez*, 88 NY2d 777, 781 [1996]; *see People v Dubarry*, 25 NY3d 161, 170-172 [2015]). Although that theory may be applied to assault charges (*see e.g. People v Williams*, 124 AD3d 920, 921 [2d Dept 2015], *lv denied* 25 NY3d 993 [2015]; *People v Jacobs*, 52 AD3d 1182, 1184 [4th Dept 2008], *lv denied* 11 NY3d 926 [2009]), County Court's jury instruction in this case mandated that the jury could convict defendant of the counts of assault in the first degree only if they found that he acted "with the intent to cause serious physical injury to" each assault victim, rather than instructing the jury that they could convict defendant of those crimes if they concluded that he intended to cause such injury to the deceased victim but the codefendant actually caused injury to the assault victims. The prosecution did not object to that charge, and it is well settled that, when reviewing a "jury's guilty verdict, our review is limited to whether there was legally sufficient evidence . . . based on *the court's charge as given without exception*" (*People v Sala*, 95 NY2d 254, 260 [2000]; *see People v Prindle*, 16 NY3d 768, 770 [2011]; *People v Ford*, 11 NY3d 875, 878 [2008]). Inasmuch as there is insufficient evidence that defendant knew that either of the

assault victims was present or that he intended any harm to either of them (*cf. People v Allah*, 71 NY2d 830, 831-832 [1988]), we conclude that the evidence is not legally sufficient with respect to the assault counts as charged to the jury.

Contrary to the supposition in the dissent, we do not overtly nor implicitly disavow our decision in *Jacobs*, in which we affirmed "a conviction of assault . . . , which was based on a theory of transferred intent" (52 AD3d at 1184). Although the dissent is correct that the court's initial charge there was similar to the one given here, we affirmed in that case because "[t]he record establishe[d] that the court's final charge on [the assault] count, to which there was no objection by defendant, adequately set forth the elements of that crime" (*id.*). In that final charge in *Jacobs*, the court responded to a jury question regarding whether the pertinent assault charge applied to contact with someone who was not the intended victim, and the court thereafter correctly explained the law of transferred intent to the jury. Here, to the contrary, the court only instructed the jurors that, in order to convict defendant of assault in the first degree regarding the injured victim, they must be convinced beyond a reasonable doubt that defendant had "the intent to cause serious physical injury to [the injured victim]," rather than specifying the name of the deceased victim whom defendant intended that the codefendant harm.

We also reject the dissent's supposition that our determination will call into question the Criminal Jury Instructions (CJI). We continue to "urge Trial Judges . . . to use the language set forth in the current Criminal Jury Instructions" (*People v Slater*, 270 AD2d 925, 926 [4th Dept 2000], *lv denied* 95 NY2d 858 [2000]), and indeed we note that if the court here had complied with the CJI directive to "(*specify*)" the person to whom defendant intended that the codefendant cause injury (CJI2d[NY] Penal Law § 120.10 [1]), this issue would not be present.

The evidence is also legally insufficient with respect to the criminal use of a firearm in the first degree count, and we therefore further modify the judgment accordingly. With respect to that count, the indictment charged defendant with using a loaded firearm during the commission of the crime of assault in the first degree. Although the court's jury instructions did not specify assault in the first degree as the underlying crime for the criminal use of a firearm in the first degree count, and defendant did not object to the court's instructions and thus did not preserve this issue for our review, we conclude that "preservation is not required" (*People v Greaves*, 1 AD3d 979, 980 [4th Dept 2003]), inasmuch as "defendant has a fundamental and nonwaivable right to be tried only on the crimes charged" in the indictment (*People v Duell*, 124 AD3d 1225, 1226 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015] [internal quotation marks omitted]; *see Greaves*, 1 AD3d at 980; *People v Burns*, 303 AD2d 1032, 1033 [2003]). Therefore, based on the indictment, defendant could only be convicted of that charge if he committed assault in the first degree (*cf. People v Canteen*, 295 AD2d 256, 256-257 [1st Dept 2002], *lv denied* 98 NY2d 729 [2002]; *People v Gerard*, 208 AD2d 421, 422 [1st Dept 1994], *lv*

denied 85 NY2d 973 [1995]). Thus, we conclude that, because "the conviction[s] of assault in the first degree cannot stand, the conviction of criminal use of a firearm in the first degree, which requires commission of [the] class B violent felony offense[of assault in the first degree] while possessing a deadly weapon, also cannot stand" (*People v Walker*, 283 AD2d 912, 913 [4th Dept 2001]).

Because the evidence is legally sufficient to establish defendant's guilt with respect to the murder and criminal possession of a weapon counts, however, we reject defendant's contention that the court erred in denying his motion pursuant to CPL 330.30 (1) to set aside those parts of the verdict convicting defendant of those counts. Defendant's contentions concerning the denial of those parts of the motion directed toward the assault in the first degree and criminal use of a firearm in the first degree counts are academic in light of our determination concerning the sufficiency of the evidence with respect to those charges.

Defendant further contends that the verdict is contrary to the weight of the evidence. Viewing the evidence in light of the elements of the murder in the second degree and criminal possession of a weapon in the second degree counts 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 with respect to those two crimes (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We further conclude that "the fact that certain of [the People's] witnesses had criminal histories, were incarcerated or seeking leniency does not render their testimony incredible as a matter of law but, rather, raises an issue of credibility for the factfinder to resolve" (*People v Portee*, 56 AD3d 947, 949 [3d Dept 2008], *lv denied* 12 NY3d 820 [2009]; *see generally People v Hodge*, 147 AD3d 1502, 1503 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]). Defendant's remaining contentions concerning the weight of the evidence are based on "inconsequential discrepancies in the eyewitnesses' testimony [that] merely created a credibility contest that the jury reasonably and justifiably resolved in the People's favor" (*People v Graves*, 163 AD3d 16, 23 [4th Dept 2018]).

Contrary to defendant's contention, the court did not abuse its discretion in its evidentiary rulings. First, we reject defendant's contention that the court abused its discretion in admitting certain autopsy photographs. It is well settled that such photographs should be excluded " 'only if [their] *sole purpose* is to arouse the emotions of the jury and to prejudice the defendant' " (*People v Wood*, 79 NY2d 958, 960 [1992], quoting *People v Pobliner*, 32 NY2d 356, 370 [1973], *rearg denied* 33 NY2d 657 [1973], *cert denied* 416 US 905 [1974]; *see People v Hernandez*, 79 AD3d 1683, 1684 [4th Dept 2010], *lv denied* 16 NY3d 895 [2011]), and the photographs at issue were relevant to help explain and corroborate the testimony of the Medical Examiner concerning the deceased victim's injuries and cause of death. Next, defendant failed to preserve his contention that the court erred in admitting evidence that, on a date different than the date of these crimes, defendant possessed a .40 caliber weapon that was not used in these crimes (*see People v Cromwell*, 71 AD3d 414, 414 [1st Dept 2010],

lv denied 15 NY3d 803 [2010]; *People v Newton*, 24 AD3d 1287, 1288-1289 [4th Dept 2005], *lv denied* 6 NY3d 836 [2006]). In any event, we reject that contention inasmuch as the evidence at trial circumstantially established that defendant possessed the .40 caliber weapon at the same time as he possessed the .45 caliber weapon that was used in these crimes, and thus we conclude that defendant's possession of the .40 caliber weapon was " 'inextricably interwoven with the charged crimes, provided necessary background information, and completed the narrative of [a key prosecution] witness[ ]' " (*People v Strong*, 165 AD3d 1589, 1590 [4th Dept 2018], *lv denied* 32 NY3d 1129 [2018]; *see generally People v Moorer*, 137 AD3d 1711, 1711-1712 [4th Dept 2016], *lv denied* 27 NY3d 1136 [2016]).

With respect to defendant's remaining challenge to the court's evidentiary rulings, the court did not abuse its discretion in admitting into evidence a recording of a 911 call made during this incident, in which the deceased victim's labored breathing is heard. The recording was relevant to corroborate certain testimony, and it was not so inflammatory that its prejudicial effect exceeded its probative value (*see People v Harris*, 99 AD3d 608, 608-609 [1st Dept 2012], *lv denied* 21 NY3d 1004 [2013]). Moreover, we conclude that any error in admitting the challenged items in evidence is harmless inasmuch as the "proof of [defendant's] guilt was overwhelming . . . and . . . there was no significant probability that the jury would have acquitted [him] had the proscribed evidence not been introduced" (*People v Kello*, 96 NY2d 740, 744 [2001]; *see People v Spencer*, 96 AD3d 1552, 1553 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012], *reconsideration denied* 20 NY3d 989 [2012]).

Contrary to defendant's further contention, the court properly denied his repeated severance motions, inasmuch as defendant failed to demonstrate the requisite good cause for a discretionary severance (*see* CPL 200.40 [1]; *People v Mahboubian*, 74 NY2d 174, 183 [1989]; *cf. People v McGuire*, 148 AD3d 1578, 1579 [4th Dept 2017]). Where counts are properly joined pursuant to CPL 200.40 (1), a defendant may nevertheless seek severance for " 'good cause shown' " (*Mahboubian*, 74 NY2d at 183). "Good cause . . . includes, but is not limited to, a finding that a defendant 'will be unduly prejudiced by a joint trial' " (*id.*, quoting CPL 200.40 [1]). "Upon such a finding of prejudice, the court may order counts to be tried separately, grant a severance of defendants or provide whatever other relief justice requires" (CPL 200.40 [1]). Where, as here, "the same evidence is used to prove the charges against each defendant, a joint trial is preferred and severance will . . . be granted [only] for the most cogent reasons" (*People v Dickson*, 21 AD3d 646, 647 [3d Dept 2005]; *see* CPL 200.40 [1]; *People v Bornholdt*, 33 NY2d 75, 87 [1973], *cert denied* 416 US 905 [1974]). We conclude that the court did not abuse its discretion in denying defendant's motions inasmuch as "[t]he evidence against defendant and his codefendant[] was essentially identical, and the respective defenses were not in irreconcilable conflict" (*People v Buccina*, 62 AD3d 1252, 1253 [4th Dept 2009], *lv denied* 12 NY3d 913 [2009]; *see People v Lukens*, 107 AD3d 1406, 1408 [4th Dept 2013], *lv denied* 22 NY3d 957 [2013]). Contrary to

defendant's contention, the recorded statement of the codefendant that was introduced at trial does not incriminate defendant, and thus does not implicate *Bruton v United States* (391 US 123 [1968]).

Defendant failed to preserve for our review his contention that the court erred in permitting the People to use a peremptory challenge based on the age of a prospective juror. Defendant did not object to the challenge on that ground at trial (*see People v Neil*, 213 AD2d 1014, 1014 [4th Dept 1995], *lv denied* 86 NY2d 783 [1995]). In any event, with respect to that contention and defendant's preserved contention that the court erred in denying his *Batson* challenge to that juror and another African-American prospective juror on the basis of race (*see Batson v Kentucky*, 476 US 79, 94-98 [1986]), the prosecutor offered legitimate, nonpretextual reasons for exercising peremptory challenges with respect to those prospective jurors (*see People v English*, 119 AD3d 706, 706 [2d Dept 2014], *lv denied* 24 NY3d 1043 [2014]; *see generally People v Smocum*, 99 NY2d 418, 423 [2003]).

All concur except CURRAN, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent in part. I disagree with the majority to the extent it reverses those parts of the judgment convicting defendant of assault in the first degree and criminal use of a firearm in the first degree because they were not supported by legally sufficient evidence. Initially, I note that defendant conceded at oral argument that, in his brief, he did not make the argument relied on by the majority. Specifically, the majority bases its conclusion that the evidence with respect to those counts was insufficient on the purportedly erroneous jury instructions on the two counts of assault in the first degree (Penal Law § 120.10 [1]; *see generally People v Prindle*, 16 NY3d 768, 770 [2011]; *People v Sala*, 95 NY2d 254, 260 [2000]). I would not reach that issue and would affirm the judgment.

Moreover, even if that issue was properly before us, in my view, County Court's jury instruction with respect to assault in the first degree cannot be held to be erroneous. Importantly, I note that this Court has previously approved a nearly identical jury charge in a case involving very similar facts in *People v Jacobs* (52 AD3d 1182, 1184 [4th Dept 2008], *lv denied* 11 NY3d 926 [2009]). There, as here, the court instructed the jury on the assault charge directly from the pattern Criminal Jury Instructions (CJI) with respect to transferred intent and identified the unintended victim of the assault as the object of the intended assault. We concluded that "the court's final charge on that count, to which there was no objection by defendant, adequately set forth the elements of that crime, and there is legally sufficient evidence of the elements of that crime 'as those elements were charged to the jury without exception' " (*id.*, quoting *People v Dekle*, 56 NY2d 835, 837 [1982]).

The distinction the majority attempts to draw between this case and *Jacobs* is untenable. As the majority concedes, there, as here, the court listed the *unintended victim* as the object of the assault—not the intended victim. The majority seemingly concludes

that the *sequence* of when the jury heard the definition of transferred intent is the crux of the distinction between this case and *Jacobs*—a distinction that makes no substantive difference in my view. Instead, the majority's approach in modifying the judgment here based on a substantially similar jury charge to the one in *Jacobs* amounts to a sub silentio disavowal of the latter case.

The majority's approach also places into question the validity of the relevant CJI charge. Here, the court charged the jury directly from the CJI with respect to transferred intent and the identification of the unintended victim in the context of assault in the first degree (*see* CJI2d[NY] Penal Law § 120.10 [1] [last rev April 2018]). Specifically, as the CJI directs, the court instructed the jury that the definition of "intent" included the concept of "transferred intent." After providing a definition of terms, as directed by the CJI, the court stated the specific elements of assault in the first degree under Penal Law § 120.10 (1)—once again, as the CJI specifically directs. It followed the CJI's directions to instruct the jury that to find defendant guilty it had to find that: (1) defendant "caused serious physical injury to (*specify*);" and (2) "defendant did so with the intent to cause serious physical injury to (*specify*)" (CJI2d[NY] Penal Law § 120.10 [1]). Inasmuch as the serious physical injury was alleged to have been caused to victims who were not the target of the shooting, the court complied with the CJI by inserting their names as the actual assault victims for the respective counts.

There is no indication in the relevant CJI charge, however, that, in cases involving transferred intent, the court must *also* charge the jury that the defendant intended to cause serious physical injury to anyone other than the actual victim of the alleged assault. Rather, the concept of transferred intent is dealt with earlier in the CJI charge in the context of defining "intent" for purposes of the crimes charged. The CJI contains no directive that, in transferred intent cases, the charge must be further modified with respect to the element of intent by specifying anyone other than the actual victim of the assault. Inasmuch as the same situation occurred in *Jacobs*—the unintended victim was identified in both places where "(*specify*)" appears—the majority's conclusion that there was error here in this regard is contrary to that precedent. In short, the court followed the instructions of the CJI's charge to the letter. The majority's conclusion that the court would have complied with the CJI had it listed the name of the intended victim is certainly best practices, but I cannot conclude that the failure to do so is erroneous under our precedent.

The necessary implication of the majority's conclusion with respect to the court's jury charge on assault in the first degree is that the CJI, at a minimum, requires clarification in transferred intent cases that the present text of the pattern charge does not contain. Any future implications that necessarily flow from the majority's implicit conclusion concerning the inaccuracy of the CJI will need to be evaluated in future cases as they arise.

Absent an express disavowal of *Jacobs*, I conclude we are bound by the precedent set by that case to conclude that the charge here was not erroneous, and that the convictions of assault in the first degree and criminal use of a firearm in the first degree are supported by legally sufficient evidence.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1239

KA 15-01257

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENJAMIN BROWNLEE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered June 3, 2015. The judgment convicted defendant upon a jury verdict of criminal obstruction of breathing or blood circulation.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of criminal obstruction of breathing or blood circulation (Penal Law § 121.11 [a]). We affirm.

We reject defendant's contention that the prosecution committed a *Brady* violation by belatedly disclosing certain medical records that purportedly established the victim's lack of injuries following the alleged altercation with defendant. "To establish a *Brady* violation warranting a new trial, the defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material" (*People v Ulett*, 33 NY3d 512, 515 [2019] [internal quotation marks omitted]; *see Brady v Maryland*, 373 US 83, 87 [1963]).

Here, the medical records documenting the victim's lack of injuries were favorable to defendant inasmuch as they "tend[ed] to show that [he was] not guilty" (*People v Garrett*, 23 NY3d 878, 886 [2014], *rearg denied* 25 NY3d 1215 [2015] [internal quotation marks omitted]). However, the People's failure to disclose the medical records until six days before trial did not constitute the suppression of those records because defendant was "afforded a meaningful opportunity to use [the records] to cross-examine the People's witnesses or as evidence-in-chief" (*People v Burroughs*, 64 AD3d 894,

898 [3d Dept 2009], *lv denied* 13 NY3d 794 [2009]; *see People v Cortijo*, 70 NY2d 868, 870 [1987]; *cf. People v Carver*, 114 AD3d 1199, 1199 [4th Dept 2014]).

Moreover, even assuming, arguendo, that the prosecution's delay in disclosure did constitute suppression, we conclude that the records were not material because there was no " 'reasonable possibility' that the failure to disclose the medical records contributed to the verdict" (*People v Vilardi*, 76 NY2d 67, 77 [1990]; *see generally People v Rong He*, 34 NY3d 956, 959 [2019]; *People v McCray*, 23 NY3d 193, 198-199 [2014], *rearg denied* 24 NY3d 947 [2014]; *People v Fuentes*, 12 NY3d 259, 264-265 [2009], *rearg denied* 13 NY3d 766 [2009]). Finally, we further conclude that any alleged *Brady* violation here is harmless. The People presented overwhelming evidence of defendant's guilt—namely, the consistent testimony of three eyewitnesses who described defendant's attack on the victim—and there is no reasonable possibility that any error contributed to the verdict (*see People v Robinson*, 267 AD2d 981, 981 [4th Dept 1999], *lv denied* 95 NY2d 838 [2000]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1240

KA 19-01059

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JONATHAN H. YOUNG, DEFENDANT-RESPONDENT.

PATRICK E. SWANSON, DISTRICT ATTORNEY, MAYVILLE (JOHN ZUROSKI OF COUNSEL), FOR APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAIXI XU OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Chautauqua County Court (David W. Foley, J.), dated February 8, 2019. The order suppressed certain statements made by defendant.

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

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to suppress certain statements that he made to members of the Pennsylvania State Police during the investigation of 12 different suspected arsons that were committed in Jamestown, New York. After members of the Jamestown Police Department interviewed defendant about two of the fires, defendant fled to Butler County, Pennsylvania, where he was arrested for allegedly committing another arson and other offenses.

On March 28, 2017, defendant participated in a preliminary arraignment in Pennsylvania (*see* Pa R Crim P 519 [A] [1]; 540), and the record supports the finding of County Court that defendant requested counsel during that proceeding. On April 4, 2017, members of the Jamestown Police Department traveled to Pennsylvania to interview defendant about the Jamestown arsons. Although the Jamestown police officers ultimately did not interview defendant themselves, they observed while Pennsylvania State Troopers interrogated defendant, in the absence of defense counsel, about the offenses allegedly committed in Pennsylvania. During that interrogation, the Pennsylvania State Troopers also questioned defendant about the New York offenses, and defendant made inculpatory statements about the Jamestown fires.

Contrary to the People's contention, we conclude that the Pennsylvania State Troopers improperly interrogated defendant about

the New York offenses in violation of his indelible right to counsel. It is well settled that "once a defendant in custody on a particular matter is represented by or requests counsel, custodial interrogation on any subject, whether related or unrelated to the charge upon which representation is sought or obtained, must cease" (*People v Steward*, 88 NY2d 496, 501 [1996], *rearg denied* 88 NY2d 1018 [1996]; *see People v Lopez*, 16 NY3d 375, 382 [2011]; *People v Rogers*, 48 NY2d 167, 169 [1979]). Here, defendant's indelible right to counsel attached at the time of the preliminary arraignment by virtue of his request for counsel during that proceeding, and it was therefore improper for the Pennsylvania State Troopers to subsequently interview him about the New York offenses notwithstanding the fact that the public defender had not yet been assigned (*see Steward*, 88 NY2d at 501; *People v Huntsman*, 96 AD3d 1390, 1391-1392 [4th Dept 2012]). In reaching that conclusion, we note that even though the interview was carried out by Pennsylvania State Troopers, their interrogation is nevertheless subject to this state's right to counsel jurisprudence inasmuch as they were agents of the Jamestown police officers (*see Lopez*, 16 NY3d at 381 n 3; *People v Bing*, 76 NY2d 331, 344-345 [1990], *rearg denied* 76 NY2d 890 [1990]).

The People nevertheless contend that defendant's statements were not taken in violation of his indelible right to counsel because, prior to the April 4 interview, a Jamestown Police Department captain conducted a reasonable inquiry into defendant's representational status by asking the Pennsylvania State Troopers whether defendant was represented by counsel (*see generally Lopez*, 16 NY3d at 383). We reject that contention. The Court of Appeals has held that "an officer who wishes to question a person in police custody about an unrelated matter must make a reasonable inquiry concerning the defendant's representational status when the circumstances indicate that there is a probable likelihood that an attorney has entered the custodial matter, and the accused is actually represented on the custodial charge" (*id.*). Here, although the captain asked whether defendant was represented by counsel, based on this record, we conclude that the captain's inquiry was not reasonable inasmuch as he failed to ask whether defendant had requested counsel. Thus, all of the law enforcement officers "should be charged with the knowledge, actual or constructive, that defendant had requested counsel on the charges for which he had . . . been [preliminarily] arraigned" (*Huntsman*, 96 AD3d at 1391). Based on the foregoing, we conclude that the court properly granted that part of defendant's motion seeking to suppress his statements to the Pennsylvania State Troopers.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1242

KA 17-02143

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL REIBEL, DEFENDANT-APPELLANT.

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

MICHAEL REIBEL, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered May 12, 2017. The judgment convicted defendant upon a jury verdict of burglary in the second degree, stalking in the third degree, criminal contempt in the first degree and unlawful imprisonment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]), criminal contempt in the first degree (§ 215.51 [b] [ii]), stalking in the third degree (§ 120.50 [3]), and unlawful imprisonment in the second degree (§ 135.05). The conviction arises from an incident in which defendant, in violation of an order of protection, entered the home of his former girlfriend by breaking a glass door, dragged her from her home, and transported her to another location. Contrary to defendant's contention in his main brief, Supreme Court properly denied his request to charge criminal trespass in the second degree as a lesser included offense of the count of burglary in the second degree (*see generally People v Cajigas*, 19 NY3d 697, 701-702 [2012]). Here, based on all the evidence at trial, including defendant's testimony, we conclude that "the only reasonable view of the evidence is that defendant knowingly entered or remained unlawfully in a dwelling (*see* Penal Law § 140.15 [1]), intending to engage in conduct prohibited by the order of protection while in the banned premises that went beyond criminal trespass, thereby satisfying the intent to commit a crime therein element of burglary" (*People v Mack*, 128 AD3d 1456, 1457 [4th Dept 2015], *lv denied* 26 NY3d 969 [2015] [internal quotation marks omitted]; *see People v Lewis*, 5 NY3d

546, 548 [2005]; *see also People v Lopez*, 147 AD3d 456, 456 [1st Dept 2017], *lv denied* 29 NY3d 999 [2017]). Consequently, we further conclude that "under no reasonable view of the evidence could the jury have found that defendant committed the lesser offense but not the greater" (*People v Blim*, 63 NY2d 718, 720 [1984]; *see generally People v Glover*, 57 NY2d 61, 63 [1982]).

Similarly, the court also properly denied defendant's "request to charge criminal contempt in the second degree . . . as a lesser included offense of criminal contempt in the first degree because no reasonable view of the evidence 'would support a finding that [defendant] committed the lesser offense but not the greater' " (*People v Wilson*, 55 AD3d 1273, 1274 [4th Dept 2008], *lv denied* 11 NY3d 931 [2009]; *see Mack*, 128 AD3d at 1457).

Defendant failed to preserve for our review his challenge in his main brief to the admission in evidence of a series of text messages between him and the victim. Defendant did not object to the admission of the text messages on the specific ground he now raises on appeal (*cf. People v Grigoroff*, 131 AD3d 541, 544 [2d Dept 2015]; *see generally People v Law*, 94 AD3d 1561, 1562 [4th Dept 2012], *lv denied* 19 NY3d 809 [2012]). In any event, any error in admitting those text messages in evidence is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant contends in his main brief that the conviction of criminal contempt in the first degree is not supported by legally sufficient evidence because the People failed to establish that he placed the victim "in reasonable fear of physical injury" by "engaging in a course of conduct" (Penal Law § 215.51 [b] [ii]). We reject that contention. To the contrary, we conclude that the evidence is sufficient inasmuch as there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495 [1987]; *see People v Doherty*, 173 AD3d 592, 592-593 [1st Dept 2019], *lv denied* 34 NY3d 930 [2019]; *People v Clark*, 65 AD3d 755, 757-758 [3d Dept 2009], *lv denied* 13 NY3d 906 [2009]). Furthermore, viewing the evidence in light of the elements of all of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). With respect to defendant's contention in his main brief that the verdict is contrary to the weight of the evidence because he established that he was too intoxicated to form the intent to commit the crimes, "[a]lthough there was evidence at trial that defendant consumed a significant quantity of alcohol on the night of the incident, [a]n intoxicated person can form the requisite criminal intent to commit a crime, and it is for the trier of fact to decide if the extent of the intoxication acted to negate the element of intent" (*People v Felice*, 45 AD3d 1442, 1443 [4th Dept 2007], *lv denied* 10 NY3d 764 [2008] [internal quotation marks omitted]; *see People v Principio*, 107 AD3d 1572, 1573 [4th Dept 2013], *lv denied* 22 NY3d 1090 [2014]). Here, we perceive no basis to

disturb the jury's determination with respect to defendant's intoxication (*see Principio*, 107 AD3d at 1573).

Contrary to defendant's contention in his pro se supplemental brief, the People were not required to prove that he intended to commit a specific crime in the dwelling. It is well settled that, where, as here, the People did not limit the theory of prosecution to a specific crime in the indictment or a bill of particulars, they are required to plead and prove "only defendant's general intent to commit a crime in the [dwelling] . . . , not his [or her] intent to commit a specific crime" (*Lewis*, 5 NY3d at 552).

Contrary to defendant's additional contention in his pro se supplemental brief, the court did not err in refusing to suppress the statements defendant gave to the police. " 'It is well settled . . . that, in order to terminate questioning, the assertion by a defendant of his right to remain silent must be unequivocal and unqualified' " (*People v Zacher*, 97 AD3d 1101, 1101 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]). The issue whether defendant's "request was 'unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request[,] including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant' " (*id.*, quoting *People v Glover*, 87 NY2d 838, 839 [1995]). Here, we agree with the People that defendant "did not clearly communicate a desire to cease all questioning indefinitely" (*People v Caruso*, 34 AD3d 860, 863 [3d Dept 2006], *lv denied* 8 NY3d 879 [2007]).

Defendant failed to preserve for our review his contention in his pro se supplemental brief that his statements should have been suppressed because he was too intoxicated to knowingly and intelligently waive his constitutional rights (*see People v Williams*, 291 AD2d 891, 892 [4th Dept 2002], *lv denied* 98 NY2d 656 [2002]). He similarly failed to preserve for our review his challenge in his pro se supplemental brief to the admission in evidence of a purportedly altered recording of the victim's 911 call, inasmuch as he did not object to the admission of the recording on the specific ground he now raises on appeal (*see People v Romero*, 147 AD3d 1490, 1492 [4th Dept 2017], *amended on rearg* 148 AD3d 1726 [4th Dept 2017], *lv denied* 29 NY3d 1036 [2017]). In addition, defendant failed to preserve for our review his contention in his pro se supplemental brief that the court failed to appropriately swear in an alternate juror who did not deliberate on the case, and thereby violated the statutory requirement that jurors must be sworn in "immediately" after their selection (CPL 270.15 [2]; *see generally People v Rodriguez*, 32 AD3d 1203, 1204 [4th Dept 2006], *lv denied* 8 NY3d 849 [2007]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention in his main brief, the sentence is not unduly harsh or severe. We have reviewed the remaining contention raised in defendant's main brief and conclude

that it is without merit.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1258

CA 19-00730

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

ERSIN KONKUR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UTICA ACADEMY OF SCIENCE CHARTER SCHOOL,
DEFENDANT,
TURKISH CULTURAL CENTER AND HIGHWAY
EDUCATION, INC., DEFENDANT-APPELLANT.

EVANS FOX LLP, ROCHESTER (MATTHEW M. PISTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID G. GOLDBAS, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered October 17, 2018. The order, insofar as appealed from, denied in part the motion of defendant-appellant to dismiss the complaint against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of High Way Education, Inc., doing business as Turkish Cultural Center, incorrectly sued herein as Turkish Cultural Center and Highway Education, Inc., is granted in its entirety and the complaint against that defendant is dismissed.

Memorandum: Plaintiff, a former teacher at defendant Utica Academy of Science Charter School (UASCS), commenced this action seeking to recover damages based upon allegations that there was a scheme between UASCS and defendant High Way Education, Inc., doing business as Turkish Cultural Center (High Way), incorrectly sued herein as Turkish Cultural Center and Highway Education, Inc., in which plaintiff was required to provide donations to High Way in the form of illegal kickbacks of his salary under threat of demotion or termination. In his third cause of action, plaintiff alleged that defendants' conduct violated Labor Law § 198-b, and plaintiff sought damages arising from that violation pursuant to Labor Law § 198. High Way appeals from an order that, inter alia, granted in part its motion to dismiss the complaint against it, and denied that part of its motion seeking to dismiss plaintiff's third cause of action against it. We reverse the order insofar as appealed from, grant the motion in its entirety, and dismiss the complaint against High Way.

Although we offer no opinion with respect to whether other

provisions within article 6 of the Labor Law afford private rights of action, we agree with High Way that the legislature did not intend to create a private right of action for violations of Labor Law § 198-b (*see Kloppel v HomeDeliveryLink, Inc.*, 2019 WL 6111523, *3 [WD NY, Nov. 18, 2019, No. 17-cv-6296-FPG-MJP]; *Chan v Big Geyser, Inc.*, 2018 WL 4168967, *5-8 [SD NY, Aug. 30, 2018, No. 1:17-CV-06473(ALC)]; *see also Stoganovic v Dinolfo*, 92 AD2d 729, 729-730 [4th Dept 1983], *affd* 61 NY2d 812 [1984]), inasmuch as " '[t]he [l]egislature specifically considered and expressly provided for enforcement mechanisms' in the statute itself" (*Cruz v TD Bank, N.A.*, 22 NY3d 61, 71 [2013], quoting *Mark G. v Sabol*, 93 NY2d 710, 720 [1999]). Indeed, by its express terms, a violation of section 198-b constitutes a misdemeanor offense (*see* § 198-b [5]).

We therefore conclude that plaintiff may not assert a cause of action based upon an alleged violation of Labor Law § 198-b. Thus, Supreme Court erred in denying that part of High Way's motion seeking to dismiss plaintiff's third cause of action against it. In reaching that conclusion, we note that plaintiff's claim for damages pursuant to Labor Law § 198 in the third cause of action is based solely upon the alleged violation of section 198-b (*see generally Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457, 459 [1993], *rearg denied* 83 NY2d 801 [1994]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1267

KA 18-01570

PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS G., DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD 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 (Richard M. Healy, J.), rendered March 21, 2018. The judgment convicted defendant, upon a plea of guilty, of sexual abuse in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice, the conviction is vacated, and defendant is adjudicated a youthful offender and sentenced in accordance with the following memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]), defendant argues that he should be afforded youthful offender status. In determining whether to afford youthful offender status to an eligible youth such as defendant, a court must consider "the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life" (*People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd* 67 NY2d 625 [1986]). "[T]he Appellate Division may exercise its interest of justice jurisdiction to adjudicate a defendant a youthful offender even if it does not conclude that the trial court abused its discretion in denying youthful offender treatment" (*People v Shrubsall*, 167 AD2d 929, 930 [4th Dept 1990]).

Here, defendant was 17 years old at the time of the crimes and had no prior criminal record, history of violence, or history of sex offending. Moreover, defendant has substantial cognitive limitations, learning disabilities, and other mental health issues, and he has accepted responsibility for his actions and expressed genuine remorse.

Both the Probation Department and the reviewing psychologist recommended youthful offender treatment, and the record suggests that defendant might have the capacity for a productive and law-abiding future. The only factor weighing against affording defendant youthful offender treatment is the seriousness of the crimes.

On balance, although County Court did not abuse its discretion in denying defendant youthful offender status, we will exercise our discretion in the interest of justice to reverse the judgment, vacate the conviction, and adjudicate defendant a youthful offender (*see People v Keith B.J.*, 158 AD3d 1160, 1160-1161 [4th Dept 2018]). We impose the same sentence on the adjudication that was previously imposed on the conviction, i.e., a definite term of six months' imprisonment that shall be a condition of and run concurrently with a 10-year term of probation (*see* CPL 720.20 [3]; Penal Law §§ 60.01 [2] [d]; 60.02 [2]; 60.13; 65.00 [3] [a] [iii]; 70.80 [1] [a]; [4] [b], [c]). All conditions of probation shall remain in effect.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1276

CA 19-01256

PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

CARLA PICCARRETO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARK CHAUVIN BEZINQUE, DEFENDANT-RESPONDENT,
AND STEVEN B. LEVITSKY, DEFENDANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, ROCHESTER (ROBERT M. SHADDOCK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Robert B. Wiggins, A.J.), entered January 8, 2019. The order granted the motion of defendant Mark Chauvin Bezinque for summary judgment, dismissed the complaint and denied the cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the legal malpractice cause of action against defendant Mark Chauvin Bezinque, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for, inter alia, defendants' alleged legal malpractice in representing her in an action to recover unpaid child support from her former spouse pursuant to a judgment of divorce. Plaintiff now appeals from an order that, inter alia, granted the motion of Mark Chauvin Bezinque (defendant) for summary judgment dismissing the complaint against him. We agree with plaintiff that Supreme Court erred in granting that part of defendant's motion with respect to plaintiff's legal malpractice cause of action against him, and we therefore modify the order accordingly. In order to establish his entitlement to judgment as a matter of law with respect to the legal malpractice cause of action, defendant was required " 'to present evidence in admissible form establishing that plaintiff[] [is] unable to prove at least one necessary element' " of that cause of action (*Giardina v Lippes*, 34 AD3d 1220, 1220-1221 [4th Dept 2006]; *see generally Robbins v Harris Beach & Wilcox*, 291 AD2d 797, 798 [4th Dept 2002]). Here, defendant met his initial burden by submitting evidence in admissible form establishing that he exercised the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession with respect to his representation of plaintiff in the underlying action

(*see generally Robbins*, 291 AD2d at 798). In opposition, however, plaintiff raised an issue of fact by submitting the affidavit of an expert, who opined that defendant failed to exercise ordinary care, skill and diligence because, inter alia, he failed to take certain necessary steps to secure plaintiff's rights to the equity in certain property held by plaintiff's former spouse.

We have examined plaintiff's remaining contentions and conclude that they are without merit.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1278

CA 19-00093

PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF MATTHEW THOMS,
SUPERINTENDENT OF FIVE POINTS
CORRECTIONAL FACILITY,
PETITIONER-RESPONDENT,

MEMORANDUM AND ORDER

FOR AN ORDER AUTHORIZING THE FEEDING,
HYDRATION, AND TREATMENT OF SHANE H.,
RESPONDENT-APPELLANT.
(INDEX NO. 52579.)

DANIELLE C. WILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered January 9, 2019. The order, among other things, authorized the Department of Corrections and Community Supervision to forcibly feed respondent should respondent refuse to eat.

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

Memorandum: Respondent, a prison inmate with a history of engaging in hunger strikes, appeals from an order that, inter alia, authorizes the Department of Corrections and Community Supervision to forcibly feed him should he refuse to eat. The order remains effective until respondent's release from custody. We affirm.

The preservation rule applies in a proceeding to authorize the forcible feeding of a hunger-striking prisoner (*see Matter of Bezio v Dorsey*, 21 NY3d 93, 98-100 [2013]). Here, despite having been given a copy of the proposed order before it was signed, respondent did not object to either the duration or scope of the order, and he never asked that it be amended to incorporate the substantive limitations that he now seeks on appeal. In fact, the record shows that respondent "consented to the procedure employed by [Supreme Court], fully participated in the proceedings . . . , and did not raise [his] current objection[s] until [now]" (*THI of Ill. at Brentwood, LLC v CAM-Brentwood, LLC*, 98 AD3d 464, 464 [1st Dept 2012]). Respondent's appellate contentions are thus unpreserved for our review (*see People v Konieczny*, 2 NY3d 569, 572 [2004]; *Van Sharma, Inc. v Chamberlain*,

109 AD3d 1094, 1095 [4th Dept 2013]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1292

CA 19-00847

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

CHARLES PHILLIPS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BURGIO & CAMPOFELICE, INC., DEFENDANT-RESPONDENT.

DOLCE PANEPINTO, P.C., BUFFALO (SEAN E. COONEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (KENNETH L. BOSTICK, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 25, 2019. The order, among other things, granted defendant's motion for, inter alia, partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the Labor Law § 240 (1) cause of action and the Labor Law § 241 (6) cause of action except insofar as it is premised on the alleged violation of 12 NYCRR 23-3.3 (b) (3) and as modified the order is affirmed without costs.

Memorandum: Plaintiff was allegedly injured while working for a subcontractor on a demolition and abatement project at property owned by the State of New York (State). Burgio & Campofelice, Inc. (defendant) was the general contractor on the project. Plaintiff pursued an action against the State in the Court of Claims and commenced this action against defendant in Supreme Court. In each action, plaintiff asserted causes of action for violations of Labor Law §§ 200, 240 (1) and 241 (6) as well as for common-law negligence. Due to the fact that the notice of intention to file a claim in the State action was indisputably untimely (*see* Court of Claims Act § 10 [3]), plaintiff filed an application seeking permission to file a late claim against the State (*see* § 10 [6]). The Court of Claims denied that application, determining that plaintiff had "failed to demonstrate the merit" of the Labor Law § 240 (1) cause of action, the Labor Law § 241 (6) cause of action insofar as it was predicated on a violation of 12 NYCRR 23-3.3 (b) (3), and the claims based on an allegation of a dangerous or defective condition on the premises.

Relying on the decision and order of the Court of Claims, defendant filed a motion seeking an order granting defendant leave to

amend its answer to assert the affirmative defenses of res judicata and collateral estoppel, granting defendant partial summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action on those grounds, and precluding plaintiff from contending that a dangerous or defective condition existed on the premises at the time of his accident. Supreme Court granted defendant's motion. Plaintiff appeals.

Following entry of the court's order granting defendant's motion, we modified the order of the Court of Claims by granting plaintiff's application insofar as it sought permission to file a late claim asserting a Labor Law § 240 (1) cause of action based on our determination that the proposed section 240 (1) cause of action appeared to have merit (*Phillips v State of New York*, 179 AD3d 1497, 1499 [4th Dept 2020] [*Phillips I*]).

It is well established that "a vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case" (*Micro-Link, LLC v Town of Amherst*, 155 AD3d 1638, 1640 [4th Dept 2017] [internal quotation marks omitted]; *see City of New York v State of New York*, 284 AD2d 255, 255 [1st Dept 2001]). Inasmuch as the basis upon which the court relied in granting the motion with respect to the Labor Law § 240 (1) cause of action "no longer exists[,] . . . its order [to that extent] must be reversed" (*Reed v Commercial Union Ins. Co.*, 101 AD2d 716, 716 [4th Dept 1984]; *see Jeffrey's Auto Body, Inc. v Allstate Ins. Co.*, 159 AD3d 1481, 1482-1483 [4th Dept 2018]; *cf. Beneficial Homeowner Serv. Corp. v Mason*, 95 AD3d 1428, 1429 [3d Dept 2012]), and we therefore modify the order accordingly.

Plaintiff also contends that the court erred in granting the motion with respect to the Labor Law § 241 (6) cause of action and with respect to the claims that a dangerous or defective condition existed on the premises. Generally, "[t]he preclusive effect of a judgment is determined by two related but distinct concepts—issue preclusion and claim preclusion—which collectively comprise the doctrine of 'res judicata' " (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018]). "While issue preclusion applies only to issues actually litigated, claim preclusion . . . more broadly bars the parties or their privies from relitigating issues that were or *could have been raised* in that action" (*id.* [emphasis added]).

To the extent that plaintiff contends that the decision and order in *Phillips I* does not preclude him from litigating issues that were " 'actually litigated and resolved' " by the Court of Claims (*id.*, quoting *New Hampshire v Maine*, 532 US 742, 748-749 [2001]) because he lacked a full and fair opportunity to litigate those issues, we reject that contention (*see generally Buechel v Bain*, 97 NY2d 295, 304 [2001], *cert denied* 535 US 1096 [2002]). Plaintiff knew the importance of his claims in *Phillips I*, had incentive and initiative to argue the merits of those claims in the context of his application for leave to file a late claim, and was represented by competent counsel on the application (*see Clemens v Apple*, 65 NY2d 746, 748

[1985]; *Rozewski v Trautmann*, 151 AD3d 1945, 1946 [4th Dept 2017]). We thus conclude that the court properly granted those parts of defendant's motion seeking summary judgment dismissing the cause of action under Labor Law § 241 (6) to the extent that it is predicated upon a violation of 12 NYCRR 23-3.3 (b) (3) and seeking to preclude plaintiff from contending that there was a dangerous or defective condition on the premises.

We agree with plaintiff, however, that the court erred in applying the doctrine of claim preclusion to bar plaintiff from litigating claims or issues that were not raised in *Phillips I* (*see Paramount Pictures Corp.*, 31 NY3d at 72; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *cf. Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 123 [2008], *cert denied* 555 US 1136 [2009]; *Zoeller v Lake Shore Sav. Bank*, 140 AD3d 1601, 1602 [4th Dept 2016]). As the Court of Appeals recently reaffirmed, a party seeking to invoke claim preclusion "must show: (1) a final judgment on the merits, (2) *identity or privity of parties*, and (3) identity of claims in the two actions" (*Paramount Pictures Corp.*, 31 NY3d at 73 [emphasis added]). Here, defendant was neither a party to the earlier action nor in privity with one (*see generally Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987]) inasmuch as the interests of defendant, the general contractor, conflict with the interests of the State, the property owner (*see Tuper v Tuper*, 34 AD3d 1280, 1281-1282 [4th Dept 2006]). We thus conclude that the decision and order in *Phillips I* does not preclude plaintiff from asserting claims or causes of action against defendant that were not raised in *Phillips I*. We therefore further modify the order by denying the motion with respect to the Labor Law § 241 (6) cause of action except insofar as it is premised on the alleged violation of 12 NYCRR 23-3.3 (b) (3).

Based on our determination, we decline to address plaintiff's remaining contention.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1296

CA 19-00634

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

ANTHONY CARICATI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICIA MARY CARICATI, DEFENDANT-APPELLANT.

HEISMAN NUNES & HULL LLP, ROCHESTER (RONALD G. HULL OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John B. Gallagher, Jr., J.), entered September 19, 2018. The order, inter alia, determined the prenuptial agreement of the parties to be valid and enforceable.

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

Memorandum: Defendant wife appeals from an order determining, after a hearing, that a prenuptial agreement between defendant and plaintiff husband was valid and enforceable. Contrary to defendant's contention, Supreme Court did not err in determining that defendant failed to meet her burden of establishing that her signature on the document was a forgery. "An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" (Domestic Relations Law § 236 [B] [3]; *see generally Matisoff v Dobi*, 90 NY2d 127, 132 [1997]). "Under State law and general contract law, a forged signature renders a contract void *ab initio* . . . Because there can be no meeting of the minds of the parties when a forgery has been perpetrated, no contract exist[s]" in that instance (*Orlosky v Empire Sec. Sys.*, 230 AD2d 401, 403 [3d Dept 1997]). Where, however, as here, "a document on its face is properly subscribed and bears the acknowledgment of a notary public, it give[s] rise to a presumption of due execution, which may be rebutted only upon a showing of clear and convincing evidence to the contrary" (*Demblewski v Demblewski*, 267 AD2d 1058, 1058 [4th Dept 1999] [internal quotation marks omitted]; *see Paciello v Graffeo*, 32 AD3d 461, 462 [2d Dept 2006], *lv denied* 8 NY3d 802 [2007]). At the hearing, the notary public whose signature was on the document testified that defendant, whom she personally knew, asked her to notarize a document for her, and she did. Although defendant denied

that and even claimed that she had not seen the prenuptial agreement until a few months before the hearing, the court credited the testimony of the notary public. The court's determination was supported by other evidence in the record, including the testimony of an attorney that he prepared a prenuptial agreement for plaintiff. We therefore conclude that defendant failed to meet her burden of showing that her signature on the document was a forgery (*see Paciello*, 32 AD3d at 462; *Demblewski*, 267 AD2d at 1058).

Defendant further contends that, even if her signature was deemed authentic, the prenuptial agreement is unenforceable because the maintenance provision is no longer fair and reasonable. "It is well settled that duly executed prenuptial agreements are generally valid and enforceable given the 'strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements' " (*Van Kipnis v Van Kipnis*, 11 NY3d 573, 577 [2008]; *see Bloomfield v Bloomfield*, 97 NY2d 188, 193 [2001]). "[A] prenuptial agreement is accorded the same presumption of legality as any other contract . . . and the validity of such an agreement is presumed unless the party opposing the agreement comes forward with evidence demonstrating fraud, duress, or overreaching, or that the agreement or stipulation is . . . unconscionable" (*Trbovich v Trbovich*, 122 AD3d 1381, 1383 [4th Dept 2014] [internal quotation marks omitted]; *see Taha v Elzemity*, 157 AD3d 744, 745 [2d Dept 2018], *lv dismissed* 33 NY3d 1000 [2019]; *Gottlieb v Gottlieb*, 138 AD3d 30, 36 [1st Dept 2016], *lv dismissed* 27 NY3d 1125 [2016]). "An agreement is unconscionable if it is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense" (*Taha*, 157 AD3d at 745 [internal quotation marks omitted]; *see Ku v Huey Min Lee*, 151 AD3d 1040, 1041 [2d Dept 2017]; *Gottlieb*, 138 AD3d at 47). " 'The burden of proof is on the party seeking to invalidate the agreement' " (*Ku*, 151 AD3d at 1041; *see Taha*, 157 AD3d at 746).

Domestic Relations Law § 236 (B) (3) (3) provides that a prenuptial agreement may include a provision for the amount and duration of maintenance "provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment" (*see Taha*, 157 AD3d at 745-746). We conclude that defendant's contention is not preserved for our review inasmuch as she did not raise the issue of the alleged unconscionability of the maintenance provision. In any event, defendant did not meet her burden of proof on the issue (*see generally Ku*, 151 AD3d at 1041).

Defendant also contends that plaintiff breached the prenuptial agreement through his breach of fiduciary duty insofar as he allegedly manipulated the marital residence into his name alone, which would result in him receiving that property pursuant to the prenuptial agreement. That issue, however, was not before the court (*see Colello v Colello*, 9 AD3d 855, 859 [4th Dept 2004]).

Finally, defendant contends that the court abused its discretion in denying that part of a motion seeking attorneys' fees because she is the less monied spouse. We reject that contention. " '[A]n award of [counsel] . . . fees pursuant to Domestic Relations Law § 237 (a) will generally be warranted where there is a significant disparity in the financial circumstances of the parties' " (*Wilson v Wilson*, 128 AD3d 1326, 1327 [4th Dept 2015]). Nevertheless, " '[t]he decision to award . . . attorney[s'] fees lies, in the first instance, in the discretion of the trial court and then in the Appellate Division whose discretionary authority is as broad as [that of] the trial court[ ]' " (*Haggerty v Haggerty*, 169 AD3d 1388, 1391 [4th Dept 2019], quoting *O'Brien v O'Brien*, 66 NY2d 576, 590 [1985]). " '[I]n exercising its discretionary power to award counsel . . . fees, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions' " (*Wilson*, 128 AD3d at 1327, quoting *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]; *see* § 237 [a]). We conclude that the court did not abuse its discretion in declining to award attorneys' fees to defendant, particularly considering the relative merit of the parties' positions, which favored plaintiff (*see Dechow v Dechow*, 161 AD3d 1584, 1585-1586 [4th Dept 2018]; *Wilson*, 128 AD3d at 1327).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

1312

TP 19-01265

PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF NEW YORK STATE DIVISION OF HUMAN RIGHTS, PETITIONER,

V MEMORANDUM AND ORDER

WALDORF NIAGARA, INC., DOING BUSINESS AS VILLELLA'S ITALIAN RESTAURANT, FILIPPO VILLELLA, FILIPPO INGLIMA, AND JACINTA M. MORINELLO, RESPONDENTS.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (MICHAEL K. SWIRSKY OF COUNSEL), FOR PETITIONER.

SCHRODER, JOSEPH & ASSOCIATES, LLP, BUFFALO (LINDA H. JOSEPH OF COUNSEL), FOR RESPONDENT FILIPPO VILLELLA.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Niagara County [Daniel Furlong, J.], entered July 1, 2019) to enforce an order of petitioner New York State Division of Human Rights.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the motion of respondent Filippo Villella to dismiss the petition against him is granted, the petition is granted against respondents Filippo Inglima and Waldorf Niagara, Inc., doing business as Villella's Italian Restaurant, and those respondents are directed to pay respondent Jacinta M. Morinello the sum of $24,480 as lost wages with interest at the rate of 9% per annum commencing March 1, 2013; to pay Morinello the sum of $65,000 as compensatory damages with interest at the rate of 9% per annum commencing July 26, 2017; and to pay the Comptroller of the State of New York the sum of $20,000 for a civil fine and penalty with interest at the rate of 9% per annum commencing July 26, 2017.

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking enforcement of an order of its Commissioner that, inter alia, found respondents Waldorf Niagara, Inc., doing business as Villella's Italian Restaurant (Waldorf), and Filippo Inglima liable to respondent Jacinta M. Morinello (complainant) for sexual harassment and awarding complainant damages. Respondent Filippo Villella moved to dismiss the petition against him on the ground that he is not a proper party to an enforcement proceeding where the order to be enforced absolved him of any

liability. In opposition, petitioner argued that 22 NYCRR 202.57 (a) required it to name Villella as a respondent. Supreme Court transferred the matter to this Court and we now grant Villella's motion to dismiss. Unlike a proceeding instituted by a party aggrieved by an order of petitioner, neither Executive Law § 298 nor 22 NYCRR 202.57 (a) contains a requirement governing what parties petitioner must name in an enforcement proceeding (*see Matter of Massapequa Auto Salvage, Inc. v Donaldson*, 40 AD3d 647, 649 [2d Dept 2007]; *see generally Matter of New York State Div. of Human Rights v Soundview Instruments*, 206 AD2d 961, 961 [4th Dept 1994]). Inasmuch as petitioner raised no further opposition to Villella's motion, dismissal is warranted.

With respect to the merits of the enforcement petition, neither Waldorf nor Inglima answered the petition. Nonetheless, "[a]n enforcement proceeding initiated by the [New York State Division of Human Rights] raises the issue of whether its determination was supported by sufficient evidence in the record as a whole" even where that petition is unopposed (*Matter of New York State Div. of Human Rights v Roadtec, Inc.*, 167 AD3d 898, 899 [4th Dept 2018] [internal quotation marks omitted]; *see id.* at 901). Applying that standard, we conclude that the administrative record contains "relevant proof as a reasonable mind may accept as adequate to support" the relevant conclusions and factual findings (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Finally, because the unopposed petition for enforcement demonstrates that Waldorf and Inglima have failed to comply with the order, enforcement is granted (*see generally* Executive Law § 298).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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TP 19-01445

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

IN THE MATTER OF VAUGHN D. DERAWAY, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES
APPEALS BOARD, RESPONDENT.

JOHN G. LEONARD, ROME, FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Erin P. Gall, J.], entered August 29, 2018) to review a determination of respondent. The determination revoked petitioner's driver's license.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs and the amended petition is granted.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking his driver's license based on his refusal to submit to a chemical test following his arrest for driving while intoxicated. A police officer initially stopped petitioner on a suspected violation of Vehicle and Traffic Law § 600 (1) (a), i.e., leaving the scene of an accident that caused property damage without reporting it. The officer observed petitioner approximately one mile from the accident site driving a white pickup truck, which matched the description of the vehicle involved in the accident. The officer effected a stop of the truck by activating the patrol vehicle's lights and ultimately took petitioner into custody after petitioner exhibited signs and made statements that indicated he was intoxicated. Petitioner refused to submit to a chemical test, and thus his driver's license was temporarily suspended. A refusal revocation hearing was thereafter held pursuant to Vehicle and Traffic Law § 1194 (2) (c). The Administrative Law Judge revoked petitioner's license after concluding, inter alia, that the traffic stop was legal. In affirming that determination on petitioner's administrative appeal, respondent concluded that the stop was lawful because the officer "had a reasonable basis for stopping" petitioner.

We agree with petitioner that respondent reviewed the determination under an incorrect legal standard inasmuch as "the Court

of Appeals has made it 'abundantly clear' . . . that 'police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime' . . . [,] or where the police have 'probable cause to believe that the driver . . . has committed a traffic violation' " (*People v Washburn*, 309 AD2d 1270, 1271 [4th Dept 2003]; *see People v Robinson*, 97 NY2d 341, 348-349 [2001]). We further agree with petitioner that the record lacks substantial evidence to support the determination that the officer had the requisite probable cause at the time of the stop (*cf. Matter of Deveines v New York State Dept. of Motor Vehs. Appeals Bd.*, 136 AD3d 1383, 1384-1385 [4th Dept 2016]; *see generally Robinson*, 97 NY2d at 349; *People v Robinson*, 122 AD3d 1282, 1283 [4th Dept 2014]). We therefore annul the determination and grant the amended petition.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 19-00837

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT PIWOWAR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), rendered January 11, 2005. The judgment convicted defendant, upon a plea of guilty, of manslaughter 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 manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is invalid. We agree inasmuch as the perfunctory inquiry made by Supreme Court was "insufficient to establish that the court engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Soutar*, 170 AD3d 1633, 1634 [4th Dept 2019], *lv denied* 34 NY3d 938 [2019] [internal quotation marks omitted]; *see People v Lewis* [appeal No. 1], 161 AD3d 1588, 1588 [4th Dept 2018]; *People v Brown*, 296 AD2d 860, 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]), and the record 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]).

We nevertheless affirm. Defendant failed to preserve for our review his contention that the court failed to abide by its sentencing promise and that he is therefore entitled to specific performance of the plea agreement, which he defines as the imposition of a determinate term of 24 years' incarceration with no period of postrelease supervision. During the plea proceedings, defendant was informed that, in exchange for his guilty plea, he would be sentenced to less than the maximum term of 25 years' incarceration (*see* Penal Law § 70.02 [3] [a]), but no mention was made of postrelease

supervision. The court then sentenced defendant to a determinate term of 24 years' incarceration without imposing the mandatory period of postrelease supervision (*see* § 70.45). Two weeks later, further proceedings were held, during which the prosecutor explained that the purpose thereof was to "attach" the mandatory period of postrelease supervision to defendant's sentence. When offered a chance to speak *before* the court imposed the mandatory period of postrelease supervision, defense counsel did not object and instead agreed that postrelease supervision was "mandatory." Defendant therefore "had a reasonable opportunity to challenge the validity of his guilty plea on the same ground now advanced on appeal, or to move to withdraw the plea or otherwise to object to the imposition of postrelease supervision, and he failed to do so" (*People v King*, 151 AD3d 1759, 1759 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017]; *see People v Williams*, 27 NY3d 212, 219-225 [2016]; *People v Crowder*, 24 NY3d 1134, 1135-1137 [2015]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 18-01039

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS SIMCOE, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT 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 Niagara County Court (Matthew J. Murphy, III, J.), entered May 1, 2018. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Niagara County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order that summarily denied his CPL 440.10 motion to vacate a judgment of conviction entered following a nonjury trial in Niagara County Court in 2008. The Judge who denied defendant's motion had been the Niagara County District Attorney when defendant was indicted in 2007 on the charges that resulted in the judgment now sought to be vacated and, in fact, had signed the indictment. Thus, we conclude that the Judge was disqualified from entertaining the motion pursuant to Judiciary Law § 14, which provides in relevant part that "[a] judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he [or she] is a party, *or in which he [or she] has been attorney or counsel*" (emphasis added). Inasmuch as "this statutory disqualification deprived the court of jurisdiction," the order on appeal is void (*People v Rosario*, 170 AD3d 1275, 1276 [3d Dept 2019]; *see People v Alteri*, 47 AD3d 1070, 1070 [3d Dept 2008]; *see also People v Wright*, 16 AD2d 743, 743 [4th Dept 1962]). We therefore reverse the order and remit the matter to County Court for further proceedings on the motion before a different judge (*see People v Fardan*, 49 AD3d 1304, 1305 [4th Dept 2008]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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CAF 18-01726

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

IN THE MATTER OF ANTHONY MCMILLER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NATASHA FRANK, RESPONDENT-RESPONDENT.

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

NATASHA FRANK, RESPONDENT-RESPONDENT PRO SE.

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

Appeal from an order of the Family Court, Onondaga County (William W. Rose, R.), entered September 4, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, permitted respondent to relocate with the child to North Carolina.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the third ordering paragraph and replacing it with the following language: "ORDERED, that the father shall have parenting time with the child for six weeks every summer during the child's school summer break, as well as the child's winter (December) break or spring (April) break in alternating school years, beginning with the spring (April) break in the 2019-2020 school year, the winter (December) break in the 2020-2021 school year, and so on;" and as modified the order is affirmed without costs.

Memorandum: After respondent mother moved the subject child to North Carolina without notice to petitioner father, the father commenced this proceeding seeking modification of the prior custody and visitation order by awarding him sole custody and seeking the return of the child to Syracuse. The father appeals from an order that, inter alia, effectively denied the petition by permitting the mother to relocate with the child and modified the father's parenting time. Contrary to the father's contention, Family Court properly determined that the relocation was in the best interests of the child after considering all relevant factors (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]; *see generally Matter of Michael B. v Latasha T.-M.*, 166 AD3d 480, 481-482 [1st Dept 2018]; *Matter of Baum v Torello-Baum*, 40 AD3d 750, 751 [2d Dept 2007]), "notwithstanding the fact that the [mother] had already relocated with [the child]" (*Matter of Baxter v Borden*, 122 AD3d 1417, 1418 [4th Dept 2014], *lv denied* 24

NY3d 915 [2015]; *see Matter of Moredock v Conti*, 130 AD3d 1472, 1473 [4th Dept 2015]). "Although the unilateral removal of the child[ ] from the jurisdiction is a factor for the court's consideration" (*Matter of Tekeste B.-M. v Zeineba H.*, 37 AD3d 1152, 1153 [4th Dept 2007]; *see Baxter*, 122 AD3d at 1418; *see generally Friederwitzer v Friederwitzer*, 55 NY2d 89, 94 [1982]), the award of custody " 'must be based on the best interests of the child[ ] and not a desire to punish a recalcitrant parent' " (*Tekeste B.-M.*, 37 AD3d at 1153; *see Baxter*, 122 AD3d at 1418). We conclude that there is a sound and substantial basis in the record supporting the court's determination that "relocation would enhance the child['s life] economically, emotionally, and educationally, and that the child['s] relationship with the father could be preserved through a liberal parenting access schedule including, but not limited to, frequent communication and extended summer and holiday visits" (*Matter of Gustave v Harris*, 176 AD3d 937, 938 [2d Dept 2019]; *see generally Matter of Harrington v Harrington*, 63 AD3d 1618, 1619 [4th Dept 2009], *lv denied* 13 NY3d 705 [2009]).

We further conclude, however, that the father's parenting time schedule must be clarified and modified to comport with the child's school calendar in North Carolina, and we therefore modify the order accordingly. The father and the Attorney for the Child agree that the child does not have a winter break in the month of February. Rather, the child's winter break is in the month of December. Thus, in addition to the six weeks of parenting time afforded during the child's summer vacation, the father should be afforded parenting time during the child's December break or April break, with the breaks being alternated each school year. That schedule will result in the father having parenting time for an extended period in the summer and over one of the child's two breaks each school year.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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CA 19-01425

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

ROBERT M. KNAB, JR.,
CLAIMANT-RESPONDENT-APPELLANT,

V ORDER

NEW YORK STATE THRUWAY AUTHORITY,
DEFENDANT-APPELLANT-RESPONDENT.
(CLAIM NO. 120851.)

THE LAW FIRM OF JANICE M. IATI, P.C., PITTSFORD (JANICE M. IATI OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an interlocutory judgment of the Court of Claims (J. David Sampson, J.), entered February 21, 2019. The interlocutory judgment, among other things, adjudged that defendant was 50% liable for the happening of claimant's accident.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 27, 2019,

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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CA 19-00258

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

IN THE MATTER OF STEPHEN BARBEAU, EARL BICKETT, ROBERT BOYCE, JOSEPH MCKAY, STEPHEN MOULTON AND RONALD PAGANIN,
PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

VILLAGE OF LEROY, CIRCULAR HILL, INC., PETER MCQUILLEN, JUDITH MCQUILLEN,
RESPONDENTS-DEFENDANTS-RESPONDENTS,
AND HON. MICHELLE KRZEMIEN, IN HER CAPACITY AS JUSTICE OF THE TOWN OF DARIEN,
RESPONDENT-DEFENDANT.

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

DADD, NELSON, WILKINSON & WUJCIK, ATTICA (JAMES M. WUJCIK OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT VILLAGE OF LEROY.

BONARIGO & MCCUTCHEON, BATAVIA (KRISTIE L. DEFREZE OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS CIRCULAR HILL, INC., PETER MCQUILLEN AND JUDITH MCQUILLEN.

Appeal from a judgment (denominated order) of the Supreme Court, Genesee County (Emilio L. Colaiacovo, J.), entered January 14, 2019 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, inter alia, dismissed the petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the cross motion in part and reinstating the second and third causes of action against respondents-defendants Circular Hill, Inc., Peter McQuillen and Judith McQuillen, and as modified the judgment is affirmed without costs.

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, enforcement of a 2014 decision of the Village of LeRoy Zoning Board of Appeals (ZBA) and certain provisions of the Village of LeRoy Zoning Law, which allegedly prohibit respondents-defendants Peter McQuillen and Judith McQuillen from accessing their Robbins Road property via a driveway on property owned by respondent-defendant Circular Hill, Inc. located on Fillmore Street (Circular Hill driveway). The 2014 decision provided, in pertinent part, that

the McQuillens' "right of entry to the primary and accessory structure will be accessed through Robbins Road, LeRoy, New York *only*" (emphasis added). Judith McQuillen is the president of Circular Hill, Inc., which had granted the McQuillens an easement to use the Circular Hill driveway to access the Robbins Road property before the 2014 decision was entered. In 2016, the McQuillens sought an interpretation or clarification of the 2014 decision and, in December 2016, the ZBA issued a decision stating that it lacked jurisdiction to address that application.

After the McQuillens allegedly continued to access their Robbins Road property via the Circular Hill driveway, respondent-defendant Village of LeRoy (Village) filed an information charging Peter McQuillen with violating the December 2016 decision. That information was dismissed by respondent-defendant Hon. Michelle Krzemien (Town Justice), and the Village did not appeal.

Following that dismissal, petitioners commenced this proceeding-action and, in the first cause of action in the petition-complaint (petition), they sought to annul the decision of the Town Justice. The second and third causes of action were for nuisance and injunctive relief. The Town Justice moved for summary judgment dismissing the only cause of action asserted against her, i.e., the first cause of action. The McQuillens and Circular Hill, Inc. (collectively, McQuillen respondents) cross-moved for summary judgment "dismissing the Article 78 proceeding against them." They contended that petitioners were "attempting to improperly have the Supreme Court review [the Town Justice's] dismissal of the criminal charges against [Peter] McQuillen." Despite limiting their contentions to issues related to the CPLR article 78 cause of action, the McQuillen respondents sought summary judgment dismissing the entire petition against them, including the nuisance and injunctive relief causes of action. Petitioners thereafter moved for summary judgment on the petition.

Supreme Court denied petitioners' motion, granted the motion of the Town Justice and the cross motion of the McQuillen respondents, and dismissed the petition in its entirety. On appeal, petitioners challenge the denial of their motion and the grant of the cross motion only with respect to the second and third causes of action, i.e., the causes of action for nuisance and to enjoin the continued zoning violations. We agree with petitioners that the court erred in granting those parts of the cross motion seeking summary judgment dismissing those causes of action, and we therefore modify the judgment accordingly.

The Town Justice's motion and the McQuillen respondents' cross motion addressed standing only insofar as it concerned the first cause of action, i.e., the CPLR article 78 cause of action. In other words, the issue of standing was not raised with respect to the second and third causes of action. By granting the cross motion and dismissing the petition in its entirety, however, the court effectively dismissed the second and third causes of action based on its determination that petitioners lacked standing to pursue the first cause of action.

We thus conclude that the court erred in sua sponte reaching the issue of standing with respect to the second and third causes of action (*see Matter of Associated Gen. Contrs. of NYS, LLC v New York State Thruway Auth.*, 159 AD3d 1560, 1560 [4th Dept 2018]). Standing "is an aspect of justiciability which, *when challenged*, must be considered at the outset of any litigation" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991] [emphasis added]). Inasmuch as the McQuillen respondents' cross motion with respect to the second and third causes of action was not based on petitioners' alleged lack of standing, there was no basis for the court to reach that issue.

Although petitioners further contend that the McQuillen respondents should be judicially estopped from challenging the validity of the 2014 ZBA decision insofar as it concerns their use of the Circular Hill driveway (*see generally Secured Equities Invs. v McFarland*, 300 AD2d 1137, 1138 [4th Dept 2002]), it is premature for us to determine that evidentiary issue at this juncture.

We reject petitioners' contention that they are entitled to summary judgment on the second and third causes of action. They failed to establish their entitlement to judgment as a matter of law on those causes of action (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Finally, contrary to the McQuillen respondents' proffered alternative ground for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), we conclude that there are triable issues of fact that also preclude granting them summary judgment on those causes of action.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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CA 19-01152

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

ANN MASON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIC D. CARUANA, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (JACOB H. ZOGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered May 16, 2019. The order, among other things, granted plaintiff's motion for summary judgment as against defendant Eric D. Caruana.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking summary judgment dismissing the counterclaims of defendant Eric D. Caruana and reinstating those counterclaims, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to foreclose on a purchase money mortgage. The original note and mortgage was between plaintiff's now-deceased husband (decedent) and Eric D. Caruana (defendant), but decedent assigned those instruments to himself and plaintiff, jointly, several years before he passed away. The facts related to this action are summarized in an earlier appeal from an order denying defendant's motion for summary judgment on several of his counterclaims (*Mason v Caruana*, 177 AD3d 1295, 1295 [4th Dept 2019]). As we held in *Mason*, "plaintiff, as the assignee of a mortgagee, stands in the shoes of decedent and took the mortgage subject to the equities attending the original transaction" (*id.* at 1296 [internal quotation marks omitted]). As a result, we determined that defendant could "assert any defenses and claims against plaintiff that he could have asserted against decedent, but only as an 'offset to the amount of [plaintiff's foreclosure] demand' " (*id.*). Nevertheless, we concluded that there were triable issues of fact that precluded summary judgment in favor of defendant on the relevant counterclaims.

Following the order entered in *Mason* but before our decision was

issued, plaintiff moved for, inter alia, summary judgment on her complaint and for summary judgment dismissing defendant's affirmative defenses and counterclaims. Supreme Court granted that motion, and defendant appeals.

We conclude that the court properly granted those parts of the motion for summary judgment on the complaint and dismissing defendant's affirmative defenses. "It is well settled that a plaintiff moving for summary judgment in a mortgage foreclosure action establishes its prima facie case by submitting a copy of the mortgage, the unpaid note and evidence of default" (*Bank of N.Y. Mellon v Anderson*, 151 AD3d 1926, 1927 [4th Dept 2017]; *see Bank of N.Y. Mellon v Simmons*, 169 AD3d 1446, 1446 [4th Dept 2019]). We conclude that plaintiff established her prima facie case and that defendant "failed 'to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action' " (*Bank of N.Y. Mellon*, 169 AD3d at 1446). None of defendant's affirmative defenses or counterclaims affect the validity or enforceability of the mortgage or note, as would defenses "such as 'waiver, estoppel, bad faith, fraud or oppressive or unconscionable conduct on the part of . . . plaintiff [or decedent]' " (*Wells Fargo Bank, N.A. v Deering*, 134 AD3d 1468, 1469 [4th Dept 2015]). Indeed, defendant's allegations "challenge only the amount of the mortgage debt, as [his] claims, if proved, might be offset against the amount due and owing to . . . plaintiff" (*Johnson v Gaughan*, 128 AD2d 756, 757 [2d Dept 1987]).

We conclude, however, that the court erred in granting that part of the motion seeking summary judgment dismissing defendant's counterclaims, and we therefore modify the order accordingly. Plaintiff failed to establish as a matter of law that she was entitled to judgment dismissing the counterclaims inasmuch as plaintiff's own submissions raise triable issues of fact whether defendant is entitled to an " 'offset to the amount of [plaintiff's foreclosure] demand' " (*Mason*, 177 AD3d at 1296; *cf. Weiss v Phillips*, 157 AD3d 1, 10 [1st Dept 2017]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 19-01452

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL STENSON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered March 5, 2018. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree and criminal possession of a firearm.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a firearm (§ 265.01-b), defendant contends that County Court erred in refusing to suppress the handgun seized following a search of his vehicle. We affirm.

The evidence at the suppression hearing established that two police officers approached defendant's vehicle because it was parked in violation of a sign prohibiting "stopping from here to [the] corner." While the first officer spoke with defendant, the second officer used her flashlight to look inside the vehicle, where she observed what appeared to be a gun magazine protruding from under a shirt on the floor of the rear passenger side of the vehicle. When the officers returned to their vehicle, the second officer told the first officer what she had seen inside the vehicle. The officers returned to defendant's vehicle, confirmed the observation of the magazine, and asked defendant to step out of the vehicle, whereupon he was frisked. A subsequent search of the vehicle led to the discovery of a handgun under the shirt.

We conclude that the court did not err in refusing to suppress the evidence in question. Initially, the officers were permitted to approach the vehicle and speak to defendant because the vehicle was

illegally parked (*see generally People v Ellis*, 62 NY2d 393, 396 [1984]; *People v Amos*, 140 AD3d 1683, 1684 [4th Dept 2016], *lv denied* 28 NY3d 925 [2016]; *People v Semanek*, 30 AD3d 547, 548 [2d Dept 2006]). Having lawfully approached defendant's vehicle, the second police officer's observation of a gun magazine in plain view inside the vehicle provided probable cause for the police to suspect that there was also a gun inside the car, justifying the subsequent search (*see People v Lewis*, 117 AD3d 751, 752 [2d Dept 2014], *lv denied* 24 NY3d 1085 [2014]; *People v Johnson*, 253 AD2d 677, 677 [1st Dept 1998], *lv denied* 92 NY2d 1050 [1999]).

We further conclude that the court did not err in crediting the police officers' testimony with respect to whether the magazine was in plain view (*see generally People v Prochilo*, 41 NY2d 759, 761 [1977]; *People v Fick*, 167 AD3d 1484, 1485 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]; *People v Ramos*, 122 AD3d 462, 465 [1st Dept 2014]). Although the police officers' testimony and the surveillance video of the police encounter differed with respect to how long the officers waited to take action after they first observed the gun magazine, we conclude that this discrepancy did not render the officers' testimony incredible as a matter of law because the testimony was not obviously tailored to ameliorate any constitutional concerns, nor was it "impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Grunwald*, 29 AD3d 33, 36 [1st Dept 2006], *lv denied* 6 NY3d 848 [2006] [internal quotation marks omitted]; *see People v Tyler*, 166 AD3d 1556, 1556-1557 [4th Dept 2018], *lv denied* 32 NY3d 1179 [2019], *reconsideration denied* 33 NY3d 954 [2019]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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CAF 18-01658

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

IN THE MATTER OF CARL B., JR.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CARL B., SR., RESPONDENT-APPELLANT.

PAUL B. WATKINS, FAIRPORT, 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: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect. Contrary to the contention of the father, Family Court properly denied that part of his motion seeking to disqualify the public defender's office from representing the mother. The father failed to meet his "burden of making 'a clear showing that disqualification is warranted' " (*Lake v Kaleida Health*, 60 AD3d 1469, 1470 [4th Dept 2009]; *see Olmoz v Town of Fishkill*, 258 AD2d 447, 447-448 [2d Dept 1999]) by establishing: "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996], *rearg denied* 89 NY2d 917 [1996]; *see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9 [a]; *see also Matter of Gustavo G.*, 9 AD3d 102, 105 [1st Dept 2004]). Although the father established that a prior attorney-client relationship existed between himself and the public defender's office and that a member of that office currently represented the mother, the father failed to establish that his interests and the mother's interests were materially adverse. To the

contrary, the record demonstrates that both parents desired to have the child placed with family members rather than in foster care (*see Matter of Harley v Ziems*, 98 AD2d 720, 721 [2d Dept 1983]).

We also reject the father's contention that the court erred in denying that part of his motion seeking to remove the Attorney for the Child (AFC). No conflict of interest arose from the fact that other attorneys from the same legal aid society previously represented two of the mother's other children in an unrelated proceeding and advocated that they be placed with the mother's relative, whereas the AFC advocated placing the subject child in foster care. Moreover, although the father contends that, in recommending that the child remain in foster care instead of being placed with his siblings in the care of the mother's relative, the AFC failed to advocate for the child's best interests, we note that the other children of the mother had not developed a relationship with the subject child, who has lived with his foster parents for the vast majority of his life, and thus the father's reliance on cases supporting the proposition that siblings should remain together is misplaced (*see e.g. Obey v Degling*, 37 NY2d 768, 771 [1975]; *Salerno v Salerno*, 273 AD2d 818, 819 [4th Dept 2000]). Inasmuch as there was no conflict of interest and the AFC did not fail to diligently represent the best interests of the child, we conclude that the court properly denied the father's motion to remove the AFC (*see Sagaria v Sagaria*, 173 AD3d 1096, 1097 [2d Dept 2019]).

We reject the father's further contention that the court erred in finding that the child is a permanently neglected child and in terminating the father's parental rights with respect to him. Petitioner met its burden of establishing "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the [father] and [the child] by providing 'services and other assistance aimed at ameliorating or resolving the problems preventing [the child's] return to [the father's] care' . . . and that the [father] failed substantially and continuously to plan for the future of the child although physically and financially able to do so" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *see* Social Services Law § 384-b [7] [a]).

Petitioner created a service plan for the father that required him to engage in chemical dependency treatment and mental health therapy, obtain a stable source of income, and find stable housing. Petitioner also provided the father with transportation assistance and regular correspondence, including while he was incarcerated, and arranged visits between the father and the child. The father, however, failed to comply with the service plan, and missed several appointments to review the service plan with his caseworkers. His visits with the child were sporadic, at best, and the father missed medical and therapeutic visits for the child. Thus, we conclude that petitioner met its burden of establishing that the child was permanently neglected (*see Matter of Brooke T. [Terri T.]*, 175 AD3d 1842, 1842 [4th Dept 2019]). Finally, the court properly denied the father's request for a suspended judgment (*see Matter of Makayla S.*

[David S.- Alecia P.], 118 AD3d 1312, 1312 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]; *Matter of Lillianna G. [Orena G.]*, 104 AD3d 1224, 1225 [4th Dept 2013]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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CAF 19-00200

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

IN THE MATTER OF NYKIRA H.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHELLSIE B.-M., RESPONDENT-APPELLANT.

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

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (CAROL LYNN EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

CLAYTON F. HALE, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (James E. Walsh, Jr., J.), entered January 8, 2019 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: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order terminating her parental rights with respect to the subject child on the ground of permanent neglect. We reject the mother's contention that petitioner failed to establish that it exercised diligent efforts to encourage and strengthen the parent-child relationship while the mother was incarcerated, as required by section 384-b (7) (a). Where, as here, a parent is incarcerated during the relevant period of time, petitioner's duty to engage in diligent efforts to strengthen the parent-child relationship "may be satisfied by informing the parent of the child['s] well-being and progress, responding to the parent's inquiries, investigating relatives suggested by the parent as placement resources, and facilitating communication between the child[ ] and the parent" (*Matter of Jarrett P. [Jeremy P.]*, 173 AD3d 1692, 1694 [4th Dept 2019], *lv denied* 34 NY3d 902 [2019] [internal quotation marks omitted]; *see* § 384-b [7] [f]). Here, we conclude that petitioner exercised diligent efforts inasmuch as the caseworker, over the course of at least one year, sent the mother monthly letters informing her of service plan review meetings, providing her with updates on the child's condition and progress, and explaining to her that if the child remained in foster care, the mother's parental

rights could be terminated. We note that in light of the distance to the prison facilities and the child's age, medical needs, and inability to speak, neither visitation nor telephone contact was feasible (*see Matter of Lawrence KK. [Lawrence LL.]*, 72 AD3d 1233, 1234 [3d Dept 2010], *lv denied* 14 NY3d 713 [2010]).

Contrary to the mother's further contention, petitioner established that, despite its diligent efforts, the mother failed substantially and continuously or repeatedly to maintain contact with or plan appropriately for the future of the child (*see Matter of Christian C.-B. [Christopher V.B.]*, 148 AD3d 1775, 1776-1777 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]). We conclude that "[t]he [mother's] failure . . . to provide any realistic and feasible alternative to having the child[ ] remain in foster care until [the mother's] release from prison . . . supports a finding of permanent neglect" (*Matter of Davianna L. [David R.]*, 128 AD3d 1365, 1365 [4th Dept 2015], *lv denied* 25 NY3d 914 [2015] [internal quotation marks omitted]). Furthermore, where the evidence demonstrates that the foster placement is providing for the extensive needs of a child with medical concerns and that the parent "lack[s] knowledge, insight and understanding" into those needs, there is a sound and substantial basis in the record for determining that it is in the child's best interests to be freed for adoption by the foster family (*Matter of Deime Zechariah Luke M. [Sharon Tiffany M.]*, 112 AD3d 535, 537 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]). Thus, "[i]n light of 'the positive living situation' of the child[ ] while residing with [her] foster parent[], 'the absence of a more significant relationship' between the child[ ] and the [mother], 'and the uncertainty surrounding' " the mother's ability to care for the child and the stability of her living situation, we further conclude that termination of mother's parental rights was warranted (*Matter of Nataylia C.B. [Christopher B.]*, 150 AD3d 1657, 1659 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]; *see Matter of Isabella M. [Kristine N.]*, 168 AD3d 1234, 1236 [3d Dept 2019]).

Finally, contrary to the mother's contention that she was denied effective assistance of counsel, we conclude that " '[t]he record, viewed in its totality, establishes that the [mother] received meaningful representation' " (*Matter of Kemari W. [Jessica J.]*, 153 AD3d 1667, 1668 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

40

CA 19-00675

PRESENT: CARNI, J.P., CURRAN, WINSLOW, AND DEJOSEPH, JJ.

LAUREN D. DZIWULSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LISA TOLLINI-REICHERT, M.D., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (KARA M. EYRE OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, BUFFALO (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered April 1, 2019. The order denied the motion of defendant Lisa Tollini-Reichert, M.D. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint is dismissed against defendant Lisa Tollini-Reichert, M.D.

Memorandum: Plaintiff commenced this medical malpractice action alleging, inter alia, that Lisa Tollini-Reichert, M.D. (defendant) was negligent in the care and treatment that she rendered to plaintiff and that, as a result of the negligence, plaintiff suffered serious and permanent injuries, including cardiopulmonary failure, congestive heart failure, and viral myocarditis. Defendant appeals from an order denying her motion for summary judgment dismissing the complaint against her.

We agree with defendant that Supreme Court erred in denying her motion inasmuch as she met her initial burden of establishing the absence of any departure from good and accepted medical practice and that any departure was not the proximate cause of plaintiff's injuries (*see Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The medical expert's affidavit submitted by defendant in support of her motion was "detailed, specific and factual in nature" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755 [3d Dept 2001]) and " 'address[ed] each of the specific factual claims of negligence raised in [the] plaintiff's bill of particulars' " (*Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]; *see Bubar*, 177 AD3d at 1360-1361). Specifically, we agree with defendant that the court erred in

concluding that defendant's medical expert did not address plaintiff's allegation that defendant failed to admit plaintiff to a hospital. Defendant's medical expert opined that, "[g]iven [plaintiff's] history and presentation, there were no further tests, consultations, or treatment that [defendant] should have, but failed to, recommend." In our view, the medical expert's opinion that no further tests, consultations, *or treatment* were indicated necessarily means that transfer to a hospital was not indicated.

The affidavit of plaintiff's medical expert failed to raise a triable issue of fact in opposition inasmuch as the affidavit itself lacked a proper foundation for consideration (*see Luu v Paskowski*, 57 AD3d 856, 858 [2d Dept 2008]; *Wilson v Buffa*, 294 AD2d 357, 358 [2d Dept 2002], *lv denied* 98 NY2d 611 [2002]; *see also Keller v Liberatore*, 134 AD3d 1495, 1496 [4th Dept 2015]). Notably, plaintiff's expert failed to state whether he or she reviewed the bill of particulars, the deposition testimony, or the affidavit of defendant's medical expert. We therefore reverse the order, grant the motion, and dismiss plaintiff's complaint against defendant.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 17-01359

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERMAN ROSADO-THOMAS, ALSO KNOWN AS "MAN MAN", DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered May 2, 2016. The judgment convicted defendant, upon a plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). We affirm. We note at the outset that defendant does not challenge the validity of his waiver of the right to appeal. Although defendant's challenge to the voluntariness of his guilty plea would survive even a valid waiver of the right to appeal, it is nevertheless unpreserved for appellate review and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see People v Arline*, 169 AD3d 1371, 1372 [4th Dept 2019], *lv denied* 33 NY3d 974 [2019]). Defendant's challenge to the severity of his sentence is foreclosed by his unchallenged waiver of the right to appeal (*see People v Putman*, 163 AD3d 1461, 1461 [4th Dept 2018]). Finally, to the extent that defendant challenges the legality of his sentence, that contention is without merit (*see* § 70.02 [3] [a]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

52

CAF 17-01249

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

IN THE MATTER OF AAREN F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

AMBER S., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

NICHOLAS G. LOCICERO, BUFFALO, FOR PETITIONER-RESPONDENT.

JOSEPH J. SCINTA, JR., ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered February 28, 2017 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had derivatively abused the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the order determining that the child was derivatively abused and substituting therefor a determination that the child was derivatively neglected, and as modified the order is affirmed without costs.

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent mother appeals from three orders determining that, inter alia, she abused one child (appeal No. 2), derivatively abused a second child (appeal No. 1), and derivatively neglected a third child (appeal No. 3). As a preliminary matter, we note that, in its bench decision, Family Court determined that the child in appeal No. 1 was derivatively neglected. Inasmuch as there is a conflict between the decision and the order in appeal No. 1, that order must be conformed to the decision (*see Matter of Esposito v Magill*, 140 AD3d 1772, 1773 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016]; *Matter of Edward V.*, 204 AD2d 1060, 1061 [4th Dept 1994]; *see generally* CPLR 5019 [a]). We therefore modify the order in appeal No. 1 by vacating that part of the order determining that the child was derivatively abused and substituting therefor a determination that the child was derivatively neglected.

Contrary to the mother's contention in appeal No. 2, petitioner established by a preponderance of the evidence that she abused the child who is the subject of the order in that appeal (*see* Family Ct

Act § 1046 [b] [i]). The evidence included testimony from the child's father that the child had no injuries before the child was taken to the mother's house for weekend visitation and that, when he picked up the child several days later, there were bruises and scars on the child's body. A pediatric nurse and one of petitioner's caseworkers testified that the child eventually disclosed that the mother had inflicted his injuries with a belt and that the mother had coached him to blame the father's wife. The court found the testimony of petitioner's witnesses to be credible and the testimony of the mother incredible, and we see no reason to disturb the court's credibility determinations inasmuch as they are supported by the record (*see Matter of Alesha P. [Audrey B.]*, 112 AD3d 1369, 1369 [4th Dept 2013]; *Matter of Zanna E. [Ila E.]*, 77 AD3d 1364, 1365 [4th Dept 2010]).

We conclude, contrary to the mother's further contention in appeal No. 2, that the court properly determined that the "persisting" scarring of the wounds inflicted on the subject child constituted protracted disfigurement within the meaning of Family Court Act § 1012 (e) (*see Matter of A.J.*, 17 Misc 3d 631, 640 [Fam Ct, Queens County 2007]; *Matter of Roy T.*, 126 Misc 2d 172, 175 [Fam Ct, Monroe County 1984]). We reject the mother's contention in appeal No. 2 that the court abused its discretion in limiting her testimony, on the ground that it was not relevant, concerning a bruise she had seen on the subject child's back six to eight months before the incident that gave rise to this proceeding (*see generally Matter of Canfield v McCree*, 90 AD3d 1653, 1654 [4th Dept 2011]).

We reject the mother's contention in appeal Nos. 1 and 3 that the court erred in finding that the mother derivatively neglected the children who are the subjects of the orders in those appeals. A finding of derivative neglect is appropriate "where the evidence with respect to the child found to be abused or neglected demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the parent's] care" (*Matter of Alexia J. [Christopher W.]*, 126 AD3d 1547, 1548 [4th Dept 2015] [internal quotation marks omitted]). Here, the pediatric nurse testified that, days after the injuries were inflicted on the child in appeal No. 2, she counted the loop-shaped marks on the body of that child and determined that the child may have been struck as many as 26 times. We conclude that the mother's prolonged beating of the child who is the subject of the order in appeal No. 2 "can be said to evidence fundamental flaws in the [mother's] understanding of the duties of parenthood" (*Matter of Angel L.H. [Melissa H.]*, 85 AD3d 1637, 1637-1638 [4th Dept 2011], *lv denied* 17 NY3d 711 [2011] [internal quotation marks omitted]), thus warranting a finding of derivative neglect with respect to the children in appeal Nos. 1 and 3.

Finally, we reject the mother's contention in all three appeals that the court's destruction of certain trial exhibits precludes adequate appellate review inasmuch as "the information in the missing exhibit[s] can be gleaned from the record and there is no dispute as to [the] accuracy" of that information (*People v Yavru-Sakuk*, 98 NY2d

56, 60 [2002]; *see Matter of Daniel BB.*, 26 AD3d 687, 688 [3d Dept 2006]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

53

CAF 17-01250

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

IN THE MATTER OF DOMINICK L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

NICHOLAS G. LOCICERO, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered June 15, 2017 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had abused the subject child.

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

Same memorandum as in *Matter of Aaren F. (Amber S.)* ([appeal No. 1] — AD3d — [Mar. 13, 2020] [4th Dept 2020]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

54

CAF 17-01251

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

IN THE MATTER OF BROOKLYN S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

NICHOLAS G. LOCICERO, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered June 15, 2017 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent derivatively neglected the subject child.

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

Same memorandum as in *Matter of Aaren F. (Amber S.)* ([appeal No. 1] — AD3d — [Mar. 13, 2020] [4th Dept 2020]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

70

KA 18-01411

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STORM U. LANG, 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 an order of the Genesee County Court (Charles N. Zambito, J.), entered June 1, 2018. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Contrary to defendant's contention, the 20 points assessed under risk factor 4, for a continuing course of sexual misconduct, are supported by clear and convincing evidence. Here, the evidence, including the victim's statement and defendant's admissions in the presentence report, establishes that defendant engaged in sexual contact with the seven-year-old victim on at least three occasions over a period of more than two weeks (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006]; *see generally People v Leeson*, 148 AD3d 1677, 1678 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]).

Defendant's challenge to his underlying conviction, based on an alleged jurisdictional defect in his waiver of indictment, is not properly before us on this appeal from the SORA determination (*see People v Jamison*, 137 AD3d 1742, 1742 [4th Dept 2016], *lv denied* 27 NY3d 910 [2016]).

In light of our determination, we do not consider defendant's remaining contention concerning County Court's alternative basis for

its risk level assessment.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 18-02393

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON GRIFFITH, DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRITTANY GROME ANTONACCI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 24, 2018. The judgment convicted defendant upon his plea of guilty of promoting prison contraband in the first degree (two counts).

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 two counts of promoting prison contraband in the first degree (Penal Law § 205.25 [2]), defendant contends that County Court improperly denied his request to represent himself. We reject that contention. The right to counsel may be waived, allowing a defendant to proceed pro se, when: " '(1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues' " (*People v Silburn*, 31 NY3d 144, 150 [2018]; *see generally People v Crampe*, 17 NY3d 469, 481-482 [2011], *cert denied* 565 US 1261 [2012]). " '[A] reviewing court may look to the whole record, not simply to the waiver colloquy, in order to determine if a defendant effectively waived counsel' " (*Crampe*, 17 NY3d at 482). Here, defendant failed to satisfy the first and second factors. With respect to the first factor, his request to proceed pro se was made based on his belief that all the attorneys were in "cahoots," rather than on an unequivocal desire to proceed without the assistance of counsel (*see generally People v Larkins*, 128 AD3d 1436, 1441 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016]; *People v Chicherchia*, 86 AD3d 953, 954 [4th Dept 2011], *lv denied* 17 NY3d 952 [2011]).

With respect to the second factor, we conclude that the court properly determined that defendant could not make a knowing and intelligent waiver of the right to counsel. "[T]he second prong . . .

is satisfied when a defendant, competent to stand trial, satisfies the court, upon inquiry, that he [or she] understands the risks and disadvantages of proceeding pro se" (*People v Schoolfield*, 196 AD2d 111, 116 [1st Dept 1994], *lv dismissed* 83 NY2d 858 [1994], *lv denied* 83 NY2d 915 [1994]). Although defendant correctly contends that a defendant who is deemed competent to stand trial necessarily has the competency to waive the right to counsel (*see People v Reason*, 37 NY2d 351, 353-354 [1975], *rearg denied* 37 NY2d 817 [1975]), courts have "long recognized that a mentally-ill defendant, though competent to stand trial, may not have the capacity to appreciate the demands attendant to self-representation, resulting in an inability to knowingly, voluntarily and intelligently waive the right to counsel and proceed pro se" (*People v Stone*, 22 NY3d 520, 526-527 [2014]). Following its colloquy with defendant, the court determined that he lacked the ability to knowingly, voluntarily and intelligently waive the right to counsel. We see no basis to disturb that determination.

We reject defendant's further contention that the court abused its discretion in denying his motion to withdraw his guilty plea. " 'When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances' " (*People v Manor*, 27 NY3d 1012, 1013 [2016]; *see* CPL 220.60 [3]; *People v Mitchell*, 21 NY3d 964, 966 [2013]; *People v Spencer*, 170 AD3d 1614, 1615 [4th Dept 2019]). " 'Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea' " (*People v Leach*, 119 AD3d 1429, 1430 [4th Dept 2014], *lv denied* 24 NY3d 962 [2014]).

Here, defendant contends that his motion should have been granted because he was actually innocent and entered his plea under duress. Even assuming, arguendo, that those contentions are preserved for our review, we conclude that they are "unsupported by the record and belied by [defendant's] statements during the plea colloquy" (*People v Gerena*, 174 AD3d 1428, 1430 [4th Dept 2019], *lv denied* 34 NY3d 981 [2019]; *see People v Dale*, 142 AD3d 1287, 1289 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]).

Finally, defendant contends that his sentence is unduly harsh and severe. Where, as here, a defendant receives the minimum term of incarceration authorized by law, "that part of his [or her] sentence cannot be considered unduly harsh or severe" (*People v Hughes*, 124 AD3d 1380, 1382 [4th Dept 2015], *amended on rearg* 126 AD3d 1430 [4th Dept 2015], *lv denied* 25 NY3d 1165 [2015]; *see People v Heverly*, 165 AD3d 1320, 1321 [3d Dept 2018], *lv denied* 32 NY3d 1112 [2018]; *People v Leggett*, 101 AD3d 1694, 1695 [4th Dept 2012], *lv denied* 20 NY3d 1101 [2013]). This Court lacks the " 'interest of justice jurisdiction to impose a sentence less than the mandatory statutory minimum' " (*People*

v Dexter, 104 AD3d 1184, 1185 [4th Dept 2013]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 18-00860

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LERON BAILEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE 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 March 6, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant's conviction stems from two incidents. In the first incident, he possessed a loaded firearm and fired shots in the air. That incident was witnessed by a former neighbor of defendant. In the second incident, which occurred 10 months later, defendant fired shots at a person who was sitting in the driver's seat of a parked vehicle (victim) and who was familiar with defendant. One bullet struck the victim, injuring him, and another bullet struck a backseat passenger, killing her.

We reject defendant's contention that Supreme Court erred in refusing to suppress the identifications of defendant made by the witness to the first incident and the victim of the second incident. The first photo array identification procedure completed with the witness to the first incident was not in any way suggestive, and she immediately identified defendant as the perpetrator. The second photo array identification procedure completed with that witness occurred during her grand jury testimony, and we conclude that the witness's identification of defendant from the second photo array, which was identical to the first photo array, was merely confirmatory of her

first identification (*see People v Walden*, 37 AD3d 1067, 1067 [4th Dept 2007], *lv denied* 8 NY3d 992 [2007]; *People v Floyd*, 135 AD2d 650, 650 [2d Dept 1987], *lv denied* 70 NY2d 1006 [1988]). Two photo array identification procedures were also conducted with the victim of the second incident. We conclude that any taint from the first identification procedure was attenuated by, inter alia, the passage of six months between the first and second identification procedures (*see People v Prindle*, 63 AD3d 1597, 1598 [4th Dept 2009], *mod on other grounds* 16 NY3d 768 [2011]; *People v Molson*, 89 AD3d 1539, 1540 [4th Dept 2011], *lv denied* 18 NY3d 960 [2012]; *see generally People v Dickerson*, 66 AD3d 1371, 1372 [4th Dept 2009], *lv denied* 13 NY3d 859 [2009]).

We reject defendant's contention that the evidence is legally insufficient to establish his identity as the shooter in the second incident (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The victim of that incident identified defendant as the shooter, and the victim's testimony was not incredible as a matter of law (*see People v Moore* [appeal No. 2], 78 AD3d 1658, 1659 [4th Dept 2010], *lv denied* 17 NY3d 798 [2011]). We further conclude that, viewing the evidence in light of the elements of the crimes arising from that incident as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence with respect to defendant's identity as the perpetrator of those crimes. In addition to the testimony of the victim, there was testimony that the gun used in the first shooting, in which defendant was identified as the perpetrator by his former neighbor, was the same gun used in the second shooting. In addition, the shooter in the second incident was seen fleeing in a getaway vehicle that was identified by witnesses, which led to discovery of the identity of the driver of that vehicle. The evidence established that the driver and defendant had exchanged several phone calls immediately before the shooting. Moreover, defendant's DNA could not be excluded from a mixture of DNA recovered from the exterior passenger door handle of that vehicle and a cup from inside the vehicle.

Next, defendant contends that he was denied effective assistance of counsel. Defense counsel's concession that defendant committed the first incident was a matter of strategy given the strength of the eyewitness identification and was an attempt to show that defendant was not guilty of the more serious murder and attempted murder counts (*see People v Jenkins*, 90 AD3d 1326, 1330 [3d Dept 2011], *lv denied* 18 NY3d 958 [2012]). Defense counsel's admission to other bad conduct by defendant was also a matter of trial strategy (*see generally People v Benevento*, 91 NY2d 708, 712 [1998]). Defense counsel's failure to request a charge of the lesser included offense of reckless manslaughter does not constitute ineffective assistance. Viewing the evidence in the light most favorable to defendant (*see People v Martin*, 59 NY2d 704, 705 [1983]), we conclude that there was no reasonable view of the evidence that defendant engaged in reckless rather than intentional conduct when he fired several shots at close range toward the victim (*see People v Seeler*, 63 AD3d 1595, 1596 [4th Dept 2009], *lv denied* 13 NY3d 838 [2009]; *see generally People v*

Glover, 57 NY2d 61, 63 [1982]). The fact that one of his shots missed the target and struck the backseat passenger does not show that defendant's conduct was reckless and not intentional. Thus, defense counsel was not ineffective for failing to request that lesser included charge inasmuch as such a request would have had little or no chance of success (*see People v Henley*, 145 AD3d 1578, 1580 [4th Dept 2016], *lv denied* 29 NY3d 998 [2017], *reconsideration denied* 29 NY3d 1080 [2017]; *People v Elian*, 129 AD3d 1635, 1636 [4th Dept 2015], *lv denied* 26 NY3d 1087 [2015]).

Defendant also contends that he was denied a fair trial by prosecutorial misconduct. Defendant objected to only one instance of alleged error by the prosecutor, thereby rendering the remaining instances unpreserved for our review (*see People v Young*, 153 AD3d 1618, 1620 [4th Dept 2017], *lv denied* 30 NY3d 1065 [2017], *reconsideration denied* 31 NY3d 1123 [2018], *cert denied* — US —, 139 S Ct 84 [2018]). In any event, we reject defendant's contention with respect to two unpreserved instances in which the prosecutor was alleged to have improperly vouched for the quality of the evidence. Rather, the prosecutor was making fair comment on the evidence and responding to defense counsel's summation (*see People v Coleman*, 32 AD3d 1239, 1240 [4th Dept 2006], *lv denied* 8 NY3d 844 [2007]). We further reject defendant's contention with respect to one unpreserved and one preserved instance in which the prosecutor was alleged to have improperly shifted the burden of proof. Again, those statements were fair comment on the evidence and fair response to defense counsel's summation (*see id.*).

Defendant's contention that the sentence constitutes cruel and unusual punishment is not preserved for our review (*see People v Pena*, 28 NY3d 727, 730 [2017]). Likewise, his contention that he was penalized for exercising his right to a trial is also not preserved for our review (*see People v McCullough*, 128 AD3d 1510, 1512 [4th Dept 2015], *lv denied* 26 NY3d 1010 [2015]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, considering defendant's extensive criminal history and the nature of the offenses, we conclude that the sentence is not unduly harsh or severe.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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CAF 18-02344

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

IN THE MATTER OF GARY LATRAY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANDREA HEWITT, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

STEPHANIE N. DAVIS, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Karen Stanislaus, R.), entered September 5, 2018 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal from the order insofar as it concerns the parties' oldest child is unanimously dismissed and the order is affirmed without costs.

Memorandum: In appeal No. 1, Gary Latray, the petitioner in appeal No. 1 and the respondent in appeal No. 2 (father), appeals from an order dismissing his petition seeking to modify the parties' existing custody arrangement by awarding him sole custody of the subject children. In appeal No. 2, the father appeals from an order that, in effect, granted the petition of Andrea Hewitt, the respondent in appeal No. 1 and the petitioner in appeal No. 2 (mother), seeking to modify the parties' custody arrangement by establishing a definitive parenting schedule and directed that the parties shall continue to have joint legal and shared physical custody of the children. We note at the outset that the parties' oldest child has attained the age of 18, and we therefore dismiss as moot both appeals from the orders insofar as they concern that child (*see Matter of Graham v Thering*, 55 AD3d 1319, 1320 [4th Dept 2008], *lv denied* 11 NY3d 714 [2008]).

We reject the father's contention in both appeals that Family Court erred in refusing to award him sole custody of the children and in continuing the preexisting custodial arrangement. "Even assuming, arguendo, that the father met his threshold burden of demonstrating a change in circumstances sufficient to justify a best interests analysis" (*Matter of William F.G. v Lisa M.B.*, 169 AD3d 1428, 1430 [4th Dept 2019]), we conclude that the court's determination that the

preexisting custodial arrangement is in the children's best interests is supported by a sound and substantial basis in the record (*see generally Matter of Mayes v Laplatney*, 125 AD3d 1488, 1489 [4th Dept 2015]).

Although the Attorney for the Children (AFC) contends that the court should have awarded sole custody to the mother, the AFC did not file a notice of appeal, nor did the mother. Thus, the AFC's contention is not properly before us (*see generally Matter of Lawrence v Lawrence*, 151 AD3d 1879, 1879 [4th Dept 2017]; *Matter of Kessler v Fancher*, 112 AD3d 1323, 1324 [4th Dept 2013]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

126

CAF 18-02345

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

IN THE MATTER OF ANDREA HEWITT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GARY LATRAY, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

STEPHANIE N. DAVIS, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Karen Stanislaus, R.), entered September 11, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, continued joint legal and shared physical custody of the subject children.

It is hereby ORDERED that said appeal from the order insofar as it concerns the parties' oldest child is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Matter of Latray v Hewitt* ([appeal No. 1] — AD3d — [Mar. 13, 2020] [4th Dept 2020]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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CA 19-01351

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

NICOLE P. BASS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LYNN R. BURRELL, B&R GREEN TRUCKING, LLC,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FANIZZI & BARR, P.C., NIAGARA FALLS (KEVIN F. WALSH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered May 1, 2019. The order, insofar as appealed from, denied the motion of defendants Lynn R. Burrell and B&R Green Trucking, LLC, for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this action to recover damages for personal injuries she sustained following a collision between the vehicle she was operating and a tractor-trailer operated by defendant Lynn R. Burrell during the course of his employment with defendant B&R Green Trucking, LLC (collectively, defendants). The collision occurred when plaintiff attempted to exit an interstate highway, encountered icy conditions on the exit ramp, and then lost control of her vehicle, which veered back into the lanes of interstate traffic where it was struck by Burrell's tractor-trailer. Defendants moved for summary judgment dismissing the complaint against them, contending that Burrell was not negligent and that he acted reasonably in response to an emergency situation.

Contrary to defendants' contention, we conclude that Supreme Court properly denied their motion. Defendants' own submissions "raise an issue of fact whether the speed at which [Burrell] was traveling, although reduced because of the weather conditions, was reasonable and prudent under the circumstances" (*Moore v Curtiss*, 129 AD3d 1504, 1505 [4th Dept 2015]; *see* Vehicle and Traffic Law § 1180 [a]) and whether Burrell "contributed to the accident by following . . . plaintiff too closely" (*Stuve v Baingan*, 120 AD3d 1221, 1222 [2d

Dept 2014]; *see* § 1129 [a]; *see generally Frutchey v Felicita*, 11 NY3d 764, 765 [2008]).

For the same reasons, we conclude that defendants failed to make a prima facie showing of entitlement to judgment as a matter of law based on the emergency doctrine (*see White v Connors*, 177 AD3d 1250, 1252 [4th Dept 2019]; *Noriega v King*, 15 AD3d 267, 267 [1st Dept 2005]; *see generally Frutchey*, 11 NY3d at 764-765). Because defendants failed to meet their initial burden, the burden never shifted to plaintiff to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

136

CA 19-00399

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

ANALISA MCDOWELL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM D. MALDOVAN, ERIE COUNTY SPECIAL ADMINISTRATOR, AS ADMINISTRATOR OF THE ESTATE OF PETER B. FRENNING, ALSO KNOWN AS PETER BARBEY FRENNING, ET AL., DEFENDANTS, AND MICHAEL C. BRANT, DEFENDANT-APPELLANT. (APPEAL NO. 1.)

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (PETER D. CANTONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

HEMMING & STAEHR, P.C., WILLIAMSVILLE (JONATHAN E. STAEHR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 23, 2018. The order denied the motion of defendant Michael C. Brant for summary judgment dismissing the amended complaint against him.

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

Memorandum: Plaintiffs commenced these actions seeking damages for injuries they allegedly sustained as a result of exposure to lead paint. In each appeal, Michael C. Brant (defendant) appeals from an order denying his motion for summary judgment dismissing the amended complaint against him. We agree with defendant in both appeals that Supreme Court erred in denying those motions.

"To establish that a landlord is liable for a lead-paint condition, a plaintiff must demonstrate that the landlord had actual or constructive notice of, and a reasonable opportunity to remedy, the hazardous condition, and failed to do so" (*Kimball v Normandeau*, 132 AD3d 1340, 1341 [4th Dept 2015] [internal quotation marks omitted]). With respect to constructive notice, a triable issue of fact exists where "the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the

hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment" (*Chapman v Silber*, 97 NY2d 9, 15 [2001]; *see Kimball*, 132 AD3d at 1341).

Here, defendant owned the subject property, as a tenant in common, with his father during the period of plaintiffs' tenancy from 1992 to 1994. In support of his motions, defendant submitted his affidavit, wherein he averred, among other things, that he was a co-owner of the property "on paper only," that his father handled all day-to-day maintenance of the property, and that defendant never entered plaintiffs' apartments or hired anyone to make repairs thereto during plaintiffs' tenancy. Defendant further averred that he did not have a key to the apartments and that he never spoke to or received complaints from plaintiffs or plaintiffs' mother. Defendant's submissions also established that he had no knowledge of inspections for or the existence of lead paint at the property during plaintiffs' tenancy and that he was unaware that the property was constructed at a time before lead paint was banned, that paint was peeling at the property, that lead paint posed a danger to young children, and that young children lived on the property.

Regardless of whether defendant's father had actual or constructive notice through his own involvement with the property, that notice cannot be imputed to defendant absent evidence of defendant's own actual or constructive notice (*see Hamilton v Picardo*, 118 AD3d 1260, 1261-1262 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]). Under these circumstances, we agree with defendant that he met his initial burden of establishing that he did not have actual or constructive notice of a hazardous lead paint condition on the premises (*see generally Taggart v Fandel*, 148 AD3d 1521, 1522-1523 [4th Dept 2017], *lv denied* 30 NY3d 903 [2017]; *Johnson v Giles*, 128 AD3d 1333, 1334 [4th Dept 2015]), and that plaintiffs failed to raise an issue of fact in opposition.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

137

CA 19-00400

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

JORDAN MCDOWELL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES EADS, ET AL., DEFENDANTS,
AND MICHAEL C. BRANT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (PETER D. CANTONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

HEMMING & STAEHR, P.C., WILLIAMSVILLE (JONATHAN E. STAEHR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 23, 2018. The order denied the motion of defendant Michael C. Brant for summary judgment dismissing the amended complaint against him.

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

Same memorandum as in *McDowell v Maldovan* ([appeal No. 1] — AD3d — [Mar. 13, 2020] [4th Dept 2020]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

157

CA 19-01267

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

IN THE MATTER OF KEION PIERRE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered February 19, 2019 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules. Supreme Court dismissed the petition and confirmed the determination. Petitioner contends that the Hearing Officer failed to comply with 7 NYCRR 254.5 (b) inasmuch as the testimony of petitioner's requested witness was taken outside his presence (*see Matter of Trapani v Annucci*, 117 AD3d 1473, 1474 [4th Dept 2014]; *Matter of Jones v Smith*, 116 AD2d 993, 993 [4th Dept 1986]; *cf. Matter of Janis v Prack*, 106 AD3d 1297, 1297 [3d Dept 2013], *lv denied* 21 NY3d 864 [2013]). This Court has no discretionary power to reach that contention because petitioner failed to raise a challenge on that ground in his administrative appeal and therefore failed to exhaust his administrative remedies with respect thereto (*see Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]; *see also Matter of Godwin v Goord*, 270 AD2d 881, 881 [4th Dept 2000]). We reject petitioner's further contention that the Hearing Officer was biased and that the determination flowed from the alleged bias (*see Matter of Jones v Annucci*, 141 AD3d 1108, 1109 [4th Dept 2016]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

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CA 18-02307

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

LUNDY DEVELOPMENT & PROPERTY MANAGEMENT, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COR REAL PROPERTY COMPANY, LLC,
DEFENDANT-RESPONDENT.

SHEATS & BAILEY, PLLC, LIVERPOOL (EDWARD SHEATS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MANNION & COPANI, SYRACUSE (GABRIELLE MARDANY HOPE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered September 20, 2018. The order, among other things, dismissed plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the complaint is reinstated, and the matter is remitted to Supreme Court, Jefferson County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action for, inter alia, breach of contract following defendant's termination of an agreement to purchase real property from plaintiff. Plaintiff subsequently moved to compel discovery, and defendant cross-moved to dismiss the complaint on several grounds. Supreme Court granted the cross motion on the ground that plaintiff's remedy was contractually limited to retaining the deposit, and it did not address the alternative grounds for dismissal advanced in the cross motion. In light of its determination, the court denied plaintiff's motion to compel as moot. Plaintiff appeals, and we now reverse the order and reinstate the complaint.

A limitation of remedies "will not be implied and to be enforceable must be clearly, explicitly and unambiguously expressed in a contract" (*Terminal Cent. v Modell & Co.*, 212 AD2d 213, 218 [1st Dept 1995]). Indeed, "[s]uch clauses are . . . strictly construed against the party seeking to avoid liability" (*id.* at 219), and " 'a provision must be included in the agreement limiting a party's remedies to those specified in the contract in order for courts to find that th[o]se remedies are exclusive' " (*HealthNow N.Y., Inc. v David Home Bldrs., Inc.*, 176 AD3d 1602, 1604 [4th Dept 2019]). Here, nothing in the contract stated that plaintiff's contractual right to

retain the deposit upon defendant's breach was plaintiff's sole and exclusive remedy for such a breach. The court thus erred in granting the cross motion on that ground (*see id.*; *Sutton Madison, Inc. v 27 E. 65th St. Owners Corp.*, 8 AD3d 90, 92 [1st Dept 2004]).

Inasmuch as the court did not address the alternative grounds for dismissal raised in the cross motion, we remit the matter to Supreme Court to consider those grounds and determine the cross motion anew (*see Torres v Etilee Taxi, Inc.*, 136 AD3d 437, 439 [1st Dept 2016]; *Matter of New York Mills Redevelopment Co., LLC v Town of Whitestown*, 88 AD3d 1281, 1284 [4th Dept 2011]; *Colon v Bernabe*, 65 AD3d 969, 971 [1st Dept 2009]). Given our reinstatement of the complaint, the motion to compel is no longer moot, and we also direct Supreme Court to determine that motion as necessary upon remittal (*see Weiss v Zellar Homes, Ltd.*, 169 AD3d 1491, 1494-1495 [4th Dept 2019]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

182

KA 17-02128

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAJOR C., DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIELLE E. PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Erie County Court (Thomas P. Franczyk, J.), rendered October 10, 2017. Defendant was adjudicated a youthful offender upon his plea of guilty to assault in the second degree.

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

Memorandum: On appeal from a youthful offender adjudication based upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [1]), defendant contends that he did not validly waive his right to appeal and that the sentence is unduly harsh and severe. The record establishes that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*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]). The valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

183

KA 18-01176

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHAD J. MUHAMMAD, DEFENDANT-APPELLANT.

KATHRYN B. FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered April 13, 2018. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child (two counts) and rape 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 predatory sexual assault against a child (Penal Law § 130.96) and rape in the second degree (§ 130.30 [1]). Defendant contends that County Court erred in refusing to suppress the DNA evidence because the police interview during which defendant agreed to provide a DNA sample was coercive and the police officers failed to advise defendant that he had the right to refuse to provide that sample. We reject that contention. Even though one of the police officers lied and used some deceptive methods in questioning defendant, " 'the deception was not so fundamentally unfair as to deny due process . . . [and] was not so extensive as to . . . overcome [] defendant's will' " (*People v Henry*, 173 AD3d 1470, 1478 [3d Dept 2019], *lv denied* 34 NY3d 932 [2019]; *see People v Andrus*, 77 AD3d 1283, 1284 [4th Dept 2010], *lv denied* 16 NY3d 827 [2011]). Moreover, although the police officers did not advise defendant of his right to refuse consent to providing a DNA sample, that fact " 'does not, by itself, negate the consent otherwise freely given' " (*People v Osborne*, 88 AD3d 1284, 1285 [4th Dept 2011], *lv denied* 19 NY3d 999 [2012], *reconsideration denied* 19 NY3d 1104 [2012]; *see People v Parker*, 133 AD3d 1300, 1301 [4th Dept 2015], *lv denied* 27 NY3d 1153 [2016], *reconsideration denied* 28 NY3d 1030 [2016]). Further, the record establishes that, in response to defendant's question, one of the officers admitted to defendant that they did not have court papers requiring defendant to provide a DNA sample, but defendant nevertheless consented to the taking of a sample. We

conclude that the totality of the circumstances demonstrates that defendant's consent was voluntary and not the product of coercion (*see People v Graham*, 153 AD3d 1634, 1635 [4th Dept 2017], *lv denied* 30 NY3d 1060 [2017]; *see also People v Jemes*, 132 AD3d 1361, 1362 [4th Dept 2015], *lv denied* 26 NY3d 1110 [2016]; *People v Dail*, 69 AD3d 873, 874 [2d Dept 2010], *lv denied* 14 NY3d 839 [2010]).

We also reject defendant's contention that the court erred in denying his requests for new counsel. The court made extensive inquiries into defendant's requests, but defendant failed to show good cause for substitution inasmuch as his complaints were not "serious complaints about counsel" (*People v Jones*, 149 AD3d 1576, 1577 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017] [internal quotation marks omitted]; *see generally People v Porto*, 16 NY3d 93, 100 [2010]). Rather, defendant's complaints were disagreements over strategy, which are not sufficient grounds for substitution (*see People v Bradford*, 118 AD3d 1254, 1255 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]; *People v Welch*, 2 AD3d 1354, 1355 [4th Dept 2003], *lv denied* 2 NY3d 747 [2004]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

185

KA 16-01426

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYANT BYRD, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Monroe County Court (Victoria M. Argento, J.), rendered February 25, 2016. Defendant was resentenced upon his conviction of burglary in the second degree.

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

Memorandum: Defendant was convicted, upon his guilty plea, of burglary in the second degree (Penal Law § 140.25 [2]), and he now appeals from a resentence with respect to that conviction. We agree with defendant that his waiver of the right to appeal is invalid. County Court mischaracterized the nature of the right that defendant was being asked to waive inasmuch as the court stated that the waiver was an absolute bar to taking an appeal, as well as a bar to all postconviction relief (*see People v Thomas*, — NY3d —, 2019 NY Slip Op 08545, *6 [2019]). Additionally, there is "no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues" (*People v Stenson*, 179 AD3d 1449, 1449 [4th Dept 2020]). Thus, although defendant may challenge the severity of his sentence, we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

186

KA 18-00169

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE KNIGHTON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER 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, upon a jury verdict, of predatory sexual assault, menacing in the second degree (two counts) and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, predatory sexual assault (Penal Law § 130.95 [1] [b]). We affirm.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The victim's testimony was not "so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285 [4th Dept 2007], *lv denied* 8 NY3d 982 [2007]). Any inconsistencies in the victim's testimony presented issues of credibility for determination by the jury (*see People v Scheidelman*, 125 AD3d 1426, 1426-1427 [4th Dept 2015]), and we see no basis for disturbing the jury's credibility determinations in this case.

In light of defendant's lengthy prior criminal history and complete lack of remorse, we do not consider the sentence of 25 years to life unduly harsh or severe.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

187

KA 19-00889

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID G. COX, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (John L. DeMarco, J.), entered March 8, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We reject defendant's contention that County Court's assessment of 15 points for a history of drug or alcohol abuse, which was based upon the recommendation in the risk assessment instrument prepared by the Board of Examiners of Sex Offenders, is not supported by the requisite clear and convincing evidence (*see generally* § 168-n [3]). Although defendant stated in his most recent presentence report that his alcohol use was "responsible" and that he did not use illegal drugs, he had previously admitted to a significant history of drug abuse (*see People v St. Jean*, 101 AD3d 1684, 1684 [4th Dept 2012]; *People v Mundo*, 98 AD3d 1292, 1293 [4th Dept 2012], *lv denied* 20 NY3d 855 [2013]; *cf. People v Palmer*, 20 NY3d 373, 378-379 [2013]). Additionally, the record establishes that defendant incurred a tier III drug use violation and was required to attend drug and alcohol treatment while incarcerated, thus further supporting the court's assessment of points for a history of drug or alcohol abuse (*see People v Englant*, 118 AD3d 1289, 1289-1290 [4th Dept 2014]; *Mundo*, 98 AD3d at 1293; *People v Woodard*, 63 AD3d 1655, 1656 [4th Dept 2009], *lv denied* 13 NY3d 706 [2009]).

We reject defendant's further contention that the court erred in assessing 15 points for inflicting physical injury on the victim. The SORA Risk Assessment Guidelines and Commentary (2006) (Guidelines) incorporates the definition of physical injury in Penal Law § 10.00

(9), i.e., "impairment of physical condition or substantial pain" (*see* Guidelines at 8). "Of course 'substantial pain' cannot be defined precisely, but it can be said that it is more than slight or trivial pain. Pain need not, however, be severe or intense to be substantial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and his or her pain, whether the victim sought medical treatment, and the motive of the offender" (*People v Haynes*, 104 AD3d 1142, 1143 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]). Here, the People submitted, inter alia, the victim's trial testimony, wherein she testified that she suffered pain sufficiently severe during the attack that it caused her to defecate involuntarily. The People also submitted the victim's medical records, which demonstrated that she suffered bruising all over her body and lacerations to her neck and that medical personnel were unable to complete a physical examination of the victim due to her pain. Further, the victim testified that defendant threatened to hurt or kill her throughout the attack and that he said he "wanted to hurt [her] and bruise [her] badly." We therefore conclude that the People established this risk factor by clear and convincing evidence (*see People v Kruger*, 88 AD3d 1169, 1170 [3d Dept 2011], *lv denied* 18 NY3d 806 [2012]; *see generally* Correction Law § 168-n [3]).

Finally, defendant's contention that a downward departure from his presumptive risk level was warranted is without merit inasmuch as he failed to prove, by a preponderance of the evidence, a "mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (Guidelines at 4; *see People v Byrd*, 171 AD3d 1517, 1517 [4th Dept 2019], *lv denied* 33 NY3d 913 [2019]; *People v Collette*, 142 AD3d 1300, 1301 [4th Dept 2016], *lv denied* 28 NY3d 912 [2017]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

190

CA 19-01357

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

PAUL ZIMMER, PLAINTIFF-APPELLANT,

V ORDER

JAMES K. ZIMMER, AS EXECUTOR OF THE ESTATE
OF ROBERTA JUNE ZIMMER, DECEASED,
DEFENDANT-RESPONDENT.

TREVETT CRISTO P.C., ROCHESTER (DAVID H. EALY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (F. MICHAEL OSTRANDER OF COUNSEL), AND WIEDMAN, VAZZANA, CORCORAN & VOLTA, P.C., FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (John M. Owens, S.), entered October 9, 2018. The order, inter alia, granted 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.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

193

CA 19-01599

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

AMY KESSEL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

APRIL ADAMS, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AARON M. ADOFF OF COUNSEL), FOR DEFENDANT-APPELLANT.

NASH CONNORS, P.C., BUFFALO, GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ELIZABETH G. ADYMY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 14, 2019. The order, insofar as appealed from, denied the motion of defendant April Adams for summary judgment dismissing the complaint against her.

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

Memorandum: Plaintiff, a school teacher, commenced this action seeking damages for injuries she sustained to her shoulder and back when defendants, two of her students, began fighting one another and plaintiff, who was standing between them, was propelled into a locker. Plaintiff asserted a sole cause of action, for negligence. April Adams (defendant) moved for summary judgment dismissing the complaint against her on the ground that plaintiff's action was time-barred. Defendant appeals from an order insofar as it denied her motion.

We agree with defendant that Supreme Court erred in denying the motion. Defendant met her initial burden by establishing that plaintiff was injured as a result of intentional conduct that constituted a battery and not negligent conduct (*see Cagliostro v Madison Sq. Garden, Inc.*, 73 AD3d 534, 534-535 [1st Dept 2010]; *see also Borrerro v Haks Group, Inc.*, 165 AD3d 1216, 1218 [2d Dept 2018]). "A valid claim for battery exists where a person intentionally touches another without that person's consent" (*Wende C. v United Methodist Church, N.Y. W. Area*, 4 NY3d 293, 298 [2005], *cert denied* 546 US 818 [2005]; *see Relf v City of Troy*, 169 AD3d 1223, 1226 [3d Dept 2019]; *Robert M.D. v Sterling*, 129 AD3d 1489, 1490 [4th Dept 2015]). " 'The intent required for battery is intent to cause a bodily contact that a reasonable person would find offensive'; 'there is no requirement that

the contact be intended to cause harm' " (*Relf*, 169 AD3d at 1226). The deposition testimony of plaintiff and defendants submitted in support of the motion established that defendants intentionally caused offensive bodily contact with each other by engaging in a physical fight (*see Eisch v Sandy Cr. Cent. Sch. Dist.*, 141 AD3d 1091, 1092 [4th Dept 2016]; *Council v Utica First Ins. Co.*, 77 AD3d 1433, 1434 [4th Dept 2010], *lv denied* 16 NY3d 702 [2011]). Although defendants did not intend to make physical contact with or to injure plaintiff, the contact that resulted in plaintiff's injuries was nevertheless intentional under the doctrine of "transferred intent" (*Rubino v Ramos*, 226 AD2d 912, 913 [3d Dept 1996]; *see Jones v State of New York*, 96 AD2d 105, 110-111 [4th Dept 1983], *lv denied* 62 NY2d 605 [1984]; *see also Borrerro*, 165 AD3d at 1218; *Parler v North Sea Ins. Co.*, 129 AD3d 926, 928 [2d Dept 2015]).

Defendant thus established that this action is barred by the one-year statute of limitations applicable to intentional torts (*see* CPLR 215 [3]; *McDonald v Riccuiti*, 126 AD3d 954, 954-955 [2d Dept 2015]; *see also Tong v Target, Inc.*, 83 AD3d 1046, 1046 [2d Dept 2011], *lv denied* 17 NY3d 712 [2011]). In opposition to the motion, plaintiff failed to raise a triable issue of fact. Plaintiff "could not avoid the running of the limitations period merely by attempting to couch the [complaint] as sounding in negligence" (*McDonald*, 126 AD3d at 955).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

195

CA 19-01804

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF ALEXANDER BILICKI,
PETITIONER-APPELLANT,

V ORDER

SYRACUSE UNIVERSITY, RESPONDENT-RESPONDENT.

RATSCHKO WALLACE PLLC, NEW YORK CITY (JONATHAN WALLACE OF COUNSEL), FOR PETITIONER-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JOHN G. POWERS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered March 21, 2019 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

196

CA 18-00726

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF VICTOR K. THOMAS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TINA M. STANFORD, CHAIRWOMAN, NEW YORK
STATE BOARD OF PAROLE AND THOMAS KUBINIEC,
ADMINISTRATIVE LAW JUDGE,
RESPONDENTS-RESPONDENTS.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (HEATHER MCKAY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (M. William Boller, A.J.), entered February 9, 2018 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination revoking his release to parole supervision upon his plea of guilty to violating a condition of his parole that precluded him from "possess[ing] a smart phone, with internet, camera [and] video capabilities, without permission from his parole officer." The determination was affirmed on administrative appeal. Petitioner now appeals from a judgment dismissing the petition, and we affirm.

Petitioner contends that the subject parole condition violated his right to free speech. Petitioner never raised that contention on administrative appeal, and he therefore failed to exhaust his administrative remedies with respect to that contention (*see Matter of Espinal v Annucci*, 173 AD3d 1850, 1851 [4th Dept 2019]; *see also Matter of Secore v Mantello*, 176 AD2d 1244, 1244 [4th Dept 1991]; *People ex rel. Cotton v Rodriquez*, 123 AD2d 338, 339 [2d Dept 1986]). This Court has no discretionary authority to reach the contention (*see Matter of Alvarez v Fischer*, 94 AD3d 1404, 1406 [4th Dept 2012]; *see generally Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]). We have considered

petitioner's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

200

CA 19-01077

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

DEANNA HARRIS, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

ANNIE FEAZELL, DEFENDANT-RESPONDENT-APPELLANT.

PARISI & BELLAVIA, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HAGELIN SPENCER LLC, BUFFALO (RICHARD J. PORTER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered April 29, 2019. The order denied in part the motion of defendant for summary judgment dismissing the complaint and denied in part the cross motion of plaintiff for partial summary judgment.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

201

CA 18-00213

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

IBUKUN OGUNBEKUN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STRONG MEMORIAL HOSPITAL, DR. SAM HUBER,
DR. TELVA OLIVARES AND DR. ERIC CAINE,
DEFENDANTS-RESPONDENTS.

HOGANWILLIG, PLLC, AMHERST (SCOTT MICHAEL DUQUIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (RICHARD BRISTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered November 8, 2017. The order denied plaintiff's motion to vacate an order dismissing his complaint.

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

Memorandum: Plaintiff appeals from an order that denied his motion to vacate an order dismissing the complaint pursuant to 22 NYCRR 202.27 (b) upon his default. Contrary to plaintiff's contention, Supreme Court did not abuse its discretion in denying the motion. The motion was untimely inasmuch as it was not made within one year after service of a copy of the default order of dismissal with notice of entry (*see* CPLR 5015 [a] [1]; *Chase Home Fin., LLC v Desormeau*, 152 AD3d 1033, 1035 [3d Dept 2017]; *Hayes v Village of Middleburgh*, 140 AD3d 1359, 1362 [3d Dept 2016]) and, although the court "retains inherent authority to vacate its own order 'in the interest of justice, even where the statutory one-year period . . . has expired' " (*Hayes*, 140 AD3d at 1362), plaintiff failed to "demonstrate a reasonable excuse for his lengthy delay in moving" to vacate the order of dismissal (*Feldman v Delany*, 94 AD3d 1043, 1043 [2d Dept 2012]; *see Malik v Noe*, 54 AD3d 733, 734 [2d Dept 2008]; *cf. Bodden v Penn-Attransco Corp.*, 20 AD3d 334, 334-335 [1st Dept 2005]; *see also Pawarski v Southeast Community Work Ctr.*, 143 AD2d 511, 511 [4th Dept 1988]). Moreover, even if plaintiff had timely moved to vacate or presented a reasonable excuse for his delay in moving, "[a] plaintiff seeking relief from a default [order] must establish a reasonable excuse for the default and a meritorious cause of action" (*Butchello v Terhaar*, 176 AD3d 1579, 1580 [4th Dept 2019] [internal

quotation marks omitted]), and plaintiff made neither showing in this case.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

203

TP 19-01493

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

IN THE MATTER OF EDWIN RUIZ, PETITIONER,

V ORDER

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

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

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 August 5, 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.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

205

KA 16-01187

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMANTHA DIXON, DEFENDANT-APPELLANT.

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered April 12, 2016. The judgment convicted defendant, upon a nonjury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a nonjury verdict, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), arising from her sale of heroin to a confidential informant. Defendant's contention that the evidence is legally insufficient to support the conviction because the testimony of the People's witnesses was incredible as a matter of law is not preserved for our review (*see People v Wilcher*, 158 AD3d 1267, 1267-1268 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]; *People v Gaston*, 100 AD3d 1463, 1464 [4th Dept 2012]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, that contention lacks merit. In presenting their case, the People offered the testimony of the confidential informant to establish the elements of the crimes charged, including defendant's knowing possession, intent to sell, and sale of a controlled substance. The confidential informant's testimony "was not incredible as a matter of law inasmuch as it was not impossible of belief, i.e., it was not manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*Wilcher*, 158 AD3d at 1268 [internal quotation marks omitted]; *see People v Harris*, 56 AD3d 1267, 1268 [4th Dept 2008], *lv denied* 11 NY3d 925 [2009]). The confidential informant's criminal history and receipt of a benefit in exchange for her willingness to work with the police did not render her testimony

incredible as a matter of law (*see People v Hodge*, 147 AD3d 1502, 1503 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]; *People v Carr*, 99 AD3d 1173, 1174 [4th Dept 2012], *lv denied* 20 NY3d 1010 [2013]). Those facts were placed before County Court, and we see no basis to disturb the court's credibility determination (*see Carr*, 99 AD3d at 1174). Furthermore, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support defendant's conviction with respect to each count (*see People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Bausano*, 122 AD3d 1341, 1342 [4th Dept 2014], *lv denied* 25 NY3d 1069 [2015]). Neither the absence of a recording of the transaction nor defendant's challenges to the credibility of the police witnesses precluded the court from finding, based on the testimony of the confidential informant and the forensic chemist who confirmed that the tested substance contained heroin, that defendant knowingly and unlawfully possessed heroin with intent to sell and did sell the drug to the informant (*see* Penal Law §§ 220.16 [1]; 220.39 [1]; *People v Nichol*, 121 AD3d 1174, 1177 [3d Dept 2014], *lv denied* 25 NY3d 1205 [2015]).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495 [1987]; *People v Stephenson*, 104 AD3d 1277, 1278 [4th Dept 2013], *lv denied* 21 NY3d 1020 [2013], *reconsideration denied* 23 NY3d 1025 [2014]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

206

KA 18-02428

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LANCE RILEY, DEFENDANT-APPELLANT.

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

LANCE RILEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered August 14, 2018. The judgment convicted defendant upon a plea of guilty of rape in the second degree and criminal sexual act in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by directing that the periods of postrelease supervision imposed shall run concurrently and by amending the order of protection, and as modified the judgment is affirmed, and the matter is remitted to Livingston County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the second degree (Penal Law § 130.30 [1]) and criminal sexual act in the third degree (§ 130.40 [2]). As defendant contends in his main brief and as the People correctly concede, County Court erred in imposing consecutive periods of postrelease supervision (*see People v Vickers*, 151 AD3d 1627, 1627 [4th Dept 2017]). Pursuant to Penal Law § 70.45 (5) (c), multiple periods of postrelease supervision merge and are satisfied by the service of the longest unexpired term (*see People v Kennedy*, 78 AD3d 1477, 1479 [4th Dept 2010], *lv denied* 16 NY3d 798 [2011]). We therefore modify the judgment accordingly.

Defendant further contends in his main brief, and the People correctly concede, that the court erred in setting the expiration date of the order of protection. Although defendant failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 315-316 [2004]; *People v Coleman*, 145 AD3d 1641, 1642 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3]

[c]; *People v Lopez*, 151 AD3d 1649, 1650 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]; *People v Richardson*, 134 AD3d 1566, 1567 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016]). In light of our determination that the court erred in imposing consecutive periods of postrelease supervision and in light of the court's failure to account for defendant's jail time credit, we agree with defendant that the court erred in calculating the duration of the order of protection (*see* CPL 530.12 [5] [A]; *Coleman*, 145 AD3d at 1642). We therefore further modify the judgment by amending the order of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled and to specify an expiration date in accordance with CPL 530.12 (5) (A) (*see People v Richardson*, 143 AD3d 1252, 1255 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]).

Defendant's contentions in his pro se supplemental brief are based on matters outside the record and must therefore be raised by way of a motion pursuant to CPL 440.10 (*see People v Jordan*, 153 AD3d 1130, 1131 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

207

KA 18-02418

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAREZ LOVE, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered June 6, 2018. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [3]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Herman*, 151 AD3d 1866, 1867 [4th Dept 2017], *lv denied* 29 NY3d 1127 [2017]), we conclude that the sentence is not unduly harsh or severe.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

208

KA 17-00933

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CINDY SHIELDS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered December 9, 2016. The judgment convicted defendant upon her plea of guilty of assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the plea is vacated, and the matter is remitted to Oneida County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that her plea was not knowingly, voluntarily, and intelligently entered because County Court threatened to impose a greater sentence in the event of a conviction following trial. Although that contention survives defendant's valid waiver of the right to appeal (*see People v Garner*, 111 AD3d 1421, 1421 [4th Dept 2013], *lv denied* 23 NY3d 1036 [2014]), defendant failed to move to withdraw her plea or to vacate the judgment of conviction and thus failed to preserve her contention for our review (*see People v Kelly*, 145 AD3d 1431, 1431 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017]; *People v Flinn*, 60 AD3d 1304, 1305 [4th Dept 2009]). Nevertheless, we exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [a]).

At an appearance prior to the plea proceeding, the court stated that, if defendant decided to reject the plea offer and was convicted after trial, it intended to impose the maximum sentence on the top count and consecutive time on an unnamed additional count. At that same appearance, the court said that defendant and her codefendants, who were her sister and brother-in-law, would also be federally prosecuted and that "the evidence is overwhelming here." It is well settled that "[a] defendant may not be induced to plead guilty by the

threat of a heavier sentence if he [or she] decides to proceed to trial" (*People v Christian* [appeal No. 2], 139 AD2d 896, 897 [4th Dept 1988], *lv denied* 71 NY2d 1024 [1988]; *see People v Boyd*, 101 AD3d 1683, 1683 [4th Dept 2012]). Here, we agree with defendant that "the court's statements do not amount to a description of the range of the potential sentences but, rather, they constitute impermissible coercion, 'rendering the plea involuntary and requiring its vacatur' " (*Flinn*, 60 AD3d at 1305; *see People v Kelley*, 114 AD3d 1229, 1230 [4th Dept 2014]). Consequently, we reverse the conviction, vacate the plea, and remit the matter to County Court for further proceedings on the indictment.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

209

KA 17-01848

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH ESCOBAR, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB 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 August 4, 2017. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the second degree (two counts) and tampering with physical evidence.

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

Memorandum: Defendant appeals from a judgment rendered upon a jury verdict convicting him of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]) arising out of a drive-by shooting of the victim on a street corner and also convicting him of tampering with physical evidence (§ 215.40 [2]) arising out of a separate incident involving the discharge of a firearm in a residential basement. We affirm.

Defendant contends that the prosecutor's exercise of peremptory challenges with respect to three prospective jurors constituted a *Batson* violation. Initially, inasmuch as the prosecutor offered race-neutral reasons for each challenge and the court thereafter "ruled on the ultimate issue" by determining that those reasons were not pretextual, the issue of the sufficiency of defendant's prima facie showing of discrimination at step one of the *Batson* test is moot (*People v Smocum*, 99 NY2d 418, 423 [2003]; *see People v Jiles*, 158 AD3d 75, 78 [4th Dept 2017], *lv denied* 31 NY3d 1149 [2018]; *cf. People v Bridgeforth*, 28 NY3d 567, 575-576 [2016]). With respect to step two, "[t]he burden . . . is minimal, and the explanation must be upheld if it is based on something other than the juror's race,

gender, or other protected characteristic" (*People v Smouse*, 160 AD3d 1353, 1355 [4th Dept 2018]; *see Hernandez v New York*, 500 US 352, 360 [1991]; *People v Payne*, 88 NY2d 172, 183 [1996]). "To satisfy its step two burden, the nonmovant need not offer a persuasive or even a plausible explanation but may offer *any facially neutral reason* for the challenge—even if that reason is ill-founded—so long as the reason does not violate equal protection" (*Smouse*, 160 AD3d at 1355 [internal quotation marks omitted]; *see Purkett v Elem*, 514 US 765, 767-768 [1995]; *Payne*, 88 NY2d at 183). "[A]t step three, the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the peremptory strike was pretextual and whether the movant has shown purposeful discrimination" (*Bridgeforth*, 28 NY3d at 571; *see People v Hecker*, 15 NY3d 625, 634-635 [2010]).

Here, contrary to defendant's contention, we conclude that County Court properly determined at step two that the People met their burden of offering a facially race-neutral explanation for each challenge. The prosecutor explained that he challenged the first prospective juror based on her husband's past incarceration and her implausible answers regarding the extent of her knowledge thereof (*see People v Garcia*, 143 AD3d 1283, 1284 [4th Dept 2016], *lv denied* 28 NY3d 1184 [2017]; *People v Ball*, 11 AD3d 904, 905 [4th Dept 2004], *lv denied* 3 NY3d 755 [2004], *reconsideration denied* 4 NY3d 741 [2004]). The prosecutor explained that he challenged the second prospective juror because she worked as a nurse and people who work in that field tend to see everyone in the best light and have a difficult time voting to convict (*see People v Holloway*, 71 AD3d 1486, 1486-1487 [4th Dept 2010], *lv denied* 15 NY3d 774 [2010]). With respect to the third prospective juror, the prosecutor explained that, although he thought she "would be a good juror," only he had peremptory challenges remaining and, compared to the third prospective juror, he preferred a different person coming up later in panel due to that person's background in law enforcement as a former corrections officer. We conclude that the offered reason was facially neutral inasmuch as it was based on something other than the third prospective juror's race, i.e., the prosecutor's preference for the former corrections officer who was more connected to law enforcement than was the third prospective juror (*see People v Wheeler*, 124 AD3d 1136, 1137 [3d Dept 2015], *lv denied* 25 NY3d 993 [2015]).

We also reject defendant's contention that the court erred at step three. A "trial court's determination whether a proffered race-neutral reason is pretextual is accorded 'great deference' on appeal" (*Hecker*, 15 NY3d at 656), and we see no reason on this record to disturb the court's determination that the prosecutor's explanations were not pretextual (*see Wheeler*, 124 AD3d at 1137).

Defendant contends that the verdict with respect to the crimes arising from the drive-by shooting is against the weight of the evidence on the issues of his identity as the shooter and, relatedly, his possession of a handgun. We reject that contention. Viewing the evidence in light of the elements of the crimes as charged to the jury

(*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although defendant contends that the testimony of the victim who identified him as the shooter should be discredited for various reasons—including the impact of the vehicle's rate of speed on the victim's ability to view the occupants thereof, the absence of documentation corroborating the victim's testimony that he and defendant had an altercation at a correctional facility prior to the shooting, and the victim's reluctance to cooperate with the investigation and prosecution—the jury "was able to consider each of these issues now raised and chose to credit the identification of defendant as the shooter" (*People v Lanier*, 130 AD3d 1310, 1311 [3d Dept 2015], *lv denied* 26 NY3d 1009 [2015]; *see People v Cross*, 174 AD3d 1311, 1314-1315 [4th Dept 2019], *lv denied* 34 NY3d 950 [2019]). Moreover, "[t]he credibility of defendant and the weight to be accorded to his version of the events was a matter for the jury" (*People v Hudson*, 158 AD3d 1087, 1087 [4th Dept 2018], *lv denied* 31 NY3d 1117 [2018]), and there is no basis for disturbing its determinations.

Defendant also contends that the evidence is legally insufficient to support the conviction of tampering with physical evidence (Penal Law § 215.40 [2]) arising from the incident involving the discharge of a firearm in a residential basement. Even assuming, arguendo, that defendant preserved his contention for our review (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), we conclude that it lacks merit. "Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]; *see People v Delamota*, 18 NY3d 107, 113 [2011]), we conclude that the evidence is legally sufficient to establish that defendant, "[b]elieving that certain physical evidence [was] about to be produced or used in . . . a prospective official proceeding, and intending to prevent such production or use, . . . suppresse[d] it by any act of concealment . . . or destruction" (§ 215.40 [2]). Contrary to defendant's contention, "it could readily be contemplated under the circumstances of this case that the evidence he [concealed or destroyed] would be received as evidence at a prospective official proceeding" (*People v Santiago*, 273 AD2d 488, 488 [2d Dept 2000], *lv denied* 95 NY2d 892 [2000]; *see People v Cardenas*, 239 AD2d 594, 595 [2d Dept 1997], *lv denied* 90 NY2d 902 [1997]; *People v Johnson*, 219 AD2d 865, 865-866 [4th Dept 1995], *lv denied* 87 NY2d 847 [1995]).

Defendant contends that he was deprived of effective assistance of counsel because defense counsel failed to call an expert to testify about the reliability of eyewitness identifications. We conclude, however, that defendant has not demonstrated "the absence of strategic or other legitimate explanations for counsel's alleged shortcoming[]" (*People v Benevento*, 91 NY2d 708, 712 [1998] [internal quotation marks omitted]; *see People v Stanley*, 108 AD3d 1129, 1130-1131 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013]). Nor was defense counsel ineffective in failing to object to alleged double hearsay testimony. Even assuming, arguendo, that the testimony at issue constituted

inadmissible hearsay, we conclude that "the single error by defense counsel in failing to object to its admission was not so egregious as to deprive defendant of a fair trial" (*People v Galens*, 111 AD3d 1322, 1323 [4th Dept 2013], *lv denied* 22 NY3d 1088 [2014]; *see People v Hobot*, 84 NY2d 1021, 1022 [1995]). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we further conclude that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, contrary to defendant's contention, the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

210

CAF 18-00739

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

IN THE MATTER OF ILENE M. FIRENZE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN A. FIRENZE, RESPONDENT-APPELLANT.

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

ELIZABETH C. FRANI, SYRACUSE, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered June 30, 2017 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, directed respondent to pay semi-monthly support of $1,206.56.

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 father appeals from an order that granted in part petitioner mother's objections to the order of the Support Magistrate and fixed the amount of the father's semi-monthly child support obligation at $1,206.56. We affirm.

Initially, we reject the contention of the father that the Support Magistrate lacked subject matter jurisdiction on the ground that the father raised "visitation as a defense" to the petition (Family Ct Act § 439 [a]; *see Matter of Rubino v Morgan*, 203 AD2d 698, 699-700 [3d Dept 1994]). Contrary to the father's contention, the record demonstrates that he merely identified his equal visitation time with the children as a factor for the Support Magistrate to consider in determining whether a deviation from the presumptive support obligation calculated pursuant to the Child Support Standards Act ([CSSA] Family Ct Act § 413) was appropriate (*see* § 413 [1] [f] [9]; *cf. Rubino*, 203 AD2d at 699-700).

We reject the father's contention that Family Court erred in granting the mother's objections with respect to the Support Magistrate's determination that the father's basic child support obligation under the CSSA was unjust or unfair and that a downward deviation from the presumptively correct amount was warranted. The father paid for some of the children's sports equipment and sports

registration fees, and he also paid for food, lodging, and travel associated with some of the games. The father failed, however, to establish that those expenses were "extraordinary" and that the mother's expenses were substantially reduced as a result of the father's expenditures. Housing, food, and other similar expenses are not "extraordinary expenses" within the meaning of Family Court Act § 413 (1) (f) (9) (i) (*see Matter of Jerrett v Jerrett*, 162 AD3d 1715, 1717 [4th Dept 2018]), nor is the cost of entertainment, including sports, an extraordinary visitation expense for purposes of calculating child support (*see Matter of Pandozy v Guadette*, 192 AD2d 779, 780 [3d Dept 1993]). The father also failed to establish that his past service as a volunteer coach for the children's sports teams and his decision to travel less for work were non-monetary contributions to the care and well-being of the children within the meaning of section 413 (1) (f) (5).

Finally, we have considered the father's remaining contention and conclude that it lacks merit.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

211

CAF 19-00303

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

IN THE MATTER OF MARK CRILL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SHAYLEE CRILL, RESPONDENT-APPELLANT.

IN THE MATTER OF SHAYLEE CRILL,
PETITIONER-APPELLANT,

V

MARK CRILL, RESPONDENT-RESPONDENT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

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

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered January 9, 2019 in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted sole legal custody of the subject children to petitioner-respondent.

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-petitioner mother appeals from an order that, inter alia, granted petitioner-respondent father's petition to modify a prior order of custody and visitation by awarding the father sole custody of the parties' children.

"Where an order of custody and visitation is entered on stipulation, a court cannot modify that order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the child[ren]" (*Matter of McKenzie v Polk*, 166 AD3d 1529, 1529 [4th Dept 2018]). Because both parties sought modification of the prior custody order, "neither party dispute[s] that there was a sufficient change in circumstances demonstrating a real need for a change in order to insure the child[ren's] best interests" (*Matter of Nordee v Nordee*, 170 AD3d 1636, 1637 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019] [internal quotation marks omitted]).

"It is well settled that a court's determination regarding custody . . . , 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 . . . , i.e., it is not supported by a sound and substantial basis in the record" (*Matter of DeVore v O'Harra-Gardner*, 177 AD3d 1264, 1266 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Krug v Krug*, 55 AD3d 1373, 1374 [4th Dept 2008]). Contrary to the mother's contention, we conclude that there is a sound and substantial basis in the record to support Family Court's determination that it was in the children's best interests to award the father sole custody.

The mother's further contention that the Attorney for the Children failed to provide meaningful representation to the subject children is not preserved for our review (*see Matter of Elniski v Junker*, 142 AD3d 1392, 1393 [4th Dept 2016]). In any event, that contention is without merit (*see Matter of Terramiggi v Tarolli*, 151 AD3d 1670, 1672 [4th Dept 2017]; *Elniski*, 142 AD3d at 1393).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

214

CAF 19-00273

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

IN THE MATTER OF JAMARION N.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ERNEST N., RESPONDENT-APPELLANT.

SCOTT T. GODKIN, WHITESBORO, FOR RESPONDENT-APPELLANT.

PETER M. RAYHILL, COUNTY ATTORNEY, UTICA (DENISE J. MORGAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

PAUL A. NORTON, CLINTON, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered January 9, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, 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: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect. Contrary to the father's contention, petitioner established by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen his relationship with the child during his periods of incarceration and while he was released (*see Matter of Caidence M. [Francis W.M.]*, 162 AD3d 1539, 1539-1540 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018]; *Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1149-1150 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]). Among other things, while the father was incarcerated, petitioner sent monthly letters to him, advised him to complete mental health and substance abuse treatment upon release, investigated the father's sister as a potential placement resource for the child, and responded to the father's inquiries. In addition, when the father was not incarcerated, petitioner provided him with opportunities for mental health and substance abuse treatment and also arranged his visitation with the child.

Contrary to the father's further contention, Family Court properly determined that he failed to plan for the future of the child

(*see Matter of Jarrett P. [Jeremy P.]*, 173 AD3d 1692, 1695 [4th Dept 2019], *lv denied* 34 NY3d 902 [2019]; *Matter of Callie H. [Taleena W.]*, 170 AD3d 1612, 1614 [4th Dept 2019]; *Alex C., Jr.*, 114 AD3d at 1150; *see generally* Social Services Law § 384-b [7] [a]). The father made no substantive progress in addressing his mental health or substance abuse issues, and there is no evidence that he had a "realistic plan to provide an adequate and stable home for the child[ ]" (*Jarrett P.*, 173 AD3d at 1695 [internal quotation marks omitted]). Notably, the father did not "identify a placement resource for the child during the pendency of his incarceration, nor did he have an alternative proposal if he was not released from prison" (*id.*). The above factors support a finding of permanent neglect.

Finally, the father never requested a suspended judgment, and thus he failed to preserve for our review his contention that the court abused its discretion in failing to issue one (*see Matter of Hayleigh C. [Ronald S.]*, 172 AD3d 1921, 1922 [4th Dept 2019], *lv denied* 33 NY3d 911 [2019]; *Matter of Justin T. [Wanda T.–Joseph M.]*, 154 AD3d 1338, 1339-1340 [4th Dept 2017], *lv denied* 30 NY3d 910 [2018]). In any event, inasmuch as the father had not made any progress in addressing the issues noted above, a suspended judgment was not warranted in this case (*see Justin T.*, 154 AD3d at 1340).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

218

CA 19-00737

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

ROBERT RISSONE AND DONNA RISSONE,
PLAINTIFFS-APPELLANTS,

V ORDER

DAVID FLANIGEN, JOHN P. GIEHL,
JENNIFER E. FLANIGEN, HARBOR HILL SUBDIVISION
ASSOCIATION, INC., AND BOARD OF DIRECTORS OF
HARBOR HILL SUBDIVISION ASSOCIATION, INC.,
DEFENDANTS-RESPONDENTS.

LACY KATZEN LLP, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LITPAK NOWAK LLP, JAMESVILLE (LAUREN M. MILLER OF COUNSEL), FOR DEFENDANT-RESPONDENT DAVID FLANIGEN.

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID M. TANG OF COUNSEL), FOR DEFENDANTS-RESPONDENTS HARBOR HILL SUBDIVISION ASSOCIATION, INC. AND BOARD OF DIRECTORS OF HARBOR HILL.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered February 13, 2019. The order, among other things, granted in part the motion of defendants Harbor Hill Subdivision Association, Inc. and Board of Directors of Harbor Hill Subdivision Association, Inc., for summary judgment, denied plaintiffs' cross motion to amend their complaint, and granted plaintiffs summary judgment on the cause of action for breach of contract.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

220

CA 18-00966

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

NEB MORROW, III, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.

NEB MORROW, III, CLAIMANT-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered March 5, 2018. The order denied the motion of claimant for summary judgment, granted summary judgment to defendant and dismissed the claim.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

224

TP 19-01809

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

IN THE MATTER OF EDWARD ALEXANDER, PETITIONER,

V ORDER

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

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

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 October 1, 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: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

225

TP 19-01940

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

IN THE MATTER OF AMANDA BIDWELL, PETITIONER,

V MEMORANDUM AND ORDER

TINA M. STANFORD, CHAIRWOMAN OF NEW YORK STATE BOARD OF PAROLE, RESPONDENT.

LAW OFFICE OF GEORGE F. ANEY, HERKIMER (FRANK L. MADIA OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [David A. Murad, J.], entered October 11, 2019) to review a determination of respondent. The determination revoked petitioner's release to parole supervision.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking her release to parole supervision. " '[I]t is well settled that a determination to revoke parole will be confirmed if the procedural requirements were followed and there is evidence [that], if credited, would support such determination' " (*Matter of Wilson v Evans*, 104 AD3d 1190, 1190 [4th Dept 2013]; *see Matter of Rosa v Fischer*, 108 AD3d 1227, 1228 [4th Dept 2013], *lv denied* 22 NY3d 855 [2013]). We conclude that the Administrative Law Judge's (ALJ) determination that petitioner violated the conditions of her parole by attempting to escape custody and failing to successfully complete an inpatient treatment program is supported by substantial evidence (*see generally Matter of Tambadou v Annucci*, 151 AD3d 1699, 1700 [4th Dept 2017]). In making that determination, the ALJ was entitled to credit the testimony of respondent's witnesses and reject petitioner's version of the events (*see id.* at 1700; *Matter of Johnson v Alexander*, 59 AD3d 977, 978 [4th Dept 2009]), and he was entitled to consider hearsay evidence (*see Matter of Johnson v Thompson*, 134 AD3d 1404, 1405 [4th Dept 2015]; *Matter of Prodromidis v McCoy*, 292 AD2d 769, 769-770 [4th Dept 2002];

People ex rel. Saafir v Mantello, 163 AD2d 824, 825 [4th Dept 1990]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

227

KA 18-00857

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

VALERIE L. RHODES, ALSO KNOWN AS VALERIE DRAYTON,
DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, 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 (Marianne Furfure, A.J.), rendered October 3, 2017. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

228

KA 17-01912

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JUSTIN L. LETZELTER, 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 Supreme Court, Ontario County (Craig J. Doran, J.), rendered June 5, 2017. The judgment convicted defendant, upon a plea of guilty, of burglary in the third degree and criminal mischief in the third degree.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

229

KA 18-00543

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA D. HUNTRESS, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (ADAM W. KOCH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered January 18, 2018. The judgment convicted defendant upon a plea of guilty of aggravated vehicular homicide and assault in the second degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Wyoming County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of aggravated vehicular homicide (Penal Law § 125.14 [5]) and three counts of assault in the second degree (§ 120.05 [4]). We agree with defendant and the People correctly concede that defendant was improperly sentenced as a second felony offender inasmuch as the predicate conviction, i.e., the Pennsylvania crime of receiving stolen property (a firearm) (18 Pa Cons Stat §§ 3903 [a] [3]; 3925) is not the equivalent of the New York felony of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [4]). Upon our review of Pennsylvania statutory and case law, the operability of a firearm is not an element of the Pennsylvania offense (*see Commonwealth v Batty*, 169 A3d 70, 77 [Pa Super Ct 2017], *appeal denied* 645 Pa 701 [2018]), whereas it is a required element of the New York offense (*see People v Cruz*, 272 AD2d 922, 922 [4th Dept 2000], *affd* 96 NY2d 857 [2001]; *People v Samba*, 97 AD3d 411, 414 [1st Dept 2012], *lv denied* 20 NY3d 1065 [2013]; *People v Rowland*, 14 AD3d 886, 887 [3d Dept 2005]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to resentence defendant.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

231

CAF 18-01007

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

IN THE MATTER OF BRAYLYNN S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ERIC S., SR., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 26, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In these proceedings pursuant to Social Services Law § 384-b, respondent father appeals from two orders that terminated his parental rights to the subject children on the ground of permanent neglect. Contrary to the father's contention in both appeal No. 1 and appeal No. 2, petitioner demonstrated by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the relationship between the father and the children (*see* § 384-b [7] [a]; *Matter of Kyle K.*, 49 AD3d 1333, 1335 [4th Dept 2008], *lv denied* 10 NY3d 715 [2008]) and that, despite those efforts, the father failed " 'to correct the conditions that led to the placement of the children in the custody of petitioner' " (*Kyle K.*, 49 AD3d at 1335). In the original neglect proceeding, the father admitted that he "failed to cooperate with intensive or preventative services," and in the instant proceedings petitioner established that the father continued to be uncooperative and argumentative with service providers and was unable to consistently apply the knowledge and benefits that he gained from those services that were provided (*see Matter of Serenity G. [Orena G.]*, 101 AD3d 1639, 1640 [4th Dept 2012]; *Matter of Gerald G. [Orena G.]*, 91 AD3d 1320, 1321 [4th Dept 2012], *lv denied* 19 NY3d 801 [2012]; *see also Matter of Brady J.C. [Justin P.C.]*, 154 AD3d 1325, 1326 [4th Dept 2017], *lv denied* 30 NY3d

909 [2018]). The refusal to engage with services "demonstrates a failure to address or gain insight into the problems that led to the removal of the child[ren] and continued to prevent the child[ren's] safe return" (*Matter of D'Angel M.-B. [Donell M.-B.]*, 173 AD3d 1764, 1765 [4th Dept 2019] [internal quotation marks omitted]).

Contrary to the father's further contention in both appeals, Family Court did not abuse its discretion in refusing to enter a suspended judgment with respect to each child. The record of the dispositional hearing establishes that the father did not have " 'a realistic, feasible plan to care for the children' " (*Matter of Nicholas B. [Eleanor J.]*, 83 AD3d 1596, 1598 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]) and that "any progress made by the father was not sufficient to warrant any further prolongation of the [children's] unsettled familial status" (*D'Angel M.-B.*, 173 AD3d at 1766 [internal quotation marks omitted]; *see Matter of Eden S. [Joshua S.]*, 170 AD3d 1580, 1583 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

232

CAF 18-01092

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

IN THE MATTER OF ERIC S., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ERIC S., SR., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 26, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Braylynn S. (Eric S., Sr.)* (— AD3d — [Mar. 13, 2020] [4th Dept 2020]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

233

CAF 18-01897

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

IN THE MATTER OF JASON M., ARIANNA M., AND CLARICE M.

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

JOSHUA M., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered April 11, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, determined that the subject children were permanently neglected by respondent.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

234

CAF 18-01898

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

IN THE MATTER OF JASON M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOSHUA M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered September 24, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the custody and guardianship of the subject child to petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent challenges the finding of permanent neglect, and the order is affirmed without costs.

Memorandum: In appeal Nos. 2, 3, and 4, respondent father appeals from three orders, each of which terminated his parental rights with respect to a specific child. Although the orders were entered on default given the father's failure to appear at the dispositional hearing and "[n]o appeal lies from an order entered upon the default of the appealing party" (*Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]), his appeals nevertheless bring up for review any issue that was subject to contest in the proceedings below, i.e., Family Court's fact-finding determination (*see id.*). On the merits, we reject the father's contention that petitioner failed in its duty to make diligent efforts to encourage and strengthen his relationships with the subject children during the relevant time period (*see Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1500 [4th Dept 2015]). We therefore affirm the order in each appeal.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

235

CAF 18-01899

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

IN THE MATTER OF ARIANNA M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOSHUA M., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered September 24, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the custody and guardianship of the subject child to petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent challenges the finding of permanent neglect, and the order is affirmed without costs.

Same memorandum as in *Matter of Jason M. (Joshua M.)* ([appeal No. 2] — AD3d — [Mar. 13, 2020] [4th Dept 2020]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

236

CAF 18-01900

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

IN THE MATTER OF CLARICE M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOSHUA M., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered September 24, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the custody and guardianship of the subject child to petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent challenges the finding of permanent neglect, and the order is affirmed without costs.

Same memorandum as in *Matter of Jason M. (Joshua M.)* ([appeal No. 2] — AD3d — [Mar. 13, 2020] [4th Dept 2020]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

237

CAF 19-00396

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

IN THE MATTER OF ASHLEY M. LADD,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD G. FRANK, II, RESPONDENT-APPELLANT.

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

KEVIN EARL, COUNTY ATTORNEY, BATAVIA (TINA M. KASPEREK OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered January 14, 2019 in a proceeding pursuant to Family Court Act article 4. The order, among other things, directed respondent to surrender himself to serve the period of incarceration previously imposed.

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 a period of five months. Because he concedes that he has already served his sentence, the appeal is moot (*see Matter of Barney v Thomas*, 178 AD3d 1440, 1441 [4th Dept 2019]; *Matter of McGrath v Healey*, 158 AD3d 1069, 1069 [4th Dept 2018]; *Matter of Brookins v McCann*, 137 AD3d 1726, 1727 [4th Dept 2016], *lv denied* 27 NY3d 910 [2016]). To the extent that respondent contends that the appeal is not moot because a finding of a willful violation may have significant collateral consequences for him, we note that he did not appeal from the order finding him in willful violation of the order requiring him to pay child support (*see McGrath*, 158 AD3d at 1069-1070).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

248

CA 19-01181

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

US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR
RASC 2006KS2, PLAINTIFF-APPELLANT,

V ORDER

LYNDA A. GOODHUE, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

RAS BORISKIN, LLC, WESTBURY (CHRISTOPHER LESTAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF PETER D. GRUBEA, WILLIAMSVILLE (JOSEPH E. DEMARCO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 3, 2019. The order granted plaintiff's motion for leave to reargue and, upon reargument, denied the motion of plaintiff to restore the action to the calendar and for a judgment of foreclosure and sale.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

249

CA 19-01472

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

US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR RASC 2006KS2, PLAINTIFF-APPELLANT,

V ORDER

LYNDA A. GOODHUE, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 2.)

RAS BORISKIN, LLC, WESTBURY (CHRISTOPHER LESTAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF PETER D. GRUBEA, WILLIAMSVILLE (JOSEPH E. DEMARCO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered December 19, 2018. The order, insofar as appealed from, denied the motion of plaintiff to restore the action to the calendar and for a judgment of foreclosure and sale.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]; *Public Serv. Truck Renting v Ambassador Ins. Co.*, 136 AD2d 911, 911 [4th Dept 1988]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

252

TP 19-00582

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

IN THE MATTER OF ADAM HAMILTON, PETITIONER,

V MEMORANDUM AND ORDER

STEWART T. ECKERT, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT.

ADAM HAMILTON, 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, Erie County [Emilio L. Colaiacovo, J.], entered March 25, 2019) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul a determination, following a tier II disciplinary hearing, that he violated certain inmate rules. The record does not support petitioner's contention that his plea of guilty to the alleged violations was the product of duress or coercion (*see generally Matter of Burch v Venettozzi*, 160 AD3d 1328, 1328-1329 [3d Dept 2018]). Petitioner's plea of guilty precludes his further contention that the determination is not supported by substantial evidence (*see Matter of Washington v Annucci*, 170 AD3d 1585, 1585 [4th Dept 2019]; *Matter of Ingram v Annucci*, 151 AD3d 1778, 1778 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

254

KA 19-01820

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DEMONZ GUICE, DEFENDANT-RESPONDENT.

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

Appeal from an order of the Supreme Court, Erie County (M. William Boller, A.J.), dated March 11, 2019. The order, inter alia, granted the motion of defendant to suppress a gun.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: The People appeal from an order granting defendant's omnibus motion insofar as it sought to suppress a gun recovered from a vehicle. We agree with the People that Supreme Court erred in suppressing the gun without determining whether defendant had standing to challenge the search of the vehicle (*see People v Sweat*, 148 AD3d 1641, 1642 [4th Dept 2017]; *see also* CPL 710.60 [6]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court to rule on that issue (*see Sweat*, 148 AD3d at 1642; *see generally People v Concepcion*, 17 NY3d 192, 194-195 [2011]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

261

CAF 18-01124

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

IN THE MATTER OF MAURICE A. GILBERT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NATASHKA M. NUNEZ-MERCED, RESPONDENT-APPELLANT.

MATTER OF NATASHKA M. NUNEZ-MERCED,
PETITIONER-APPELLANT,

V

MAURICE A. GILBERT, RESPONDENT-RESPONDENT.

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

MAURICE A. GILBERT, PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT PRO SE.

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

Appeal from an order of the Family Court, Onondaga County (Karen Stanislaus, R.), entered May 18, 2018 in proceedings pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner-respondent Maurice A. Gilbert sole legal and residential custody of the subject child.

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

Memorandum: Respondent-petitioner mother appeals from an order that, inter alia, awarded petitioner-respondent father sole legal and residential custody of the subject child. We reject the mother's contention that Family Court's custody determination lacks a sound and substantial basis in the record. In making an initial custody determination, the court is "required to consider the best interests of the child by reviewing such factors as maintaining stability for the child, . . . the home environment with each parent, each parent's past performance, relative fitness, ability to guide and provide for the child's overall well-being, and the willingness of each parent to foster a relationship with the other parent" (*Matter of Buckley v Kleinahans*, 162 AD3d 1561, 1562 [4th Dept 2018] [internal quotation marks omitted]). We agree with the court that those factors weigh in

the father's favor, particularly in light of the mother's efforts to interfere with the father's contact with the child, and thus the record supports the court's determination that it is in the child's best interests to award sole custody to the father (*see Matter of Athoe v Goodman*, 170 AD3d 1532, 1533 [4th Dept 2019]).

Contrary to the mother's contention, the record establishes that the father "is an active and capable parent notwithstanding his work schedule" (*Matter of Owens v Pound*, 145 AD3d 1643, 1645 [4th Dept 2016], *lv denied* 29 NY3d 902 [2017]). Furthermore, it is well settled that "a more fit parent will not be deprived of custody simply because the parent assigns day-care responsibilities to a relative owing to work obligations" (*Matter of Chyreck v Swift*, 144 AD3d 1517, 1518 [4th Dept 2016]; *see Hendrickson v Hendrickson*, 147 AD3d 1522, 1523 [4th Dept 2017]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

268

CA 19-01673

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

ROSEMARY A. LIGOTTI, PLAINTIFF-RESPONDENT,

V ORDER

WEGMANS FOOD MARKETS, INC., AND JOHN DOE,
ALSO KNOWN AS "DAVE B., EMPLOYEE NUMBER 40783",
DEFENDANTS-APPELLANTS.

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

BAUMEISTER DENZ, LLP, BUFFALO (ARTHUR G. BAUMEISTER, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered September 9, 2019. The order denied the motion of defendants to dismiss the complaint.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

269

CAF 19-00652

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

IN THE MATTER OF DELBERT W. HARGIS, JR.,
PETITIONER-RESPONDENT,

V ORDER

VICTORIA PRITTY-PITCHER, RESPONDENT-APPELLANT,
AND NICOLE E. HARGIS, RESPONDENT-RESPONDENT.

SUSAN B. MARRIS, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR RESPONDENT-APPELLANT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

DELBERT W. HARGIS, JR., PETITIONER-RESPONDENT PRO SE.

TODD G. MONAHAN, LITTLE FALLS, FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered February 22, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner custody of the subject child.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

278

KA 16-01585

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN A. ROSA, DEFENDANT-APPELLANT.

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

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

Appeal from an amended sentence of the Monroe County Court (John L. DeMarco, J.), rendered March 9, 2016. The amended sentence imposed restitution of $3,000.

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

Memorandum: Defendant appeals from an amended sentence directing him to pay restitution arising from a judgment convicting him, upon a plea of guilty, of criminal trespass in the second degree (Penal Law § 140.15 [1]). Restitution was not part of the plea bargain, and thus the amended sentence exceeded the sentence promised in the plea bargain (*see People v Feher*, 165 AD3d 1610, 1610-1611 [4th Dept 2018], *lv denied* 32 NY3d 1171 [2019]). Defendant objected to County Court imposing restitution (*see People v Gilmore*, 12 AD3d 1155, 1156 [4th Dept 2004]), but the court rejected defendant's request for specific performance of the plea agreement and instead offered defendant the opportunity to withdraw his plea, which defendant declined. As defendant contends and the People correctly concede, defendant was entitled to specific performance of the plea agreement because he "placed himself in a 'no-return' position by carrying out his obligations under" the agreement here, and there was "no significant additional information bearing upon the appropriateness of the plea bargain" (*People v Danny G.*, 61 NY2d 169, 171 [1984]; *see generally People v Smith*, 93 AD3d 1239, 1239 [4th Dept 2012]). We therefore vacate the amended sentence imposing restitution (*see People v Nilsen*, 129 AD3d 994, 995 [2d Dept 2015]; *see also Feher*, 165 AD3d at 1611).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

280

KA 19-00890

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN D. CROGAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered March 29, 2019. The judgment convicted defendant upon a 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]). We agree with defendant that he did not validly waive his right to appeal because County Court's oral colloquy "utterly 'mischaracterized the nature of the right' " to appeal (*People v Thomas*, — NY3d —, 2019 NY Slip Op 08545, *6 [2019]), inasmuch as "the court's advisement as to the rights relinquished [by defendant] was incorrect and irredeemable under the circumstances" (*id.* at —, 2019 NY Slip Op 08545, *5). Because the court provided defendant with erroneous information about the scope of the waiver of the right to appeal and failed to identify the several rights that would survive that waiver, we conclude that the colloquy was insufficient to ensure that the waiver was voluntary, knowing, and intelligent (*see id.* at —, 2019 NY Slip Op 08545, *6-7). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

281

KA 18-00807

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE WILLIAMS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 11, 2017. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant's conviction stems from the seizure of a firearm following a search of his residence by parole officers. We reject defendant's contention that County Court (Aloi, J.) erred in refusing to suppress the physical evidence discovered during the search. A senior parole officer testified at the suppression hearing that he made the determination to search defendant's residence based on defendant's recent parole violations (*see People v Goss*, 143 AD3d 1279, 1280 [4th Dept 2016], *lv denied* 28 NY3d 1145 [2017]; *People v Scott*, 93 AD3d 1193, 1194 [4th Dept 2012], *lv denied* 19 NY3d 967 [2012], *reconsideration denied* 19 NY3d 1001 [2012]). We agree with the court that the search was "rationally and reasonably related to the performance of the parole officer's duty" (*People v Huntley*, 43 NY2d 175, 181 [1977]; *see People v Reed*, 150 AD3d 1655, 1655-1656 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]). Contrary to defendant's contention, the fact that the police were notified of the search and assisted the parole officers after the firearm was discovered did not render the search a police operation (*see People v Wheeler*, 149 AD3d 1571, 1572 [4th Dept 2017], *lv denied* 29 NY3d 1095 [2017]). We have reviewed defendant's remaining contentions regarding the search of his residence and conclude that none warrants reversal or modification of the judgment.

Finally, we conclude that defendant's sentence is not unduly harsh or severe.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

282

KA 16-00426

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKY P. WALLACE, DEFENDANT-APPELLANT.

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

RICKY P. WALLACE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered December 15, 2015. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, those parts of the omnibus motion seeking to suppress physical evidence and statements are granted, the indictment is dismissed, and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends in his main and pro se supplemental briefs that County Court (Dinolfo, J.) erred in refusing to suppress the physical evidence seized from him and his subsequent statements to the police. We agree.

The evidence at the suppression hearing establishes that the arresting officer was on routine patrol in what he described as a high-crime area known to be an "open air drug market," where there had also been numerous burglaries and robberies. That officer had been a member of the police force for only a few months, and he was under the supervision of a training officer. The arresting officer testified that he observed defendant walking on a sidewalk shortly after midnight on a chilly night, with temperatures near 40 degrees, and that defendant was wearing a mask that covered the lower part of his face. The officer had not received any reports of recent crimes in the area, was not responding to any call, and did not observe defendant engage in any illegal activity. The officer pulled his

patrol vehicle in front of defendant's path of travel, exited the patrol vehicle along with the training officer, approached defendant, and asked defendant why he was wearing a mask. Defendant replied that he was walking his dog, and the unchallenged evidence at the hearing establishes that he was indeed walking a dog. The arresting officer testified that the training officer asked defendant what was in a bag, which defendant was apparently holding, and defendant replied that it was "weed." The arresting officer then frisked defendant and recovered a firearm. Defendant thereafter made admissions regarding that weapon.

In *People v De Bour* (40 NY2d 210, 223 [1976]), the Court of Appeals provided a "graduated four-level test for evaluating street encounters initiated by the police" (*People v Moore*, 6 NY3d 496, 498 [2006]). Under *De Bour*, insofar as relevant here, "level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor" (*Moore*, 6 NY3d at 498-499). Here, defendant contends that the officers lacked the requisite reasonable suspicion of criminal activity for a *De Bour* level three encounter or the founded suspicion required for a level two encounter.

In determining whether an officer had the requisite basis to support the level of intrusion that occurred, the suppression court must consider the totality of circumstances (*see generally People v Mercado*, 120 AD3d 441, 442 [1st Dept 2014], *affd* 25 NY3d 936 [2015]). In addition, the court must determine " 'whether the officer's action was justified at its inception' " (*People v William II*, 98 NY2d 93, 98 [2002]) and, because " 'police-citizen encounters are dynamic situations during which the degree of belief possessed at the point of inception may blossom by virtue of responses or other matters which authorize and indeed require additional action as the scenario unfolds' " (*People v Perez*, 31 NY3d 964, 966 [2018]), whether any subsequent escalation of the intrusion by the officer is supported by the requisite level of suspicion (*see e.g. People v Pettiford*, 173 AD3d 1716, 1716-1717 [4th Dept 2019], *lv denied* 34 NY3d 936 [2019]; *see generally People v Nicodemus*, 247 AD2d 833, 835 [4th Dept 1998], *lv denied* 92 NY2d 858 [1998]). Here, assuming, arguendo, that the arresting officer had the requisite "objective, credible reason, not necessarily indicative of criminality" to support his approach and his initial question to defendant regarding defendant's face mask (*Moore*, 6 NY3d at 498), we conclude "the People failed to meet their burden of establishing the legality of the police conduct" that occurred thereafter (*People v Carr*, 103 AD3d 1194, 1195 [4th Dept 2013]; *see generally People v Wise*, 46 NY2d 321, 329 [1978]; *People v Baldwin*, 25 NY2d 66, 70-71 [1969]).

The evidence at the hearing establishes that, after the arresting officer asked defendant why he was wearing the mask, the training

officer asked defendant what was in the bag defendant was holding. There is no evidence regarding why the training officer did so. The evidence at the hearing further establishes that the arresting officer, who was the People's only witness at the hearing, did not see the bag before the training officer asked what was in it. Because the training officer engaged in a level two intrusion, i.e., "a more pointed inquiry into [defendant's] activities" (*People v Doll*, 98 AD3d 356, 367 [4th Dept 2012], *affd* 21 NY3d 665 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* 572 US 1022 [2014]), by asking "invasive question[s] focusing on the possible criminality of the subject" (*People v Hightower*, 136 AD3d 1396, 1397 [4th Dept 2016] [internal quotation marks omitted]; *see People v Hollman*, 79 NY2d 181, 191-192 [1992]), the People were required to demonstrate that the training officer had "a founded suspicion that criminal activity [was] afoot" (*Moore*, 6 NY3d at 498).

The People's reliance on the training officer's trial testimony that he asked defendant if he had any weapons and that defendant said that he did not is misplaced. "It is well settled that 'evidence subsequently admitted [at] trial cannot be used to support [or undermine] the determination of the suppression court denying [a] motion to suppress . . . ; the propriety of the denial must be judged on the evidence before the suppression court' " (*People v Lane*, 106 AD3d 1478, 1479 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013], quoting *People v Gonzalez*, 55 NY2d 720, 721-722 [1981], *rearg denied* 55 NY2d 1038 [1982], *cert denied* 456 US 1010 [1982]; *see People v Carmona*, 82 NY2d 603, 610 n 2 [1993]). Based on the evidence at the suppression hearing, the People failed to meet their burden of establishing that the training officer had the requisite founded suspicion (*see Carr*, 103 AD3d at 1195). Thus, we conclude that the training officer's inquiry and the subsequent frisk of defendant by the arresting officer was not a proper escalation of the level one encounter.

We further conclude that the frisk of defendant and seizure of the gun was not justified "as having been in the interests of the officer[']s] safety, since there was no testimony that the [arresting] officer[ ] believed defendant to be carrying a weapon . . . , and the People presented no other evidence establishing that the [arresting] officer had reason to fear for his safety" (*People v Roberts*, 158 AD3d 1141, 1143 [4th Dept 2018] [internal quotation marks omitted]; *cf. People v Fletcher*, 130 AD3d 1063, 1065 [2d Dept 2015], *affd* 27 NY3d 1177 [2016]; *People v Fagan*, 98 AD3d 1270, 1271 [4th Dept 2012], *lv denied* 20 NY3d 1061 [2013], *cert denied* 571 US 907 [2013]). We therefore reverse the judgment, grant those parts of defendant's omnibus motion seeking to suppress the physical evidence seized and his subsequent statements, and dismiss the indictment.

In light of our determination, defendant's remaining contentions

in his main and pro se supplemental briefs are academic.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

294

CA 19-00238

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

IN THE MATTER OF THE APPLICATION OF
TERRY L.M., PETITIONER-APPELLANT,

FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY OF MARY L.M., AN ALLEGED INCAPACITATED PERSON, RESPONDENT.

CENTER FOR ELDER LAW & JUSTICE,
RESPONDENT-RESPONDENT.

ORDER

MATTHEW ALBERT, BUFFALO, FOR PETITIONER-APPELLANT.

CENTER FOR ELDER LAW & JUSTICE, BUFFALO (SARAH J. DUVAL OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), dated January 14, 2019. The order, among other things, granted a judgment in favor of Mary L.M. as against Terry L.M. in the amount of $232,555.70.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

308

CA 19-01855

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

EDMUND J. GIZA, PLAINTIFF-RESPONDENT,

V ORDER

CATHERINE A. BARNEY, DEFENDANT-APPELLANT.

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

KIRWAN LAW FIRM, P.C., SYRACUSE (TERRY J. KIRWAN, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Martha Walsh Hood, A.J.), entered April 9, 2019 in a divorce action. The judgment, among other things, dissolved the marriage between the parties, equitably distributed the marital assets and awarded defendant maintenance.

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: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

316

CA 19-01258

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

RONALD D. TURNER, PLAINTIFF-RESPONDENT,

V ORDER

JOSEPH F. BUCCOLERI AND B&D OF BUFFALO, INC.,
DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (A. PETER SNODGRASS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered December 24, 2018. The order granted the motion of plaintiff for summary judgment on the issue of defendants' negligence.

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

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

333

CA 19-01108

PRESENT: PERADOTTO, J.P., TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

JOHN GUIDO AND SALLY GUIDO, PLAINTIFFS,

V ORDER

COUNTY OF CAYUGA, ET AL., DEFENDANTS.

COUNTY OF CAYUGA, JACKIE WOJESKI, RN, CAROL WALLACE, RN, CHRISTINE LITTY, RN, CPT. JOHN MACK, C.O. BRETT FLETCHER, SGT. SHANE PERKINS AND PANGH LAY KOOI, MD, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

AUBURN COMMUNITY HOSPITAL, ALSO KNOWN AS AUBURN MEMORIAL HOSPITAL, PHILIP GOTTLIEB, MD, DARYL HENDERSON, MD, THIRD-PARTY DEFENDANTS-APPELLANTS, AND CHARLES HENNEMEYER, MD, THIRD-PARTY DEFENDANT-RESPONDENT.

AUBURN COMMUNITY HOSPITAL, FOURTH-PARTY PLAINTIFF,

V

AUBURN RADIOLOGY, P.C., FOURTH-PARTY DEFENDANT, AND OLEAN RADIOLOGY, P.C., FOURTH-PARTY DEFENDANT-APPELLANT.

EAGAN & HEIMER, PLLC, BUFFALO (LAUREN HEIMER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT AUBURN COMMUNITY HOSPITAL, ALSO KNOWN AS AUBURN MEMORIAL HOSPITAL.

MACKENZIE HUGHES LLP, SYRACUSE (JENNIFER P. WILLIAMS OF COUNSEL), SYRACUSE, FOR THIRD-PARTY DEFENDANT-APPELLANT PHILIP GOTTLIEB, MD.

SUGARMAN LAW FIRM, LLP, SYRACUSE (SARAH M. KELLY OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT DARYL HENDERSON, MD AND FOURTH-PARTY DEFENDANT-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (CHARLES C. SPAGNOLI OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Cayuga County (Mark

H. Fandrich, A.J.), entered May 20, 2019. The order, among other things, denied the motion of third-party defendant Philip Gottlieb, MD, for summary judgment, denied the motion of third-party defendant Daryl Henderson, MD, and fourth-party defendant Olean Radiology, P.C., for summary judgment and denied in part the motion of third-party defendant Auburn Community Hospital for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 3, 5, 14 and 18, 2020,

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

339

KA 18-02379

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERARD D. CRIBB, ALSO KNOWN AS JERRY HARGRAVE/GERALD CRIBB, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered March 16, 2015. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm. Even assuming, arguendo, that defendant's waiver of the right to appeal does not encompass his challenge to the severity of the period of postrelease supervision imposed by Supreme Court, we nevertheless conclude that such aspect of his sentence is not unduly harsh or severe.

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

349

CAF 16-01228

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

IN THE MATTER OF JOSEPH M. PARK,
PETITIONER-APPELLANT,

V ORDER

DEBORAH L. MILLER, RESPONDENT-RESPONDENT.

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

ELIZABETH J. CIAMBRONE, BUFFALO, FOR RESPONDENT-RESPONDENT.

TINA M. HAWTHORNE, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), entered March 10, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject children to respondent.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

352

CA 19-01853

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

TIMOTHY J. KUPKA AND DEBORAH A. KUPKA,
PLAINTIFFS-RESPONDENTS,

V ORDER

SERRIE C. LICO, M.D., CARDIOVASCULAR
AND THORACIC SURGERY, P.C., DEFENDANTS-APPELLANTS,
CATHARINE M. ARMENTROUT, N.P., MERCY HOSPITAL OF
BUFFALO AND CATHOLIC HEALTH SYSTEM, INC.,
DEFENDANTS-RESPONDENTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

BARGNESI BRITT PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 23, 2018. The order denied the motion of defendants Serrie C. Lico, M.D. and Cardiovascular and Thoracic Surgery, P.C. seeking summary judgment dismissing all claims and cross claims against them.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 20, 2019,

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

353

CA 19-01032

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

MOHAMED SAIF MOHAMED, PLAINTIFF-APPELLANT,

V ORDER

CITY OF BUFFALO, DEFENDANT-RESPONDENT.

LOTEMPIO P.C. LAW GROUP, BUFFALO (ANDREW GILL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 4, 2019. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

366

CA 19-01873

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

PATRICIA SPEARS AND RAYMOND SPEARS,
CLAIMANTS-APPELLANTS,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125368.)

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANDREW J. CONNELLY OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered March 18, 2019. The order granted the motion of defendant for summary judgment and dismissed the claim.

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

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

376.1

CA 19-01943

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

KENNETH KITTINGER AND TONI GERACE,
PLAINTIFFS-RESPONDENTS,

V ORDER

JAMES SABUDA, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

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

RAMOS & RAMOS, BUFFALO (JOSEPH L. NICASTRO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 16, 2019. The order, among other things, granted plaintiff's motions to compel the production of certain discovery.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 3, 2020,

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

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, AND CURRAN, JJ. (Filed Mar. 13, 2020.)

MOTION NOS. (770-771/11) KA 10-00418. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NATHANIEL MYERS, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 10-00419. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NATHANIEL MYERS, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, NEMOYER, WINSLOW, AND DEJOSEPH, JJ. (Filed Mar. 13, 2020.)

MOTION NO. (9/12) KA 10-00664. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRANDON DENNIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ. (Filed Mar. 13, 2020.)

MOTION NO. (336/19) KA 15-02009. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SYLVESTER E. BAXTRUM, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, NEMOYER, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 13, 2020.)

MOTION NO. (688/19) CA 18-01211. -- J. PATRICK BARRETT, PLAINTIFF-RESPONDENT-APPELLANT, V CHRISTINE R. BARRETT,

DEFENDANT-APPELLANT-RESPONDENT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, AND CURRAN, JJ. (Filed Mar. 13, 2020.)

MOTION NO. (706/19) CA 18-01405. -- IN THE MATTER OF JAMES LIEBEL, DOING BUSINESS AS FINGER LAKES WOODWORKS, PETITIONER-APPELLANT, V CITY OF ROCHESTER, RESPONDENT-RESPONDENT, AND EDWARD D'AMICO, RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ. (Filed Mar. 13, 2020.)

MOTION NO. (918/19) CA 19-00309. -- PAULINE A. BEAGLE, PLAINTIFF-RESPONDENT, V CITY OF BUFFALO, DEFENDANT-APPELLANT, JOHN GIKAS, SAM GIKAS, MILKIE'S ON ELMWOOD, INC., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ. (Filed Mar. 13, 2020.)

MOTION NO. (1026/19) CA 19-00747. -- JASON WOOD AND JANEL WOOD, PLAINTIFFS-RESPONDENTS, V THE BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Mar. 13, 2020.)

MOTION NO. (1031/19) CA 17-01291. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V CORDERO RUMPH, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ. (Filed Mar. 13, 2020.)

MOTION NO. (1112/19) CA 19-00940. -- LOIS REID, PLAINTIFF-APPELLANT, V UNIVERA HEALTHCARE, EXCELLUS HEALTH PLAN, INC., AND LIFETIME HEALTHCARE, INC., DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND WINSLOW, JJ. (Filed Mar. 13, 2020.)

MOTION NOS. (1141-1143/19) CA 18-01987. -- 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; THERESA M. GIROUARD, ESQ., APPOINTED GUARDIAN FOR MARGARET Z., AN ALLEGED INCAPACITATED PERSON, RESPONDENT-RESPONDENT. (APPEAL NO. 1.) CA 18-01988. -- 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; THERESA M. GIROUARD, ESQ., APPOINTED GUARDIAN FOR MARGARET Z., AN ALLEGED INCAPACITATED PERSON, RESPONDENT-RESPONDENT. (APPEAL NO. 2.) CA 18-01989. -- 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; THERESA M. GIROUARD, ESQ., APPOINTED GUARDIAN FOR MARGARET Z., AN ALLEGED INCAPACITATED PERSON, RESPONDENT-RESPONDENT. (APPEAL NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND DEJOSEPH, JJ. (Filed Mar. 13, 2020.)

MOTION NO. (256/20) KA 18-01349. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WENDELL FUQUA, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ. (Filed Mar. 13, 2020.)

KAH 19-00823. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. ANTHONY FLOWERS, PETITIONER, V NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [4th Dept 1979]). (Appeal from Judgment of Supreme Court, Wyoming County, Michael M. Mohun, A.J. - Habeas Corpus). PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 13, 2020.)

KA 17-00188. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JIMMIE D. JOHNSON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [4th Dept 1979]). (Appeal from Judgment of Monroe

County Court, Victoria M. Argento, J. - Attempted Burglary, 2nd Degree). PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 13, 2020.)

KA 18-00703. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KRISTA SCHULTZ, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [4th Dept 1979]). (Appeal from Judgment of Supreme Court, Erie County, Christopher J. Burns, J. - Violation of Probation). PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 13, 2020.)

KA 19-00169. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARTIN WASHINGTON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [4th Dept 1979]). (Appeal from Judgment of Wyoming County Court, Michael M. Mohun, J. - Attempted Promoting Prison Contraband, 1st Degree). PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 13, 2020.)

KA 19-00863. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANIEL WILLIAMS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [4th Dept 1979]). (Appeal from Judgment of Wyoming County Court, Michael M. Mohun, J. - Promoting Prison Contraband, 1st Degree). PRESENT:

SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 13, 2020.)

CAF 19-00562 -- IN THE MATTER OF ALIVIA W., RESPONDENT-APPELLANT -- MONROE COUNTY PRESENTMENT AGENCY, PETITIONER-RESPONDENT. -- Order unanimously affirmed. Counsel's motion to be relieved of assignment granted. (Appeal from Order of Family Court, Monroe County, Joan S. Kohout, J. -- Juvenile Delinquent). PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 13, 2020.)