SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 17, 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 JULY 17, 2020

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

1093

CA 18-02123

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

RICHARD WALKOW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MJ PETERSON/TUCKER HOMES, LLC, RGGT, LLC, AND SCOTT HAPEMAN, DOING BUSINESS AS HAPEMAN & SON, DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ANANT KISHORE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HIGGINS KANE LAW GROUP, P.C., BUFFALO (MICHAEL J. WILLETT OF COUNSEL), AND GIBSON, MCASKILL & CROSBY, LLP, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 17, 2018. The order granted plaintiff's motion for partial summary judgment and denied defendants' cross motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the motion and granting the cross motion in part and dismissing the common-law negligence and Labor Law § 200 claims against defendants MJ Peterson/Tucker Homes, LLC and RGGT, LLC and the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (d); and 23-1.21 (b) (3) (iv); (4) (i), (iv), and (v) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained when he fell from a roof in the course of his employment installing siding on a residential construction project. At the time of the accident, plaintiff was working on a second-story dormer, which was located above a porch. Two ladders had been set up on the porch roof to provide access to the second-story roof and dormer. In order to reach the front of the dormer, plaintiff, who was perched on one of the ladders, moved laterally from that ladder to the second ladder, which was positioned about two feet away. After successfully transferring to the second ladder, plaintiff started to ascend it. The second ladder "kicked out" from under him, causing him to fall to the ground. Plaintiff commenced this action, asserting claims for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6), against defendants MJ Peterson/Tucker Homes, LLC (Tucker Homes), which was retained by the nonparty titleholders of the subject property to act as "project coordinator" for the construction project; RGGT, LLC (RGGT), the subcontractor that

hired plaintiff's employer; and Scott Hapeman, doing business as Hapeman & Son (Hapeman), plaintiff's employer. Plaintiff thereafter moved for partial summary judgment with respect to liability on the Labor Law §§ 240 (1) and 241 (6) claims, and defendants cross-moved for summary judgment dismissing the complaint. Supreme Court granted the motion and denied the cross motion, and defendants now appeal.

Initially, we conclude that the court erred in granting the motion and denying the cross motion with respect to the Labor Law § 241 (6) claim to the extent it is predicated on alleged violations of 12 NYCRR 23-1.21 (b) (3) (iv) and 23-1.21 (b) (4) (i) because, as the court noted in its written decision, plaintiff withdrew that part of the section 241 (6) claim during oral argument before the motion court. We therefore modify the order accordingly.

With respect to the Labor Law § 200 and common-law negligence claims against Tucker Homes and RGGT, we conclude that defendants met their initial burden of establishing entitlement to judgment as a matter of law by submitting evidence that neither Tucker Homes nor RGGT had the authority to direct or control plaintiff's work on the site (*see Fisher v WNY Bus Parts, Inc.*, 12 AD3d 1138, 1139-1140 [4th Dept 2004]; *Kazmierczak v Town of Clarence*, 286 AD2d 955, 956 [4th Dept 2001]), thereby shifting the burden to plaintiff to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Having submitted no evidence in opposition to that part of defendants' cross motion, plaintiff failed to meet that burden (*see generally Sweney v County of Niagara*, 122 AD3d 1432, 1434 [4th Dept 2014], *lv denied* 25 NY3d 907 [2015]). Plaintiff's general reference to the cross motion in the "[w]herefore" clause of his opposition was insufficient to raise an issue of fact because he never addressed the factual claims of defendants adduced on the cross motion with respect to the Labor Law § 200 and common-law negligence claims against Tucker Homes and RGGT (*see generally Groff v Kaleida Health*, 161 AD3d 1518, 1521 [4th Dept 2018]). The court thus erred in granting the motion and denying the cross motion with respect to the Labor Law § 200 and common-law negligence claims against Tucker Homes and RGGT, and we further modify the order accordingly.

We further conclude that the court erred in granting the motion and denying the cross motion with respect to the Labor Law § 241 (6) claim insofar as it is predicated on alleged violations of 12 NYCRR 23-1.7 (d) and 23-1.21 (b) (4) (iv) and (v), and we further modify the order accordingly. With respect to 12 NYCRR 23-1.7 (d), which provides that "[e]mployers shall not suffer or permit any employee to use . . . [an] elevated working surface which is in a slippery condition," we conclude that plaintiff did not meet his initial burden on the motion of showing that the regulation was violated because he made no specific arguments concerning that provision in his motion. In contrast, defendants met their initial burden on the cross motion of establishing that there was no evidence of a slippery condition at the work site at the time of the accident. Although plaintiff submitted in reply the affidavit of an expert who opined that the ladder was placed on a slippery surface because the composition of the roofing tiles resulted in a slippery condition, we conclude that the

expert affidavit failed to raise a triable issue of fact with respect to the existence of a slippery condition within the meaning of that Industrial Code provision because the roofing tiles did not constitute a "foreign substance" like ice, snow, or grease that was not itself already a part of the roofing structure (12 NYCRR 23-1.7 [d]; *see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530 [1st Dept 2013]).

Plaintiff did not meet his initial burden on his motion with respect to the applicability of 12 NYCRR 23-1.21 (b) (4) (iv) and (v), which require a ladder to be secured against "side slip," because he never addressed them in his motion papers, and we may not consider his reply submissions to cure that deficiency (*see Paul v Cooper*, 45 AD3d 1485, 1486 [4th Dept 2007]; *Seefeldt v Johnson*, 13 AD3d 1203, 1203-1204 [4th Dept 2004]). Moreover, as plaintiff correctly concedes in his brief, 12 NYCRR 23-1.21 (b) (4) (iv) does not apply to the facts of this case because the ladder did not "side slip" but instead kicked straight out from under him (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2d Dept 2008]). Defendants met their initial burden on the cross motion of showing that 12 NYCRR 23-1.21 (b) (4) (v) was similarly inapplicable to the facts of the case (*see Kwang Ho Kim*, 47 AD3d at 619), and plaintiff did not raise a triable issue of fact in opposition (*see Zuckerman*, 49 NY2d at 562).

The court also erred in granting the motion with respect to the Labor Law § 241 (6) claim insofar as it is predicated on an alleged violation of 12 NYCRR 23-1.21 (b) (4) (ii), and we further modify the order accordingly. 12 NYCRR 23-1.21 (b) (4) (ii) requires that "[a]ll ladder footings shall be firm. Slippery surfaces . . . shall not be used as ladder footings." Plaintiff never addressed that provision in his motion, and we may not rely on his reply submissions to remedy that deficiency (*see Paul*, 45 AD3d at 1486; *Seefeldt*, 13 AD3d at 1203-1204). We reject defendants' further contention that the court erred in denying the cross motion with respect to that claim. Although defendants met their initial burden on the cross motion with respect to that Industrial Code provision, plaintiff's expert raised an issue of fact by averring that the roofing tiles constituted a slippery surface within the meaning of 12 NYCRR 23-1.21 (b) (4) (ii).

We reject defendants' contention that Tucker Homes was not an owner, general contractor or agent thereof and that the court thus erred in determining that Tucker Homes is subject to liability under the Labor Law (*see generally* Labor Law § 240 [1]). The court properly concluded that Tucker Homes was an owner under the Labor Law based on its equitable interest in the property (*see Sweeting v Board of Coop. Educ. Servs.*, 83 AD2d 103, 113-114 [4th Dept 1981], *lv denied* 56 NY2d 503 [1982]). Although the term owner generally refers to the titleholder of the property, it may "also encompass[ ] one who has an interest in the property [and] . . . who contracted for or otherwise ha[d] the right to control the work" (*Walp v ACTS Testing Labs., Inc./Div. of Bur. Veritas*, 28 AD3d 1104, 1104-1105 [4th Dept 2006] [internal quotation marks omitted]; *see Copertino v Ward*, 100 AD2d 565, 566-567 [2d Dept 1984]). Here, Tucker Homes had an equitable

interest in the property by virtue of provisions in its contract with the titleholders that permitted it to take possession of the deed and obtain legal title to the property if the titleholders did not pay for the home's construction. Moreover, Tucker Homes, as the only entity that had a contractual relationship with RGGT, was the only entity that could insist that RGGT adhere to safety practices and obtain insurance. The titleholders, by contrast, had no contractual relationship with RGGT and did not obtain any insurance on the project. Thus, the court properly concluded that Tucker Homes, "as the only party with [both] a property interest and the right to insist on safety practices," was an owner within the meaning of the Labor Law (*Sweeting*, 83 AD2d at 114).

Even if Tucker Homes was not an "owner" for purposes of the Labor Law, we conclude that the court properly determined that Tucker Homes was a general contractor based on its power to enforce safety standards and essentially select the responsible subcontractors to perform work on the project, such as RGGT (*see Rauls v DirecTV, Inc.*, 113 AD3d 1097, 1098 [4th Dept 2014]). Plaintiff submitted evidence showing that Tucker Homes had a longstanding business relationship with RGGT, that Tucker Homes essentially selected RGGT as a subcontractor on behalf of the titleholders, and that the insurance obtained by RGGT was for the benefit of Tucker Homes, not the titleholders. That evidence is sufficient to meet plaintiff's burden of showing that Tucker Homes was the general contractor on the project, and Tucker Homes failed to raise a triable issue of fact in opposition with its self-serving statements denying that it was the general contractor (*see Zuckerman*, 49 NY2d at 562; *Bouras v Corsell*, 301 AD2d 426, 426 [1st Dept 2003]).

Plaintiff also met his burden of establishing that Tucker Homes was, at the very least, a statutory agent of the titleholders, and Tucker Homes did not raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562). Unrefuted evidence established that, under the terms of the subcontract, Tucker Homes had the power to supervise and control the work being done by RGGT at the time of the accident (*see generally Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). The titleholders did not have authority to control RGGT's work and relied on Tucker Homes to facilitate everything involved in building a house. Once Tucker Homes became the titleholders' agent, it did not escape liability by subcontracting with RGGT or because RGGT hired Hapeman (*see Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 195 [1st Dept 2011]).

We agree with defendants, however, that the court erred in granting plaintiff's motion with respect to the Labor Law § 240 (1) claim, and we further modify the order accordingly. Plaintiff failed to meet his initial burden on that part of the motion inasmuch as issues of fact exist whether plaintiff was the sole proximate cause of his accident (*see Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403 [4th Dept 2015]). Here, plaintiff's submissions raised an issue of fact inasmuch as they included evidence that plaintiff "had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no

good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see Fazekas*, 132 AD3d at 1403).

All concur except CURRAN and TROUTMAN, JJ., who dissent in part and vote to affirm in the following memorandum: We agree with the majority's disposition of the Labor Law §§ 200, 241 (6) and common-law negligence claims and join the Court's memorandum with respect thereto. We also agree with the majority's conclusion that defendant MJ Peterson/Tucker Homes, LLC is subject to liability under the Labor Law because it is an owner, general contractor or agent thereof (*see generally* Labor Law § 240 [1]). We respectfully disagree, however, with the majority's conclusion that there are issues of fact whether plaintiff's conduct was the sole proximate cause of the accident. We would therefore affirm Supreme Court's order insofar as it granted that part of plaintiff's motion seeking partial summary judgment on the issue of liability with respect to his section 240 (1) claim.

On the day in question, plaintiff and his employer were engaged in work on a second-story dormer. As relevant on appeal, the dormer was situated above a porch roof, and there were two ladders on the porch roof that could be used to reach the second-story roof and the dormer. Plaintiff was standing on the first ladder, which was situated about two feet to the left of the dormer, so he could retrieve from his employer a staple gun needed for his work on the front of the dormer. Plaintiff could not, however, reach the front of the dormer from the first ladder. He therefore moved laterally to the second ladder, which was approximately two feet to his right and closer to the front of the dormer. Plaintiff safely transferred to the second ladder, but as he started to ascend, the second ladder "kicked out" from its base, causing plaintiff to fall and sustain injury.

The majority concludes that plaintiff did not meet his initial burden on the motion with respect to the Labor Law § 240 (1) claim because his own submissions raised an issue of fact whether plaintiff's decision to move to the second ladder was the sole proximate cause of his injuries. The majority thus tacitly concludes that there is a question of fact whether the first ladder was an available safety device that plaintiff, for no good reason, chose not to use when he transferred to the indisputably unsafe second ladder to reach the front of the dormer (*see generally Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

Contrary to the majority, we conclude that plaintiff met his initial burden on the motion and that his motion papers did not raise a triable question of material fact whether he was the sole proximate cause of the accident. Plaintiff established his entitlement to summary judgment on the Labor Law § 240 (1) claim through evidence that the second ladder, which slipped while he was using it, was not so placed as to provide him with proper protection (*see generally Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501 [1993]; *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403 [4th Dept 2015]).

Nothing in plaintiff's submissions supports the majority's conclusion that he was aware of an available safety device, suitable to perform his work, that he *for no good reason* chose not to use. Even assuming, arguendo, that plaintiff's employer told him not to use the second ladder, we note that the mere "failure to follow an instruction by an employer . . . to avoid unsafe practices does not constitute a refusal to use available, safe and appropriate equipment" (*Fazekas*, 132 AD3d at 1403-1404). Moreover, there was no evidence that plaintiff was directed to use only the first ladder and that he "deliberately refused" to do so (*Baun v Project Orange Assoc., L.P.*, 26 AD3d 831, 835 [4th Dept 2006] [internal quotation marks omitted]; *see Miles v Great Lakes Cheese of N.Y., Inc.*, 103 AD3d 1165, 1167 [4th Dept 2013]).

We also note plaintiff's unchallenged testimony that the first ladder was unsuitable for him to perform his work—i.e., to reach the part of the dormer he was working on—which necessitated his transfer to the second ladder. The first ladder's unsuitability to reach the dormer was confirmed by plaintiff's employer in his deposition testimony, which was attached to plaintiff's motion papers. The employer's subsequent averment, in an affidavit submitted in opposition to plaintiff's motion, that plaintiff could reach the dormer from the first ladder was plainly calculated to create a feigned issue of fact (*see Saavedra v 89 Park Ave. LLC*, 143 AD3d 615, 615 [1st Dept 2016]; *Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1579 [4th Dept 2016]). Moreover, we note that plaintiff cannot be the sole proximate cause of the accident based on his failure to reposition the first ladder to complete his work on the dormer safely (*see Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008]; *see generally Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 403 [1st Dept 2017], *lv dismissed* 29 NY3d 1100 [2017]). Thus, because there was no evidence in plaintiff's submissions that the first ladder was suitable for plaintiff's work at the time he was injured, we would conclude that plaintiff's failure to use that device instead of the second ladder could not be the sole proximate cause of the accident (*see Noor v City of New York*, 130 AD3d 536, 539-540 [1st Dept 2015], *lv dismissed* 27 NY3d 975 [2016]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 11 [1st Dept 2011]).

Furthermore, we conclude that defendants did not raise a triable issue of fact in opposition with respect to sole proximate cause (*see generally Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-290 [2003]). None of defendants' submissions established "that plaintiff knew that he was expected to use available, safe and appropriate equipment offered to him . . . and thus [defendants] failed to establish that plaintiff chose for no good reason not to use the equipment" (*Fazekas*, 132 AD3d at 1404 [internal quotation marks omitted]; *see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563 [1993]; *Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 1390-1391 [4th Dept 2014]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

1115

CA 19-00289

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

IN THE MATTER OF LEANNE MUNDELL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,
RAYMOND LAMARCO, DIRECTOR, OFFICE OF HUMAN
RESOURCES, NEW YORK STATE DEPARTMENT OF
TRANSPORTATION, RESPONDENTS-APPELLANTS,
ET AL., RESPONDENTS.
(APPEAL NO. 1.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BOSMAN LAW FIRM, LLC, BLOSSVALE (A.J. BOSMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered August 7, 2018 in a CPLR article 78 proceeding. The order, insofar as appealed from, adjudged respondents-appellants to be in contempt of court.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and that part of the motion seeking an order adjudging respondents-appellants in civil contempt is denied.

Memorandum: Petitioner was employed by respondent New York State Department of Transportation (DOT). In 2015, following an investigation, petitioner was terminated from her new position during her probationary period for alleged wrongdoing. She requested a hearing on the matter pursuant to Civil Service Law § 75. During the pendency of the hearing, the DOT suspended petitioner without pay. She thereafter commenced this proceeding pursuant to, inter alia, CPLR article 78 seeking, as relevant here, to compel respondents-appellants (DOT respondents) to restore her to paid leave status and reimburse her for back pay. In October 2015, Supreme Court issued a judgment that, inter alia, required that petitioner be "immediately" restored to paid status with back pay.

In December 2015, petitioner moved by order to show cause, inter alia, to have certain respondents held in contempt for their alleged failure to comply with the October 2015 judgment, and for attorneys'

fees and costs pursuant to Judiciary Law § 753 and CPLR article 86. She alleged that she had not been immediately restored to the payroll and, at the time of the motion, had yet to receive back pay. The court conducted a hearing on the motion on various dates between February 2016 and January 2018.

In appeal No. 1, the DOT respondents appeal from an order that, inter alia, granted petitioner's motion to the extent of holding the DOT respondents in civil contempt for violating the October 2015 judgment. The court effectively reserved decision on that part of the motion seeking attorneys' fees and costs and ordered petitioner to submit a bill of fees and costs within 30 days of service of the order in appeal No. 1. In appeal No. 2, the DOT respondents appeal from an order that granted petitioner's subsequent application for attorneys' fees and costs (application) insofar as it sought attorneys' fees and costs pursuant to Judiciary Law §§ 753 and 773 in the amount of $21,483.50 and, sua sponte, awarded a fine of $250 under Judiciary Law § 773. In appeal No. 3, the DOT respondents appeal from an order that granted the application insofar as it sought attorneys' fees and costs pursuant to CPLR article 86.

In appeal No. 1, we conclude that the court erred in granting that part of petitioner's motion seeking to have the DOT respondents adjudged in contempt of the October 2015 judgment. "A finding of civil contempt must be supported by four elements: (1) a lawful order of the court, clearly expressing an unequivocal mandate, was in effect; (2) [i]t must appear, with reasonable certainty, that the order has been disobeyed; (3) the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party; and (4) *prejudice* to the right of a party to the litigation must be demonstrated" (*Dotzler v Buono*, 144 AD3d 1512, 1513-1514 [4th Dept 2016] [internal quotation marks omitted and emphasis added]; *see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]). A movant seeking a contempt order bears the burden of establishing the foregoing elements by clear and convincing evidence (*see El-Dehdan*, 26 NY3d at 29; *Belkhir v Amrane-Belkhir*, 128 AD3d 1382, 1382 [4th Dept 2015]). We review a court's ruling on a contempt motion for an abuse of discretion (*see generally Matter of Moreno v Elliott*, 155 AD3d 1561, 1562 [4th Dept 2017], *lv dismissed in part and denied in part* 30 NY3d 1098 [2018]).

Here, we conclude that petitioner failed to show by clear and convincing evidence that the failure of the DOT respondents to immediately comply with the directives of the October 2015 judgment " 'defeat[ed], impair[ed], impede[d] or prejudice[d]' " petitioner's rights (*Palmieri v Town of Babylon*, 167 AD3d 637, 640 [2d Dept 2018]; *see Cayre v Pinelli*, 172 AD3d 611, 611 [1st Dept 2019]; *Cherico, Stix & Assoc. v Abramson*, 235 AD2d 515, 516 [2d Dept 1997]; *see generally Great Neck Pennysaver v Central Nassau Publs.*, 65 AD2d 616, 617 [2d Dept 1978]). We are mindful that "[a]ny penalty imposed [for a civil contempt] is designed *not to punish* but, rather, *to compensate* the injured private party or to coerce compliance with the court's mandate

or both" (*Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 239 [1987] [emphasis added]; *see McCain v Dinkins*, 84 NY2d 216, 226 [1994]). By the time the court conducted the hearing on petitioner's contempt motion, it was undisputed that she had been restored to the payroll, was receiving payment, and had been awarded back pay for the time she was wrongly suspended without pay. Thus, the goals of civil contempt would not be furthered by granting petitioner's motion absent any prejudice to her once the relevant DOT respondents complied with the directives of the October 2015 judgment and restored her to paid status. We therefore reverse the order in appeal No. 1 insofar as appealed from and deny that part of the motion seeking an order adjudging the DOT respondents in civil contempt.

Inasmuch as the court erred in adjudging the DOT respondents in contempt in appeal No. 1, we conclude in appeal No. 2 that petitioner is not entitled to attorneys' fees, costs, or the statutory fine flowing from the DOT respondents' allegedly contemptuous conduct (*see Halfond v White Lake Shores Assn., Inc.*, 114 AD3d 1315, 1317 [4th Dept 2014]; *Pilato v Pilato*, 206 AD2d 929, 929-930 [4th Dept 1994]). We therefore reverse the order in appeal No. 2.

Finally, in appeal No. 3, we conclude that the court erred in awarding petitioner attorneys' fees and costs pursuant to CPLR article 86, and we therefore also reverse the order in that appeal. "A party seeking an award of fees and other expenses shall, within [30] days of *final judgment* in the action, submit to the court an application" (CPLR 8601 [b] [emphasis added]). Here, we conclude that the October 2015 judgment was a final judgment for purposes of CPLR article 86 because it addressed all of petitioner's requests for CPLR article 78 relief and there was nothing left for further judicial action (*see* CPLR 8602 [c]; *see generally Burke v Crosson*, 85 NY2d 10, 15 [1995]). Inasmuch as the application was submitted about three years after the entry of the final judgment, that part of the application seeking attorneys' fees and costs pursuant to CPLR article 86 was time-barred (*see Matter of Acevedo v Wing*, 269 AD2d 339, 339 [1st Dept 2000], *lv dismissed* 95 NY2d 824 [2000], *rearg denied* 95 NY2d 888 [2000]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

1116

CA 19-00609

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

IN THE MATTER OF LEANNE MUNDELL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,
RAYMOND LAMARCO, DIRECTOR, OFFICE OF HUMAN
RESOURCES, NEW YORK STATE DEPARTMENT OF
TRANSPORTATION, RESPONDENTS-APPELLANTS,
ET AL., RESPONDENTS.
(APPEAL NO. 2.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BOSMAN LAW FIRM, LLC, BLOSSVALE (A.J. BOSMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered October 12, 2018 in a CPLR article 78 proceeding. The order granted the application of petitioner insofar as it sought attorneys' fees and costs pursuant to Judiciary Law §§ 753 and 773 and imposed a fine of $250 against respondents-appellants.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, that part of the application seeking attorneys' fees and costs pursuant to Judiciary Law §§ 753 and 773 is denied, and the award of the fine pursuant to section 773 is vacated.

Same memorandum as in *Matter of Mundell v New York State Dept. of Transp.* ([appeal No. 1] — AD3d — [July 17, 2020] [4th Dept 2020]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

1117

CA 19-00610

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

IN THE MATTER OF LEANNE MUNDELL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF TRANSPORTATION, RAYMOND LAMARCO, DIRECTOR, OFFICE OF HUMAN RESOURCES, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, RESPONDENTS-APPELLANTS, ET AL., RESPONDENTS.
(APPEAL NO. 3.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BOSMAN LAW FIRM, LLC, BLOSSVALE (A.J. BOSMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 26, 2018 in a CPLR article 78 proceeding. The order granted the application of petitioner insofar as it sought attorneys' fees and costs pursuant to CPLR article 86.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and that part of the application seeking attorneys' fees and costs pursuant to CPLR article 86 is denied.

Same memorandum as in *Matter of Mundell v New York State Dept. of Transp.* ([appeal No. 1] — AD3d — [July 17, 2020] [4th Dept 2020]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

1205

CA 19-01048

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

IN THE MATTER OF SOPHIE PETER KOTSONES, DECEASED.

JAMES KOTSONES, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ELLEN KREOPOLIDES, ALSO KNOWN AS ELLEN MARIA KREOPOLIDES, INDIVIDUALLY, AND AS TRUSTEE OF THE SOPHIE PETER KOTSONES IRREVOCABLE TRUST, ALEXANDER KREOPOLIDES, ALSO KNOWN AS ALEX KREOPOLIDES, AND 42-52 WEST MARKET STREET LLC, RESPONDENTS-APPELLANTS.

MILLER MAYER LLP, ITHACA (ANTHONY N. ELIA, III, OF COUNSEL), FOR RESPONDENT-APPELLANT ELLEN KREOPOLIDES, ALSO KNOWN AS ELLEN MARIA KREOPOLIDES, INDIVIDUALLY, AND AS TRUSTEE OF THE SOPHIE PETER KOTSONES IRREVOCABLE TRUST.

ROSSETTIE ROSSETTIE MARTINO LLP, CORNING, SCHNITTER CICCARELLI MILLS PLLC, WILLIAMSVILLE (MARY C. FITZGERALD OF COUNSEL), FOR RESPONDENT-APPELLANT ALEXANDER KREOPOLIDES, ALSO KNOWN AS ALEX KREOPOLIDES AND 42-52 WEST MARKET STREET LLC.

MULLEN ASSOCIATES PLLC, BATH (AARON I. MULLEN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Surrogate's Court, Steuben County (Patrick F. McAllister, S.), entered March 18, 2019. The order, among other things, denied the application to admit to probate the December 5, 2012 will of the deceased and invalidated various transactions.

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

Memorandum: Petitioner and respondent Ellen Kreopolides, also known as Ellen Maria Kreopolides (Ellen), individually, and as trustee of the Sophie Peter Kotsones Irrevocable Trust (trust), are the children of Sophie Peter Kotsones (decedent). Respondent Alexander Kreopolides, also known as Alex Kreopolides (Alexander), is Ellen's son. After Ellen and Alexander made an application to admit decedent's December 5, 2012 will to probate, petitioner objected to the admission of the will to probate and filed a petition seeking to invalidate the trust and certain real estate transactions involving

decedent's property, all on the ground that, inter alia, Ellen and Alexander had exerted undue influence on decedent. Respondents now appeal from an order entered following a nonjury trial that, inter alia, denied the application to admit the will to probate, granted petitioner's objection to the will, and granted his petition insofar as it sought to invalidate the trust and real estate transactions. Surrogate's Court determined that the will, trust, and real estate transactions had been procured by Ellen and Alexander exerting undue influence upon decedent. We reverse.

As an initial matter, we reject the contention of Alexander and respondent 42-52 West Market Street LLC that the Surrogate erred in denying their pretrial cross motion for summary judgment dismissing the petition against them (*see generally Matter of Randall*, 73 AD3d 1465, 1465 [4th Dept 2010]). Regarding the Surrogate's determination following the trial, however, we agree with respondents that the Surrogate erred in concluding that a confidential relationship between Ellen, Alexander, and decedent existed, which thereby triggered an inference that Ellen and Alexander exerted undue influence on decedent with respect to the will, trust, and real estate transactions. "It is well settled that, 'where there was a confidential or fiduciary relationship between the beneficiary and the decedent, [a]n inference of undue influence arises which requires the beneficiary to come forward with an explanation of the circumstances of the transaction' " (*Blase v Blase*, 148 AD3d 1777, 1778 [4th Dept 2017]), i.e., requiring the beneficiary " 'to prove the transaction fair and free from undue influence' " (*Matter of Prievo v Urbaniak*, 64 AD3d 1240, 1241 [4th Dept 2009]). Here, however, petitioner had the initial burden of establishing " 'the requisite threshold showing that a confidential relationship existed' " (*id.*; *see generally Matter of DelGatto*, 98 AD3d 975, 977 [2d Dept 2012]; *Matter of Moran* [appeal No. 2], 261 AD2d 936, 936-937 [4th Dept 1999]).

" 'In order to demonstrate the existence of a confidential relationship, there must be evidence of circumstances that demonstrate inequality or a controlling influence' " (*Matter of Nurse*, 160 AD3d 745, 748 [2d Dept 2018]). Indeed, a confidential relationship has been described as "one that is 'of such a character as to render it certain that [the parties] do not deal on terms of equality' " (*Matter of Bonczyk v Williams*, 119 AD3d 1124, 1125 [3d Dept 2014]; *see Matter of Nealon*, 104 AD3d 1088, 1089 [3d Dept 2013], *affd* 22 NY3d 1045 [2014]). Further, " '[a]n inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference' " (*Matter of Walther*, 6 NY2d 49, 54 [1959]). Here, although the record establishes that Ellen and Alexander held a position of trust with decedent, and that Ellen assisted decedent with her finances and was named decedent's power of attorney, the record also reflects that, despite Ellen's position of trust, decedent was actively and personally involved in managing her real estate and in drafting her estate plan, and that she directed her personal attorney and the branch manager at her bank to act according to her own desires based on her own personal, stated reasons. Indeed, the trial testimony established that various nonparty witnesses acted pursuant to decedent's direction, not Ellen's or Alexander's, and

decedent's testamentary capacity is not at issue on appeal. Under these circumstances, petitioner failed to meet his initial burden of establishing that the relationship of Ellen and Alexander with decedent was of such an unequal or controlling nature as to give rise to an inference of undue influence.

We likewise agree with respondents that the Surrogate erred in finding undue influence aside from the existence of a confidential relationship. To establish undue influence under such circumstances, there must be a showing of the "exercise[of] a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity [that] could not be resisted, constrained the testator to do that which was against [his or] h[er] free will" (*Matter of Kumstar*, 66 NY2d 691, 693 [1985], *rearg denied* 67 NY2d 647 [1986] [internal quotation marks omitted]; *see Matter of Lee*, 107 AD3d 1382, 1383 [4th Dept 2013]; *Matter of Alibrandi*, 104 AD3d 1175, 1177-1178 [4th Dept 2013]). Here, the record reflects that Ellen and Alexander wanted to benefit from decedent's estate, and that Ellen assisted decedent in executing the relevant estate plan and making the disputed transactions. The relevant inquiry, however, is not what Ellen and Alexander may have wanted, asked for, or facilitated, but rather whether decedent's free will, independent action, and self-agency were overcome by their conduct (*see Walther*, 6 NY2d at 53-54). In this case, the record establishes that decedent informed her attorney in 2011 that she did not want petitioner to have any further power over her affairs, that decedent thereafter worked with her attorney directly in order to revise her estate plan, and that decedent discussed with her attorney her personal reasons for altering her prior estate plan to the exclusion of petitioner. Indeed, decedent's attorney testified that he never prepared a document that decedent did not personally authorize, and testimony from numerous non-beneficiaries established decedent's capacity and active management of her own affairs during the relevant time frame, albeit with the assistance of Ellen. Simply put, the record does not reflect that decedent at any time lost her free will or agency, and instead the record reflects that she took the disputed actions based on her stated personal motives. We thus conclude that the Surrogate erred in concluding that the will, the trust, and the real estate transactions were procured by undue influence. Consequently, we reverse the order, dismiss the petition, and grant the application to admit the will to probate.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

1273

CA 19-01248

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

IN THE MATTER OF THOMAS E. CARCONE, ON BEHALF OF AND IN HIS CAPACITY AS PRESIDENT OF LOCAL 32 INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS A.F.L. - C.I.O. - C.L.C. UTICA PROFESSIONAL FIRE FIGHTERS ASSOCIATION, AND RICHARD J. FORTE, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF UTICA, ROBERT M. PALMIERI, IN HIS OFFICIAL CAPACITY AS THE MAYOR AND ACTING COMMISSIONER OF PUBLIC SAFETY FOR THE CITY OF UTICA, RESPONDENTS-APPELLANTS, AND JOHN KELLY, RESPONDENT.

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (KATHRYN F. HARTNETT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

GLEASON DUNN WALSH & O'SHEA, ALBANY (RONALD G. DUNN OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered December 27, 2018 in a CPLR article 78 proceeding. The order granted the relief sought in the second "claim" in the petition by directing respondent City of Utica to reinstate petitioner Richard J. Forte to the status of suspended with pay and to provide him with back pay.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding, which includes, inter alia, a "claim" seeking to reinstate Richard J. Forte (petitioner), who was employed by the Utica Fire Department (UFD) as a firefighter, to the payroll with back pay. Supreme Court issued an order granting that relief. Respondents City of Utica and Robert M. Palmieri, in his official capacity as the Mayor and Acting Commissioner of Public Safety for the City of Utica (collectively, respondents), appeal, and we reverse.

As a preliminary matter, "no appeal lies as of right from a nonfinal order in a CPLR article 78 proceeding" (*Matter of Laidlaw Energy & Envtl., Inc. v Town of Ellicottville*, 60 AD3d 1284, 1284 [4th

Dept 2009]; *see* CPLR 5701 [b] [1]). A nonfinal order is one, such as the order on appeal here, in which "a court decides one or more but not all causes of action in the [petition] . . . but leaves other causes of action between the same parties for resolution in further judicial proceedings" (*Burke v Crosson*, 85 NY2d 10, 15-16 [1995]; *see Matter of 1801 Sixth Ave., LLC v Empire Zone Designation Bd.*, 95 AD3d 1493, 1495 [3d Dept 2012], *lv dismissed* 20 NY3d 966 [2012]). Nevertheless, we exercise our discretion to treat the notice of appeal as an application for permission to appeal, and we grant respondents such permission (*see Laidlaw Energy & Envtl., Inc.*, 60 AD3d at 1284; *cf. Matter of Green v Monroe County Child Support Enforcement Unit*, 111 AD3d 1446, 1447 [4th Dept 2013]).

While petitioner was working at the fire station one day, he masturbated and ejaculated onto the "inside crotch area" of a pair of pants belonging to an unsuspecting female firefighter who was away from the station responding to a call. Several firefighters who had access to the pants voluntarily provided a buccal swab and were cleared by DNA testing. Petitioner refused to provide a buccal swab until he was compelled to do so by court order. Subsequent DNA testing confirmed that the semen belonged to him. Respondents brought charges against him pursuant to Civil Service Law § 75, and suspended him without pay for 30 days. Petitioner demanded arbitration pursuant to a collective bargaining agreement, and a hearing commenced. At the close of respondents' case, petitioner demanded the disciplinary file of respondent John Kelly, who had been disciplined for engaging in similar sexual misconduct at work while employed by the UFD. Respondents refused to produce the file on the ground that personnel records of firefighters are confidential pursuant to Civil Rights Law § 50-a, and may not be released without a court order unless the firefighter consents to their release, which Kelly did not. The arbitrator then adjourned the hearing so that petitioner could apply for a court order, and respondents suspended petitioner without pay for an additional period of time pending the resumption of the hearing.

Civil Service Law § 75 provides that a public employee may be suspended without pay for a maximum of 30 days while awaiting a hearing on disciplinary charges (*see* § 75 [3]). Although an employee suspended without pay for a longer period under those circumstances is generally entitled to receive back pay, he or she waives any claim to back pay if a delay in the disciplinary hearing beyond the 30-day maximum is "occasioned by" his or her own conduct (*Matter of Fusco v Griffin*, 67 AD2d 827, 827 [4th Dept 1979]; *see Gerber v New York City Hous. Auth.*, 42 NY2d 162, 165 [1977]; *Matter of Conde v Aiello*, 204 AD2d 1029, 1030 [4th Dept 1994]). Waiver, however, does not occur when the parties are "equally responsible" for the delay (*Matter of Skrypek v Bennett*, 7 NY3d 919, 919 [2006]; *see Fusco*, 67 AD2d at 827).

We agree with respondents that petitioner is not entitled to reinstatement or back pay because petitioner was solely responsible for the delay. Petitioner's attorney is an experienced practitioner familiar with Civil Rights Law § 50-a. As such, petitioner's attorney either knew or should have known that, in order to secure production

of the file, section 50-a required that he obtain either Kelly's consent or a court order. Indeed, respondents publicly announced in multiple press releases several months before the arbitration that Kelly's file was confidential pursuant to section 50-a. Moreover, petitioner's attorney had specific knowledge of the contents of the file because he was involved professionally in the investigation of Kelly's misconduct. Based on that experience and knowledge, petitioner could have taken steps to obtain the file long before the arbitration commenced, such as asking Kelly for his consent or commencing a proceeding to obtain a court order. Because petitioner failed to take any action, "the entire period of delay in holding the hearing resulted from his dilatory tactics" (*Gerber*, 42 NY2d at 165).

Entered: July 17, 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 19-01058

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

IN THE MATTER OF JOHN L. DRAKE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANN M. DRAKE, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Cattaraugus County (Moses M. Howden, J.), entered November 20, 2018 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, denied the objections of respondent to an order of the Support Magistrate.

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

Memorandum: In this proceeding pursuant to Family Court Act article 4, respondent mother appeals from an order denying her written objections to the order of the Support Magistrate, which modified a prior order of support and continued the provision of the parties' separation agreement, which was incorporated but not merged into their judgment of divorce, requiring the mother and petitioner father to contribute to their children's college expenses. We affirm.

The mother objected to the Support Magistrate's determination to impute income to her on the ground that the Support Magistrate failed to consider the totality of the circumstances, including that the mother had "experienced difficulty in maintaining employment in her field of occupation" and had never earned in excess of $55,000 working as a dental hygienist. The mother alleged that she was impacted by the turnover that was typical in her field and also by her "deteriorating health" and that the Support Magistrate also failed to consider that the mother "incurred significant liabilities," such as debts to the state and federal governments. The mother further alleged that it was a financial impossibility for her to contribute toward the college expenses of the children and that the father was "in a much better position to pay for college expenses than the [mother]."

Initially, we reject the contention of the mother that the Support Magistrate erred in imputing income to her for the purpose of calculating her child support obligation. It is well settled that

" '[c]ourts have considerable discretion to . . . impute an annual income to a parent' " (*Lauzonis v Lauzonis*, 105 AD3d 1351, 1351 [4th Dept 2013]; *see Matter of Monroe County Support Collection Unit v Wills*, 21 AD3d 1331, 1332 [4th Dept 2005], *lv denied* 6 NY3d 705 [2006]). Furthermore, "child support is determined by the parents' ability to provide for their child rather than their current economic situation" (*Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1180 [4th Dept 2007] [internal quotation marks omitted]; *see Matter of Bashir v Brunner*, 169 AD3d 1382, 1383 [4th Dept 2019]), and "a court's imputation of income will not be disturbed so long as there is record support for its determination" (*Lauzonis*, 105 AD3d at 1351).

"[I]n determining a party's child support obligation, a court need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential" (*Belkhir v Amrane-Belkhir*, 118 AD3d 1396, 1397 [4th Dept 2014] [internal quotation marks omitted]). Courts may impute income based on a party's employment history, future earning capacity, educational background, or money received from friends and relatives (*see Matter of Deshotel v Mandile*, 151 AD3d 1811, 1812 [4th Dept 2017]; *Matter of Rohme v Burns*, 92 AD3d 946, 947 [2d Dept 2012]).

Here, the Support Magistrate did not abuse her discretion by imputing income to the mother, who was working only part time and had received substantial sums of money from others, including $14,871 from the father pursuant to the parties' separation agreement, $5,000 from her second husband upon their divorce, and $20,000 in proceeds from the sale of her house in 2012. The record demonstrates that, although the mother was able to work full time and had done so in the past, she was working a maximum of 32 hours per week. Historically, however, when the mother was not able to obtain full-time hours from a single employer in her field, she supplemented her income by working nights and weekends as a waitress or retail clerk or by working at multiple dental offices. Contrary to the mother's contention that she experienced difficulty in maintaining employment as a dental hygienist due to the turnover that is typical in the industry, the record establishes that the mother was repeatedly terminated by employers for cause. To the extent the mother's financial circumstances were self-created, they provide no basis for disturbing the Support Magistrate's determination (*see Matter of Grettler v Grettler*, 12 AD3d 602, 603 [2d Dept 2004]).

The record does not support the mother's contention that her ability to work full time is impacted by her "deteriorating health." The mother's testimony was not substantiated or corroborated by any medical evidence, and "[t]he Support Magistrate was not obliged to accept the [mother's] unsupported testimony that a medical condition prevented [her] from working" full time (*Matter of Niagara County Dept. of Social Servs. v Hueber*, 89 AD3d 1433, 1434 [4th Dept 2011], *lv denied* 18 NY3d 805 [2012] [internal quotation marks omitted]; *see Matter of Michelle F.F. v Edward J.F.*, 50 AD3d 348, 349 [1st Dept 2008], *lv denied* 11 NY3d 708 [2008]).

We reject the further contention of the mother that the Support Magistrate abused her discretion in imputing income to the mother based on her 2017 income. In 2017, the mother worked at two dental offices earning $31 and $32 per hour, respectively, for a combined full-time schedule and income. Although the mother took a job in Olean in October 2017 and "voluntarily reduced her income . . . in an effort to be closer to her children," she was terminated from that job in 2018 and moved away from the children to live in Syracuse. Thus, the Support Magistrate's imputation of additional income to the mother at a rate of $30 per hour for eight hours per week, representing the difference between the mother's part-time salary and the full-time salary that she is capable of earning, is a fair representation of the mother's demonstrated earning capacity (*see Rohme*, 92 AD3d at 947; *Wills*, 21 AD3d at 1332).

The mother's contention that she proved that the parties' oldest child is constructively emancipated is not preserved for our review inasmuch as it is raised for the first time on appeal (*see Hueber*, 89 AD3d at 1434; *see also Rodman v Friedman*, 112 AD3d 537, 537-538 [1st Dept 2013]). In any event, that contention lacks merit because the mother failed to demonstrate that the child actively abandoned her by refusing all contact and visitation (*see Matter of Barlow v Barlow*, 112 AD3d 817, 818 [2d Dept 2013]; *Matter of Burr v Fellner*, 73 AD3d 1041, 1041 [2d Dept 2010]). Furthermore, where, as here, "it is the parent who causes a breakdown in communication with the child, or has made no serious effort to contact the child and exercise his or her visitation rights, the child will not be deemed to have abandoned the parent" (*Melgar v Melgar*, 132 AD3d 1293, 1294 [4th Dept 2015] [internal quotation marks omitted]).

Finally, because the mother failed to contend in her written objections to the order of the Support Magistrate that the enforcement of the provision of the parties' separation agreement requiring contribution to the children's college expenses is premature, excessive, and in violation of the Child Support Standards Act, and inasmuch as the mother did not challenge the Support Magistrate's determination of arrears on the ground that "the record indicates that [she] did not willfully violate the agreement," those contentions are not properly preserved (*see* Family Ct Act § 439 [e]; *Matter of Farruggia v Farruggia*, 125 AD3d 1490, 1490 [4th Dept 2015]; *Matter of White v Knapp*, 66 AD3d 1358, 1359 [4th Dept 2009]).

Entered: July 17, 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 19-01459

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

CAROL S. AND ROBERT S., INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF J.S., AN INFANT, AND M.S., AN INFANT, CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 126498.)

FARACI LANGE, LLP, ROCHESTER (KATHRYN LEE BRUNS OF COUNSEL), AND SMILEY & SMILEY, NEW YORK CITY, FOR CLAIMANTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered January 11, 2019. The order denied claimants' motion for partial summary judgment on liability and granted defendant's cross motion for summary judgment dismissing the claim.

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

Memorandum: Claimants commenced this premises liability action seeking damages for injuries they sustained when they were struck by a falling tree at Letchworth State Park and alleging that defendant was negligent in failing to inspect the park's trees and protect visitors to the park from injury. Claimants appeal from an order of the Court of Claims that denied their motion for partial summary judgment on the issue of liability and granted defendant's cross motion for summary judgment dismissing the claim, and we affirm.

Claimants were injured when a tree fell under its own weight and knocked down a second tree, which struck them while they were walking along a dirt path in a restricted area of the park. The dirt path on which the incident occurred had been closed to visitors for at least the past 45 years, primarily due to the risks associated with its access to a riverbed and areas with slippery and falling rocks. The dirt path was not marked on the park map and was not maintained. In order to enter it, a visitor would have to traverse a log positioned across the path, to which a sign reading "TRAIL CLOSED" had been affixed. In order to reach the location on the path where the tree fell onto claimants, one would further pass three signs reading, respectively, "STOP. TRAIL ENDS HERE," "END OF TRAIL. RESTRICTED

AREA," and "STOP. RESTRICTED AREA" and two additional signs reading "TRAIL CLOSED." Park employees were aware, however, that certain visitors ignored the signs and accessed the path and riverbed. Park employees therefore conducted daily patrols in order to remove visitors who entered the restricted area. Visitors found in the restricted area were instructed to leave and sometimes ticketed or arrested for the violation. Alternative measures had been considered in the past in order to prevent visitors from accessing the closed path. However, visitors had removed fences that had been erected, and the size and soil composition of the area rendered more substantial physical barriers impractical.

After the incident, inspections of the tree revealed signs of rot and decay that the experts of both claimants and defendant opined would have been observable, prior to the incident, upon visual inspection. Although the park employed a policy of conducting year-round tree inspection and removal in "developed areas" such as picnic sites, campgrounds, and cabins, as well as along open roads and trails, the park did not conduct such an inspection of undeveloped areas such as the closed dirt path where the incident occurred, instead allowing trees in such areas to fall naturally.

We reject claimants' contention that the court erred in granting the cross motion. "It is well settled that a landowner has a duty to exercise reasonable care in maintaining his [or her] own property in a reasonably safe condition under the circumstances. The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk and the foreseeability of a potential plaintiff's presence on the property" (*Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]; *see Kush v City of Buffalo,* 59 NY2d 26, 29-30 [1983]; *Basso v Miller,* 40 NY2d 233, 241 [1976]). "Ordinarily, a landowner's duty to warn of a latent, dangerous condition on his [or her]property is a natural counterpart to [the] duty to maintain [the] property in a reasonably safe condition" (*Galindo*, 2 NY3d at 636; *see Tagle v Jakob,* 97 NY2d 165, 169 [2001]; *Breau v Burdick*, 166 AD3d 1545, 1546-1547 [4th Dept 2018]). Defendant is subject to the same rules of liability as apply to private citizens, and thus "must act as a reasonable [person] in maintaining [its] property in a reasonably safe condition in view of all the circumstances" (*Preston v State of New York*, 59 NY2d 997, 998 [1983]; *see Basso*, 40 NY2d at 241).

When determining whether defendant fulfilled its duty to warn claimants, "the issue is not whether another type or configuration of warning sign—one that is larger in size, brighter in color or stronger in tone—would have persuaded claimants . . . [against entering the closed path] or, having entered [it], compelled them to turn back," but rather "whether the signs that were provided by defendant . . . sufficiently conveyed the specific danger to which claimants . . . would be exposed by entering the [closed path]" (*Arsenault v State of New York*, 96 AD3d 97, 102 [3d Dept 2012]). Here, the sign affixed to the log placed across the opening of the closed path, along with the other signs affixed along the path, clearly advised that the path was

closed, that the marked trail had ended, and that the area was restricted and warned visitors to stop. Although the sign did not specifically warn of a danger of falling trees in the restricted area, the record reflects that the reasons behind closing the dirt path were multiple and included dangers posed by falling rocks, slippery surfaces, and the danger posed by the riverbed to which the path led. Under these circumstances, we conclude that defendant fulfilled its duty to warn by affixing, in multiple locations, signs that sufficiently conveyed to visitors that the trail was closed and the area restricted and that they should proceed no further (*see generally DeWick v Village of Penn Yan*, 275 AD2d 1011, 1012 [4th Dept 2000]).

We likewise conclude that defendant fulfilled its "duty to exercise reasonable care in maintaining [its] own property in a reasonably safe condition" (*Galindo*, 2 NY3d at 636). Although defendant bore a duty of reasonable care, that duty did not require defendant to have " 'sanitized' " more "primitive" or undeveloped areas of what is an approximately 14,350-acre park (*Preston*, 59 NY2d at 998). Under the circumstances of this case, defendant fulfilled its duty to keep the park in a reasonably safe condition by inspecting and removing trees in developed areas and along open trails, by warning visitors at multiple locations that the path where the incident occurred was closed, and by policing the closed path by removing, warning, ticketing, and even occasionally arresting visitors who entered it, especially given that the record reflects that additional efforts at more robust physical barriers had either failed or were impractical for the purpose (*see generally Galindo*, 2 NY3d at 636; *Arsenault*, 96 AD3d at 104). Contrary to claimants' contention, "the fact that a relatively small group of [the park's total visitors] would disregard posted warning signs and violate park rules does not demonstrate either the existence of a pervasive enforcement problem or that defendant's efforts to curb such illegal conduct were deficient," and "proof of such violations is [not], under all of the attendant circumstances, sufficient to raise a question of fact as to either the adequacy of the warning signs provided or the reasonableness of defendant's efforts to keep park visitors out of harm's way" (*Arsenault*, 96 AD3d at 105).

Based on the above, we conclude that defendant established its entitlement to summary judgment by demonstrating that it fulfilled both its duty to warn and its duty of reasonable care in maintaining its property, and we further conclude that claimants failed to raise an issue of fact in opposition. Thus, the court properly granted defendant's cross motion. For the same reasons, the court properly denied claimants' motion. In light of our determination, we do not address the parties' remaining contentions.

Entered: July 17, 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 19-01532

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

OSVALDO GARCIA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

CAMPBELL & ASSOCIATES, EDEN (JOHN T. RYAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (MARC SMITH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered February 6, 2019. The order, insofar as appealed from, denied the motion of plaintiff to strike the answer of defendant Town of Tonawanda in the event that defendant Town of Tonawanda failed to produce requested discovery materials within 30 days.

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

Memorandum: Plaintiff appeals from an order insofar as it denied his motion seeking to strike the answer of defendant Town of Tonawanda (Town) in the event that the Town failed to produce certain requested discovery materials within 30 days. After entry of that order and while this appeal was pending, Supreme Court granted the Town's subsequent motion for summary judgment dismissing the complaint against it. The court's order granting summary judgment, however, is not before us on this appeal (*cf. Buffamante Whipple Buttafaro, Certified Public Accountants, P.C. v Dawson*, 118 AD3d 1283, 1284 [4th Dept 2014]). Because the court granted the Town's motion and dismissed the complaint against it, plaintiff's appeal is moot (*see generally Burke v City of Rochester,* 158 AD3d 1218, 1219 [4th Dept 2018]; *Douglas Smith Fabrication & Repair v Gasthaus*, 259 AD2d 515, 515 [2d Dept 1999]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

156

CA 19-01508

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

DANEN D. DANIELAK, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 124855.)

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered May 9, 2019. The order granted defendant's motion for summary judgment and dismissed the claim.

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

Memorandum: Claimant commenced this action seeking damages for injuries that she allegedly sustained when she slipped and fell on ice on a sidewalk on the campus of SUNY Brockport. Claimant appeals from an order that granted defendant's motion for summary judgment dismissing the claim. We affirm.

It is well settled that " '[a] property owner is not liable for an alleged hazard on [its] property involving snow or ice unless [it] created the defect, or had actual or constructive notice of its existence' " (*Sweeney v Lopez*, 16 AD3d 1174, 1175 [4th Dept 2005]; *see generally Groth v BJ's Wholesale Club, Inc.*, 59 AD3d 1086, 1086 [4th Dept 2009]). Thus, to the extent that claimant contends that defendant was required to apply a de-icing compound to the sidewalk prior to the time the icy condition existed in anticipation of freezing temperatures, we reject that contention (*see generally Glover v Botsford*, 109 AD3d 1182, 1184 [4th Dept 2013]; *Yen Hsia v City of New York*, 295 AD2d 565, 566 [2d Dept 2002]).

Contrary to the further contention of claimant, the Court of Claims properly determined that defendant is entitled to summary judgment insofar as claimant's claim is premised upon the theory that defendant created the dangerous condition on the subject sidewalk (*see Elizee v Village of Amityville*, 172 AD3d 1004, 1005 [2d Dept 2019]; *Elassad v Nastasi*, 165 AD3d 1040, 1041 [2d Dept 2018]; *Glover*, 109

AD3d at 1184).

We reject claimant's contention that defendant failed to establish that it did not have actual notice of the dangerous condition. To the contrary, defendant met its initial burden on its motion with respect to actual notice "by submitting evidence that [it] did not receive any complaints concerning the condition of the [sidewalk] and [was] not otherwise aware of any ice or other slippery substance in that location prior to [claimant's] accident" (*Chamberlain v Church of the Holy Family*, 160 AD3d 1399, 1402 [4th Dept 2018]; *see Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469 [4th Dept 2013]). In opposition to defendant's motion, claimant failed to raise a triable issue of fact with respect to actual notice (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We also reject claimant's contention that defendant failed to establish that it lacked constructive notice of the dangerous condition. "To receive summary judgment with respect to [claimant's] claim of constructive notice, defendant[] had the initial burden of establishing as a matter of law that the alleged icy condition was not visible and apparent or that the ice formed so close in time to the accident that [defendant] could not reasonably have been expected to notice and remedy the condition" (*Waters v Ciminelli Dev. Co., Inc.*, 147 AD3d 1396, 1397 [4th Dept 2017] [internal quotation marks omitted]). Here, although claimant's deposition testimony submitted in support of defendant's motion raises a triable issue of fact with respect to whether the ice was visible and apparent (*see Sodhi v Dollar Tree Stores, Inc.*, 175 AD3d 914, 916 [4th Dept 2019]; *Gwitt v Denny's Inc.*, 92 AD3d 1231, 1232 [4th Dept 2012]), we nevertheless conclude that defendant established as a matter of law that it did not have constructive notice of the dangerous condition by submitting the opinion of its expert meteorologist that the ice did not "exist[] for a sufficient period of time to permit discovery and corrective action by defendant[]" (*Wilson v Walgreen Drug Store*, 42 AD3d 899, 900 [4th Dept 2007]). Claimant failed to raise a triable issue of fact with respect to that issue (*see generally Zuckerman*, 49 NY2d at 562).

Entered: July 17, 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 19-00839

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

BACON & SEILER CONSTRUCTORS, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SOLVAY IRON WORKS, INC., ET AL., DEFENDANTS,
JOHN B. MAESTRI AND SHEILA MAESTRI,
DEFENDANTS-RESPONDENTS.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (JORDAN R. PAVLUS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered April 30, 2019. The order granted the motion of defendants John B. Maestri and Sheila Maestri for summary judgment dismissing the complaint as against them and denied plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint against defendant John B. Maestri and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action asserting various causes of action against, inter alia, John B. Maestri and Sheila Maestri (collectively, defendants), including a cause of action pursuant to ERISA alleging that defendants breached their fiduciary duties under ERISA or that plaintiff should be permitted to pierce the corporate veil and hold defendants individually liable for any such wrongdoing of defendant Solvay Iron Works, Inc. (Solvay). Defendants answered and, following the completion of discovery, moved for summary judgment dismissing the complaint against them. Plaintiff cross-moved for partial summary judgment against John B. Maestri on its ERISA cause of action. Supreme Court granted the motion and denied the cross motion. Plaintiff appeals.

Upon our review of oral argument before the motion court, we conclude that, contrary to plaintiff's contention, counsel for defendants did not clearly and unambiguously concede any ERISA liability on behalf of John B. Maestri. We similarly reject plaintiff's contention that the court should have granted the cross

motion with respect to John B. Maestri based on the collateral estoppel effect of a federal court memorandum and decision, which addressed, inter alia, certain ERISA violations alleged against him. There is no dispute that, after the entry of the subject federal court memorandum decision and order, the parties settled and discontinued that action. "When an action is discontinued, it is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified" (*Newman v Newman*, 245 AD2d 353, 354 [2d Dept 1997]; *see Brown v Cleveland Trust Co.*, 233 NY 399, 406 [1922]; *Loeb v Willis*, 100 NY 231, 235 [1885]; *Harris v Ward Greenberg Heller & Reidy LLP*, 151 AD3d 1808, 1810 [4th Dept 2017]).

Contrary to plaintiff's further contention, the court did not abuse its discretion in allowing defendants to correct an error in Sheila Maestri's declaration. While the declaration initially submitted by defendants in support of the motion was defective because the declaration was not in affidavit form (*see* CPLR 3212 [b]), defendants corrected that technical defect by submitting the identical evidence in proper form in their reply papers. Under these circumstances, the original defect in form does not require denial of defendants' motion with respect to Sheila Maestri (*see* CPLR 2001; *Qi Sheng Lu v World Wide Travel of Greater N.Y., Ltd.*, 111 AD3d 690, 690 [2d Dept 2013]; *Matos v Schwartz*, 104 AD3d 650, 653 [2d Dept 2013]; *Supreme Automotive Mfg. Corp. v Continental Cas. Co.*, 97 AD2d 700, 700 [1st Dept 1983]).

We agree with plaintiff, however, that the court erred in granting the motion with respect to John B. Maestri. In moving for summary judgment, defendants did not submit an affidavit from John B. Maestri. The attorney affirmation submitted in support of the motion merely served as the vehicle for the submission of exhibits, and the deposition testimony attached thereto consisted only of excerpts from the deposition transcripts and was equivocal with respect to John B. Maestri's liability. Sheila Maestri's declaration, subsequently converted to a reply affidavit, addressed only the causes of action against her and did not provide any direct information regarding John B. Maestri's involvement in Solvay. Under these circumstances, we conclude that defendants failed to meet their initial burden on the motion with respect to John B. Maestri (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In any event, even assuming, arguendo, that defendants met their initial burden, we conclude that plaintiff raised triable issues of fact sufficient to defeat the motion (*see generally id.*). We therefore modify the order by denying defendants' motion in part and reinstating the complaint against John B. Maestri.

Entered: July 17, 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 19-01562

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

MYLES BROOKS, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

EVERLYENE DAVIS, DEFENDANT-APPELLANT-RESPONDENT.

LAW OFFICE OF JOHN TROP, ROCHESTER (TIFFANY L. D'ANGELO OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

BERGEN & SCHIFFMACHER, LLP, BUFFALO (TODD M. SCHIFFMACHER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered March 19, 2019. The order denied the motion of defendant for summary judgment and granted in part the cross motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that he sustained in a motor vehicle collision. Defendant was operating a vehicle in the City of Buffalo traveling west on Broadway, at a speed of 20 miles per hour, toward the intersection of Broadway and Spring Street. It was a clear day. Defendant had an unobstructed view of the intersection, which was controlled by stop signs for vehicles entering from Spring Street. Plaintiff was a passenger in a truck traveling north on Spring Street. At his deposition, he testified that the truck stopped for three or four seconds at the stop sign and then proceeded gradually into the intersection, first crossing the two eastbound lanes of Broadway before entering the westbound lane in which defendant was traveling. Defendant's vehicle collided with the passenger side of the truck, causing injury to plaintiff. At her deposition, defendant testified that she did not see the truck at the stop sign, did not see it enter the intersection, and did not see it cross two lanes of Broadway. By the time she saw the truck, it was directly in front of her and the collision had already occurred.

Defendant appeals from an order denying her motion for summary judgment dismissing the complaint. Plaintiff cross-appeals from the same order insofar as it denied that part of his cross motion seeking partial summary judgment on the issue of negligence.

Contrary to defendant's contention on her appeal, Supreme Court properly denied her motion inasmuch as she failed to meet her initial burden of establishing that she was not negligent as a matter of law (*see Gilkerson v Buck*, 167 AD3d 1470, 1471 [4th Dept 2018]). " 'It is well settled that a driver who has the right-of-way is entitled to anticipate that drivers of other vehicles will obey the traffic laws requiring them to yield' " (*Heltz v Barratt*, 115 AD3d 1298, 1299 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]; *see* Vehicle and Traffic Law § 1142 [a]). "Nevertheless, a driver cannot blindly and wantonly enter an intersection . . . but, rather, is bound to use such care to avoid [a] collision as an ordinarily prudent [motorist] would have used under the circumstances" (*Heltz*, 115 AD3d at 1299 [internal quotation marks omitted]; *see Gilkerson*, 167 AD3d at 1471-1472). Here, defendant's own submissions, including her own deposition testimony, raised an issue of fact whether she met her "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Gilkerson*, 167 AD3d at 1472 [internal quotation marks omitted]; *cf. Heltz*, 115 AD3d at 1298-1299).

We respectfully disagree with the view of our dissenting colleagues that *Godwin v Mancuso* (170 AD3d 1672 [4th Dept 2019]) compels a different result. In our view, the facts are distinguishable. The truck in the instant case approached from a greater distance than did the vehicle operated by the plaintiff in *Godwin*, and defendant in the instant case was traveling at half the speed of the defendant in *Godwin* (*see id.* at 1672-1673). Nonetheless, the defendant in *Godwin*, unlike defendant in the instant case, noticed the approaching vehicle when it was one car length away, and she had time to apply the brakes and substantially slow her vehicle.

Inasmuch as there are issues of fact, we reject plaintiff's contention on his cross appeal that the court erred in denying his cross motion with respect to the issue of negligence (*see generally Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

All concur except LINDLEY and DEJOSEPH, JJ., who dissent and vote to modify in accordance with the following memorandum: We respectfully dissent inasmuch as we conclude that Supreme Court erred in denying defendant's motion for summary judgment dismissing the complaint. We would therefore modify the order by granting the motion and dismissing the complaint.

It is undisputed that the driver of the truck in which plaintiff was a passenger was traveling on the subordinate highway, which was controlled by a stop sign, and defendant was traveling on the through highway and had the right-of-way. Furthermore, in our view of the record, defendant was operating her vehicle in accordance with the rules of the road and below the speed limit and was paying proper attention to the roadway and her surroundings when the truck plaintiff was riding in suddenly and unexpectedly entered the lane in which defendant was traveling. Consequently, we conclude that defendant met her initial burden of establishing as a matter of law that she was not negligent (*see Godwin v Mancuso*, 170 AD3d 1672, 1672-1673 [4th Dept

2019]). We further conclude that plaintiff failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Even viewing the evidence in the light most favorable to plaintiff (*see Godwin*, 170 AD3d at 1673), we cannot conclude that there is a question of fact whether defendant was negligent by being inattentive to the intersection and not seeing the truck plaintiff was riding in until just before the collision. To the contrary, we conclude that, "[i]nasmuch as defendant was entitled to anticipate that [the truck] would yield the right-of-way, the fact that defendant did not notice [the truck] until it [proceeded] in front of her does not raise a question of fact whether defendant was negligent" (*id*.).

Entered: July 17, 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 19-01465

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

THOMAS TORNATORE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JEAN COHEN, D.C., DEFENDANT.

ALLIED PROFESSIONALS INSURANCE COMPANY,
APPELLANT.

TREVETT CRISTO, ROCHESTER (MELANIE S. WOLK OF COUNSEL), FOR APPELLANT.

DEFRANCISCO & FALGIATANO, LLP, EAST SYRACUSE (CHARLES FALGIATANO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered February 5, 2019. The order granted the motion of plaintiff to liquidate an appeal bond and awarded plaintiff prejudgment and postjudgment interest.

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

Memorandum: Allied Professionals Insurance Company (APIC) is the chiropractic malpractice insurer for defendant. In an underlying malpractice action, plaintiff sued defendant for injuries sustained from defendant's treatment, and plaintiff obtained a jury verdict in his favor. In the judgment, the present value was calculated, following application of CPLR article 50-a, to be $1,217,474.20. APIC then issued an appeal bond in order to stay execution of the judgment pending appeal. We affirmed the judgment on appeal (*Tornatore v Cohen*, 162 AD3d 1503 [4th Dept 2018]). APIC now appeals from an order granting plaintiff's motion to liquidate the appeal bond posted by APIC and awarding plaintiff unpaid prejudgment and postjudgment interest.

APIC contends that the language of the appeal bond unambiguously limits its liability as a surety to the present value of $1,217,474.20 and does not obligate it to pay any additional monies such as prejudgment and postjudgment interest. We reject that contention.

As relevant to the procedure used here, a stay pending appeal of proceedings to enforce a judgment directing the payment of a sum of money may be obtained upon service on the adverse party of a notice of appeal where "an undertaking in that sum is given that if the judgment

or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed" (CPLR 5519 [a] [2]). Thus, an appeal bond issued by a surety meeting the requirements of CPLR 5519 (a) (2) will effect an automatic stay of enforcement of the judgment pending appeal thereof (*see Agai v Liberty Mut. Agency Corp.*, 118 AD3d 830, 832 [2d Dept 2014], *lv denied* 24 NY3d 906 [2014]). "Surety bonds—like all contracts—are to be construed in accordance with their terms" (*Walter Concrete Constr. Corp. v Lederle Labs.*, 99 NY2d 603, 605 [2003]) "under established rules of contract construction" (*Matter of Seneca Ins. Co. v People*, 40 AD3d 1151, 1153 [3d Dept 2007]; *see General Phoenix Corp. v Cabot*, 300 NY 87, 92 [1949]; *Mendel-Mesick-Cohen-Architects v Peerless Ins. Co.*, 74 AD2d 712, 713 [3d Dept 1980]). After the meaning of the words used in an appeal bond have been so ascertained, a surety's "obligation upon its undertaking is defined solely by the language of the bond" and "cannot be extended by the court" (*Stapley v United States Cas. Co.*, 260 NY 323, 326 [1932], *affg* 235 App Div 379 [4th Dept 1932]; *see Tri-State Empl. Servs. v Mountbatten Sur. Co.*, 99 NY2d 476, 483 [2003]; *Utica City Natl. Bank v Gunn*, 169 App Div 295, 299 [4th Dept 1915], *affd* 222 NY 204 [1918]).

Here, the appeal bond upon which plaintiff sought to recover first recited the present value portion of judgment consisting of $1,217,474.20 and then indicated that defendant desired to stay execution of that judgment against her. The appeal bond therefore further provided, in pertinent part, that "[APIC] . . . hereby obligates itself, its successor and assigns and does hereby undertake and promise on the part of [defendant] and binds itself in the amount of $1,217,474.20 and does pursuant to the statute in such cases, undertake that if the judgment or order so appealed from or any part thereof, is affirmed, or the appeal is dismissed, [defendant] will pay the sum directed to be paid by the judgment or order."

Pursuant to the plain language of the appeal bond, APIC gave an undertaking in the amount of $1,217,474.20 for the purpose of securing a stay of the judgment on behalf of defendant *and*—in the conjunctive—undertook to "pay the sum directed to be paid by the judgment" if the judgment was affirmed. The latter clause of the appeal bond "does not in express language limit the amount [to be paid on the judgment] to any fixed sum" (*Hotop v Maryland Cas. Co.*, 274 NY 327, 329-330 [1937]; *cf. Shapiro v Equitable Cas. & Sur. Co.*, 256 NY 341, 345 [1931], *rearg denied* 256 NY 692 [1931]; *Mendel-Mesick-Cohen-Architects*, 74 AD2d at 712). Thus, despite its recital of the present value portion of the judgment, the appeal bond unambiguously obligates APIC to fully pay the amount directed by the judgment referenced therein and, here, the judgment unequivocally directs payment of the present value as well as prejudgment and postjudgment interest (*see generally Hotop*, 274 NY at 329-330; *Stapley*, 235 App Div at 380). Although we agree with APIC's contention that it has satisfied its obligation *as an insurer* by proffering a settlement check in an amount that represents the present value of the judgment plus interest and

exceeds the policy limit (*see generally Ragins v Hospitals Ins. Co., Inc.*, 22 NY3d 1019, 1024 [2013]), we nonetheless conclude that APIC is obligated, *as a surety*, to satisfy the full amount of the judgment on behalf of defendant (*see Hotop*, 274 NY at 329-330). When the full amount of the judgment inclusive of prejudgment and postjudgment interest is calculated, there remains an unsatisfied balance and, therefore, Supreme Court properly granted plaintiff's motion and ordered APIC to pay that balance. In light of our determination, we conclude that APIC's remaining contention is without merit.

Entered: July 17, 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 19-01224

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

THERESA CANGEMI, INDIVIDUALLY AND AS TRUSTEE
OF THE THERESA CANGEMI REVOCABLE LIVING TRUST,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GRETCHEN YEAGER AND STEVEN NICHOLS,
DEFENDANTS-RESPONDENTS.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (ERIN SKUCE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS & PANELS, SYRACUSE (MICHAEL W. HARRIS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 10, 2019. The order denied the motion of plaintiff for a preliminary injunction and temporary restraining order against defendants.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion insofar as it sought a preliminary injunction enjoining defendant Steven Nichols from trespassing on or causing damage to plaintiff's property, interfering with plaintiff's property rights, blocking plaintiff's access to her property, engaging in any conduct with the intent to injure, harass, threaten, or intimidate plaintiff, yelling obscenities at or about plaintiff, and pointing video cameras and lights at plaintiff's backyard, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings to fix an appropriate undertaking pursuant to CPLR 6312.

Memorandum: Plaintiff and defendants own adjoining parcels of real property on Oneida Lake. Defendants have an easement pursuant to which they have a right-of-way over the southernmost portion of plaintiff's property for the purposes of ingress and egress only. After a property dispute arose between the parties, plaintiff commenced this action asserting, inter alia, a claim under Civil Rights Law § 52-a and claims of trespass and private nuisance and seeking, among other things, injunctive relief. Plaintiff moved for a preliminary injunction and temporary restraining order enjoining defendants from, inter alia, trespassing on or damaging plaintiff's property and from harassing plaintiff. Supreme Court denied the

motion, and plaintiff appeals.

As a preliminary matter, we note that the court failed to set forth its reasons for its determination, thus making it difficult for this Court to review this case (*see generally McMillan v Burden,* 136 AD3d 1342, 1343 [4th Dept 2016]).

We agree with plaintiff that the court abused its discretion in denying her motion insofar as it sought a preliminary injunction with respect to defendant Steven Nichols, and we therefore modify the order accordingly. Upon a motion for a preliminary injunction, the party seeking the injunctive relief must demonstrate by clear and convincing evidence: (1) "a probability of success on the merits;" (2) "danger of irreparable injury in the absence of an injunction;" and (3) "a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *see Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]; *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216 [4th Dept 2009]).

We conclude that plaintiff met her burden of demonstrating by clear and convincing evidence a likelihood of success on the merits of her claims against Nichols for trespass and private nuisance as well as her claim against him under Civil Rights Law § 52-a (*see generally Nobu Next Door, LLC*, 4 NY3d at 840; *Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1435 [4th Dept 2010]). To demonstrate a likelihood of success on the merits, it is sufficient for the moving party to make a prima facie showing of his or her right to relief (*see Gambar Enters. v Kelly Servs.*, 69 AD2d 297, 306 [4th Dept 1979]), and the actual proving of the case "should be left to the full hearing on the merits" (*Tucker v Toia*, 54 AD2d 322, 326 [4th Dept 1976]).

To establish a claim of trespass, a plaintiff must show that an actor invaded the plaintiff's interest in the exclusive possession of his or her land (*see Behar v Quaker Ridge Golf Club, Inc.*, 118 AD3d 833, 835 [2d Dept 2014]). Plaintiff's supplemental affidavit and photographs submitted in support of the motion demonstrate that Nichols repeatedly drove across her lawn and blew snow with his snowblower onto the side of plaintiff's house, allegedly causing damage to her awning and fence. Both events were intentional invasions of plaintiff's interest in the exclusive possession of her land. Furthermore, although "an action for trespass over the lands of one property owner may not be maintained where the purported trespasser has acquired an easement of way over the land in question" (*Kaplan v Incorporated Vil. of Lynbrook*, 12 AD3d 410, 412 [2d Dept 2004] [internal quotation marks omitted]), plaintiff established that the acts allegedly committed by Nichols on the easement exceeded the scope of the easement and did not constitute a reasonable use of his interest in the easement (*cf. Havel v Goldman*, 95 AD3d 1174, 1175-1176 [2d Dept 2012]; *Mangusi v Town of Mount Pleasant*, 19 AD3d 656, 657 [2d Dept 2005]; *Kaplan*, 12 AD3d at 412). Thus, plaintiff demonstrated a likelihood of success on the merits of her trespass claim.

To establish a claim of private nuisance, a plaintiff must show: "an interference (1) substantial in nature, (2) intentional in origin,

(3) unreasonable in character, (4) with [the plaintiff's] property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*Behar*, 118 AD3d at 835; *see Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568 [1977], *rearg denied* 42 NY2d 1102 [1977]). The interference "must not be fanciful, slight or theoretical, but certain and substantial, and must interfere with the physical comfort of the ordinarily reasonable person" (*Matteliano v Skitkzi*, 85 AD3d 1552, 1553 [4th Dept 2011], *lv denied* 17 NY3d 714 [2011] [internal quotation marks omitted]). The evidence submitted by plaintiff established that Nichols drove across plaintiff's lawn, used a snowblower to blow snow onto her house, tampered with and removed her property markers, parked his vehicle so as to obstruct plaintiff's driveway, drove on the freshly paved driveway and left tire tracks in the asphalt, and repeatedly painted a white line across the driveway. That conduct exceeds the scope of the easement and may fairly be characterized as a substantial interference with plaintiff's use and enjoyment of her property. Thus, plaintiff demonstrated a likelihood of success on the merits of her private nuisance claim.

Plaintiff's affidavit and video evidence also submitted on the motion demonstrate that Nichols threatened to install a "150-foot night vision camera" in his backyard and to point it directly into plaintiff's backyard and at her living room. As Nichols installed the surveillance camera, he stated to plaintiff, "It's gonna look right in your fucking living room! . . . You're on camera bitch! . . . Smile for the camera bitch!" Thus, plaintiff also demonstrated a likelihood of success on the merits of her claim under Civil Rights Law § 52-a.

With respect to the second prong of the test for a preliminary injunction, plaintiff established by clear and convincing evidence a danger of irreparable injury in the absence of injunctive relief (*see generally Nobu Next Door, LLC*, 4 NY3d at 840). A plaintiff may demonstrate irreparable injury where, for example, a defendant encroaches upon the plaintiff's property (*see Arcamone-Makinano v Britton Prop. Inc.*, 83 AD3d 623, 624-625 [2d Dept 2011]), blocks the plaintiff's access to a private drive (*see Totman v Cornell*, 166 AD2d 865, 866 [3d Dept 1990]), or in some way threatens the destruction of the plaintiff's property (*see Trimboli v Irwin*, 18 AD3d 866, 867 [2d Dept 2005]). Here, plaintiff demonstrated through her affidavit, photographs, and video evidence that Nichols's video surveillance of her backyard and home was likely to continue in the absence of a preliminary injunction and that Nichols would likely continue to intrude upon her property and interfere with her use and enjoyment thereof if he was not preliminarily enjoined from engaging in acts of trespass and private nuisance.

Finally, plaintiff met her burden of establishing by clear and convincing evidence a balance of equities in her favor (*see generally Nobu Next Door, LLC*, 4 NY3d at 840). We conclude that "the irreparable injury to be sustained . . . is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction" (*Felix v Brand Serv. Group LLC*, 101 AD3d 1724, 1726 [4th Dept 2012] [internal quotation marks omitted]), and that "an injunction would provide some security to [plaintiff,] while merely

restraining defendant from continuing any unlawful or wrongful activities" (*Park S. Assoc. v Blackmer*, 171 AD2d 468, 470 [1st Dept 1991]).

We have considered plaintiff's remaining contentions and conclude that none warrants further modification or reversal of the order.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

257

KA 16-01584

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BERNARD L. SNOW, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (THOMAS G. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered June 20, 2016. The judgment convicted defendant upon a jury verdict of robbery in the third degree (two counts) and petit larceny.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of robbery in the third degree under count one of the indictment and vacating the sentence imposed on count two of the indictment, and as modified the judgment is affirmed, a new trial is granted on count one of the indictment, and the matter is remitted to Supreme Court, Monroe County, for resentencing on count two of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of robbery in the third degree (Penal Law § 160.05) and one count of petit larceny (§ 155.25). Defendant's conviction stems from three separate incidents, which occurred on three consecutive days. During each incident, defendant entered a different bank and stole cash from a bank employee after presenting the employee with a note demanding money.

Contrary to defendant's contention, the evidence is legally sufficient to support the conviction of robbery in the third degree under count two of the indictment, which concerns the second incident. " 'The applicable statutes do not require the use or display of a weapon nor actual injury or contact with a victim [for a person to be guilty of robbery] . . . All that is necessary is that there be a threatened use of force . . . , which may be implicit from the defendant's conduct or gleaned from a view of the totality of the circumstances' " (*People v Mosley*, 59 AD3d 961, 961 [4th Dept 2009], *lv denied* 12 NY3d 918 [2009], *reconsideration denied* 13 NY3d 861

[2009]; *see* Penal Law §§ 160.00, 160.05; *People v Parris*, 74 AD3d 1862, 1863 [4th Dept 2010], *lv denied* 15 NY3d 854 [2010]). We conclude with respect to count two that "the People presented evidence from which defendant's threatened use of force could be implied" (*Parris*, 74 AD3d at 1863 [internal quotation marks omitted]; *see Mosley*, 59 AD3d at 962). Additionally, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to count two is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *Mosley*, 59 AD3d at 962).

We also reject defendant's contention that the verdict is against the weight of the evidence with respect to his conviction of robbery in the third degree under count one, which concerns the first incident. Contrary to defendant's contention, the precise wording of the note that defendant presented to the bank employee in that incident is not dispositive. Indeed, Penal Law § 160.00 "does not require the use of any words whatsoever, but merely that there be a threat, whatever its nature, of the immediate use of physical force," nor does it require a defendant to "employ what by hindsight a reviewing court would categorize as threatening words of art" (*People v Woods*, 41 NY2d 279, 283 [1977]). Based on the totality of the circumstances, we conclude that, regardless of the precise wording of the note, the weight of the evidence presented at trial establishes that defendant's threatened use of force was implied (*see Mosley*, 59 AD3d at 962; *see also Parris*, 74 AD3d at 1863).

We agree with defendant, however, that Supreme Court erred in precluding him from calling a witness in order to assist in his defense with respect to count one. "It is well established that the party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility" (*People v Pavao*, 59 NY2d 282, 288-289 [1983]). That rule, however, "has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the jury must decide" (*People v Knight*, 80 NY2d 845, 847 [1992]; *see generally People v Bradley*, 99 AD3d 934, 937 [2d Dept 2012]). "Where the truth of the matter asserted in the proffered inconsistent statement is relevant to a core factual issue of a case, its relevancy is not restricted to the issue of credibility and its probative value is not dependent on the inconsistent statement. Under such circumstances, the right to present a defense may 'encompass[ ] the right to place before the [trier of fact] secondary forms of evidence, such as hearsay' " (*Bradley*, 99 AD3d at 937; *see generally People v Ainsley*, 132 AD3d 1007, 1008 [2d Dept 2015], *lv denied* 26 NY3d 1142 [2016]). Here, defendant sought to call a witness whose testimony related to the content of the note defendant presented to the bank employee in the first incident. Defendant specifically sought to establish that the note he presented contained language that, according to defendant, did not threaten the immediate use of force, contrary to the testimony of the bank employee who received it. Although a threat of immediate use

of force may be implicit and does not require the use of any specific words (*see Woods*, 41 NY2d at 283; *Parris*, 74 AD3d at 1863), the use of threatening language is nevertheless a factor for the jury to consider when determining whether the defendant presented such a threat (*see People v Williams*, 122 AD3d 502, 503 [1st Dept 2014], *lv denied* 25 NY3d 954 [2015]; *see generally Mosley*, 59 AD3d at 962; *People v Zagorski*, 135 AD2d 594, 595 [2d Dept 1987]). Inasmuch as the content of the note was relevant to whether defendant, either explicitly or implicitly, threatened the use of force, we conclude that the proposed testimony pertained to a noncollateral issue and that the court should have allowed the proposed witness to testify (*see Bradley*, 99 AD3d at 937-938). We further conclude that, under the circumstances of this case, the evidence of defendant's guilt with respect to count one was not overwhelming, and thus the error cannot be deemed harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

We therefore modify the judgment by reversing that part convicting defendant of robbery in the third degree under count one of the indictment, and we grant defendant a new trial on that count. Because the court imposed an enhanced sentence on count two of the indictment in consideration of, inter alia, the conviction on count one, we further modify the judgment by vacating the sentence imposed on count two of the indictment, and we remit the matter to Supreme Court for resentencing on that count. In light of our determination, we do not address defendant's remaining contentions concerning his sentence.

Entered: July 17, 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 18-00680

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

IN THE MATTER OF MELINDA BYLER,
PETITIONER-RESPONDENT,
AND KENNETH BYLER, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARY BYLER, RESPONDENT-RESPONDENT.

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

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-RESPONDENT.

JAMES SCOTT DIMMER, FREDONIA, FOR PETITIONER-RESPONDENT.

AVERY S. OLSON, JAMESTOWN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Chautauqua County (Michael J. Sullivan, J.), entered March 14, 2018 in proceedings pursuant to Family Court Act article 6. The order, insofar as appealed from, dismissed petitions filed by petitioner Kenneth Byler to modify a prior custody order.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed in the interest of justice and on the law without costs, the petition of petitioner Kenneth Byler filed on September 5, 2017 is reinstated and the joint petitions filed by petitioners on April 27 and June 12, 2017 are reinstated with respect to petitioner Kenneth Byler, and the matter is remitted to Family Court, Chautauqua County, for further proceedings in accordance with the following memorandum: Petitioner father filed one petition individually and two petitions jointly with petitioner mother seeking to modify a prior order that awarded custody of the subject children to respondent, the children's paternal aunt (aunt). As relevant here, the father sought to modify the order by awarding custody to him. As limited by his brief, the father appeals from an order insofar as it denied that relief, thereby effectively dismissing those petitions to that extent.

The father contends that Family Court erred in failing to make an initial determination with respect to the existence of extraordinary circumstances necessary to justify an award of custody to a nonparent. As a preliminary matter, although we agree with the aunt that the

father failed to preserve that contention for our review, we nevertheless review it in the interest of justice (*see generally Matter of Ferratella v Thomas*, 173 AD3d 1834, 1836 [4th Dept 2019]). Upon our review of that contention, we agree with the father that the court erred in failing to make an initial determination with respect to the existence of extraordinary circumstances.

" '[A]s between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . 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 Orlowski v Zwack*, 147 AD3d 1445, 1446 [4th Dept 2017]; *see Matter of Bennett v Jeffreys*, 40 NY2d 543, 545-546 [1976]). That rule " 'applies even if there is an existing order of custody concerning that child unless there is a prior determination that extraordinary circumstances exist' " (*Matter of Wolfford v Stephens*, 145 AD3d 1569, 1570 [4th Dept 2016]; *see Orlowski*, 147 AD3d at 1446). A prior consent order does not by itself constitute a judicial finding or an admission of extraordinary circumstances (*see Matter of Driscoll v Mack*, 183 AD3d 1229, 1230 [4th Dept 2020]; *Matter of Schultz v Berke*, 160 AD3d 1390, 1391 [4th Dept 2018]). There is no indication in the record that the court previously made a determination of extraordinary circumstances (*see Wolfford*, 145 AD3d at 1570; *Matter of Howard v McLoughlin*, 64 AD3d 1147, 1148 [4th Dept 2009]). Although we may make our own determination upon an adequate record (*see Schultz*, 160 AD3d at 1392; *Matter of Ramos v Ramos*, 75 AD3d 1008, 1010 [3d Dept 2010]), we decline to do so here. We therefore reverse the order insofar as appealed from, reinstate the petition of the father filed on September 5, 2017, and reinstate the joint petitions filed by petitioners on April 27 and June 12, 2017 with respect to the father (*see Howard*, 64 AD3d at 1148), and we remit the matter to Family Court to determine whether extraordinary circumstances exist and, if so, to make any other necessary determinations.

Entered: July 17, 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 19-00300

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

JAMES A. GARDNER,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

WHITNEY ALLYSON ZAMMIT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATE RIGHTER GARDNER, DECEASED,
DEFENDANT-APPELLANT-RESPONDENT.

ROBSHAW & VOELKL, WILLIAMSVILLE, LAW OFFICE OF BARBARA A. KILBRIDGE, BUFFALO (BARBARA A. KILBRIDGE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

JAMES P. RENDA, BUFFALO, FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 14, 2019. The order, inter alia, granted in part the motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff and decedent were married in 1982 and divorced in 2005. At the time of the divorce, they entered into a Separation and Property Settlement Agreement (settlement agreement) whereby decedent agreed to pay plaintiff monthly maintenance. The settlement agreement provided that decedent's obligation to pay maintenance would "terminate only upon death of the [h]usband," i.e., plaintiff, and that plaintiff would have an interest in decedent's stock portfolio, evidenced by a contemporaneously executed security agreement, as security for decedent's obligation to pay maintenance during plaintiff's lifetime. The settlement agreement also included a general provision stating that it was binding on "the parties, their heirs, executors, legal representatives, administrators and assigns." The settlement agreement was subsequently incorporated, but not merged, into a judgment of divorce. Following decedent's death in 2016, her estate refused to make further maintenance payments.

Plaintiff commenced this action against decedent's estate seeking, among other things, enforcement of the maintenance provision of the settlement agreement. Defendant answered and asserted as a counterclaim that the maintenance obligation expired on decedent's

death or that downward modification was warranted based on her death. Plaintiff thereafter moved for partial summary judgment on the complaint insofar as it sought, as relevant here, a determination that the estate is required to make the agreed maintenance payments for the duration of his lifetime and an award for the amount of unpaid maintenance. Supreme Court granted the motion in part by, inter alia, determining that the estate was required to pay maintenance to plaintiff for his lifetime or until further court order and awarding plaintiff the amount of the unpaid maintenance payments through the date of the order. The court also stated that the amount of maintenance for payments due after the date of the order would be fixed following the court's future determination of defendant's counterclaim for downward modification. Defendant appeals, and plaintiff cross-appeals. We affirm.

Contrary to defendant's contention on her appeal, we conclude that the court properly granted plaintiff's motion insofar as it sought a determination that the estate was obligated to make maintenance payments to him. A settlement agreement is a contract subject to principles of contract interpretation, and the court "should interpret the contract in accordance with its plain and ordinary meaning" (*Matter of Wilson*, 138 AD3d 1441, 1442 [4th Dept 2016] [internal quotation marks omitted]). In addition, "[t]he intent to vary the statutory and precedential preference of an end to maintenance payments upon death of the payor must be expressed clearly" (*Matter of Riconda*, 90 NY2d 733, 737 [1997]). Here, neither party contends that the settlement agreement is ambiguous. We agree with plaintiff that the clause at issue unequivocally permits the termination of the maintenance obligation on the happening of one event only: the death of plaintiff. Further, the settlement agreement makes all provisions of the agreement binding on "the parties, their heirs, executors, legal representatives, administrators and assigns." Thus, plaintiff met his initial burden on the motion of establishing that the maintenance payments were intended to survive decedent's death and become an obligation of her estate (*see generally id.* at 736-739; *Matter of Davis*, 32 AD2d 667, 667-668 [2d Dept 1969]), and defendant failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We take this opportunity, however, to remind practitioners of the advice given by the Court of Appeals, eight years before the agreement in this case was drafted, that "[t]o avoid these and other problems for their clients, practitioners would do well to use recommended form clauses providing expressly that maintenance payments will continue—or not—upon the death of *either* spouse or the remarriage of the recipient spouse, keyed to the drafting-stage intent of both parties reflected in the executed agreement" (*Riconda*, 90 NY2d at 741).

Plaintiff's challenge on his cross appeal concerning defendant's counterclaim for downward modification of maintenance is not properly before us for review inasmuch as the issue of downward modification was not considered by the court on plaintiff's motion (*see generally*

Sheldon v Town of Highlands, 73 NY2d 304, 311 [1989]).

Entered: July 17, 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 19-01068

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOMENIC A. MINECCIA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., 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 (Christopher S. Ciaccio, J.), rendered May 25, 2017. The judgment convicted defendant after a nonjury trial of criminal possession of a controlled substance in the third degree, criminal sale of a controlled substance in the third degree, tampering with physical evidence and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him after a bench trial of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), criminal sale of a controlled substance in the third degree (§ 220.39 [1]), tampering with physical evidence (§ 215.40 [2]), and endangering the welfare of a child (§ 260.10 [1]), defendant contends that the evidence with respect to the first two crimes is legally insufficient because the People failed to disprove his agency defense beyond a reasonable doubt. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we reject that contention. The evidence submitted by the People established, inter alia, that defendant purchased two bags of heroin, ingested three-quarters of the drugs, and gave the remaining one-quarter to his girlfriend, who died after ingesting it. Contrary to defendant's contention, the evidence is legally sufficient "to establish that [he] was the seller of a controlled substance and [was] not" merely delivering heroin to his girlfriend as her agent (*People v Burden*, 288 AD2d 821, 821 [4th Dept 2001], *lv denied* 97 NY2d 751 [2002]; *see* § 220.00 [1]; *see generally People v Lam Lek Chong*, 45 NY2d 64, 74-75 [1978], *cert denied* 439 US 935 [1978]).

Contrary to defendant's further contention, viewing the evidence in the light most favorable to the People (*see Contes*, 60 NY2d at 621), we conclude that the evidence is legally sufficient to support the conviction with respect to the crimes of tampering with physical evidence and endangering the welfare of a child (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, 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 County Court, in rejecting the agency defense with respect to the first two crimes, did not fail to give the evidence the weight it should be accorded (*see People v Walker*, 117 AD3d 1441, 1442 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]; *People v Watkins*, 284 AD2d 905, 906 [4th Dept 2001], *lv denied* 96 NY2d 943 [2001]), and that the verdict with respect to all of the crimes is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that the court erred in refusing to suppress his initial statements to the police. We reject that contention. We conclude that defendant was not in police custody at the time he made those statements, and thus *Miranda* warnings were not required (*see People v Towsley*, 53 AD3d 1083, 1084 [4th Dept 2008], *lv denied* 11 NY3d 795 [2008]; *see also People v Brown*, 111 AD3d 1385, 1385-1386 [4th Dept 2013], *lv denied* 22 NY3d 1155 [2014]; *see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). In addition, we reject defendant's claim that his statements were involuntarily made due to his alleged intoxication inasmuch as the evidence presented at the suppression hearing establishes that he was not "intoxicated to a degree of mania or of being unable to understand the meaning of his statements" (*People v Benjamin*, 17 AD3d 688, 689 [2d Dept 2005], *lv denied* 5 NY3d 803 [2005]; *see People v Iddings*, 23 AD3d 1132, 1133 [4th Dept 2005], *lv denied* 6 NY3d 776 [2006]).

Finally, defendant's contentions concerning the sentence are rendered academic by our determination in defendant's appeal from the denial of his CPL article 440 motion (*see People v Mineccia* [appeal No. 2], — AD3d — [July 17, 2020] [4th Dept 2020] [decided herewith]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

344

KA 19-00264

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOMENIC MINECCIA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Douglas A. Randall, J.), dated January 11, 2019. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of criminal possession of a controlled substance in the third degree, criminal sale of a controlled substance in the third degree, tampering with physical evidence and endangering the welfare of a child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the facts, the motion is granted, the judgment of conviction is vacated, and a new trial is granted.

Memorandum: Defendant was convicted after a bench trial by County Court (Ciaccio, J. [hereafter, trial court]) of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Defendant thereafter moved to vacate that judgment pursuant to CPL 440.10. The motion was denied, after a hearing, by County Court (Randall, J. [hereafter, motion court]). Defendant now appeals, by permission of a Justice of this Court, from the motion court's order. We reverse.

The evidence at the hearing established that the prosecutor who appeared for over six months on the People's behalf during the preliminary proceedings in this case was subsequently appointed to serve as the trial court's confidential law clerk. When the law clerk brought that conflict to the trial court's attention, the trial court appropriately screened the law clerk off from any participation in this case. When defendant sought to waive his right to a jury trial and to be tried by the court alone, however, the trial court—which had recognized the conflict and had already taken steps to mitigate

it—failed to inform defendant that its law clerk had previously prosecuted defendant in this case. Moreover, although defense counsel was aware of the law clerk's prior role as prosecutor, it is undisputed that defense counsel failed to inform defendant of that fact. Defense counsel subsequently admitted that, had he recalled the fact that the prosecutor had become the trial court's law clerk, he would have advised defendant to retain his right to a jury trial. Additionally, defendant testified at the posttrial hearing that he would not have waived his right to a jury trial had he been aware of the fact that his former prosecutor was now serving as the trial court's law clerk. Contrary to the motion court's determination, defendant's testimony in that regard was not incredible. Indeed, defendant identified rational, case-specific reasons why he distrusted the fairness of the law clerk.

Under the unique circumstances of this case, we conclude that defendant's waiver of his right to a jury trial, which was made when he was the only participant in the waiver proceeding who was ignorant of the fact that his former prosecutor had become the trial judge's legal advisor, was not tendered "knowingly and understandingly" and was not "based on an intelligent, informed judgment" (*People v Davis*, 49 NY2d 114, 119 [1979]; *see generally People v Peque*, 22 NY3d 168, 198 [2013], *cert denied* 574 US 840 [2014], citing *People v Gravino*, 14 NY3d 546, 559 [2010]). We therefore reverse the order, grant the motion, vacate the judgment of conviction, and grant defendant a new trial.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

345.1

KA 20-00442

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC MITCHELL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Erie County Court (Sheila A. DiTullio, J.), rendered October 10, 2017. Defendant was resentenced upon his conviction of criminal possession of a controlled substance in the third degree (two counts).

It is hereby ORDERED that the resentence so appealed from is unanimously modified on the law by vacating the forfeiture of $2,207, and as modified the resentence is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and, in appeal No. 2, defendant appeals from the resentence on that conviction. We note at the outset that, inasmuch as the sentence in appeal No. 1 was superseded by the resentence in appeal No. 2, the appeal from the judgment in appeal No. 1 insofar as it imposed sentence must be dismissed (*see People v Primm*, 57 AD3d 1525, 1525 [4th Dept 2008], *lv denied* 12 NY3d 820 [2009]). In addition, although the notice of appeal in appeal No. 1 relates to the judgment rendered on July 25, 2017, and not the resentence on October 10, 2017, we exercise our discretion to treat the notice of appeal as also including an appeal from the resentence (*see People v Hennigan* [appeal No. 1], 145 AD3d 1528, 1528 [4th Dept 2016], *lv denied* 29 NY3d 998 [2017]; *see also* CPL 460.10 [6]).

In appeal No. 1, defendant contends that County Court erred in refusing to suppress evidence obtained during a search of his apartment on the ground that the search warrant for his apartment was issued by a court without preliminary jurisdiction to do so (*see* CPL 1.20 [25]; 690.35 [2] [a]). We agree with defendant that the waiver of his right to appeal is invalid and thus does not preclude us from

reviewing that contention (*see People v Thomas*, 34 NY3d 545, 565-566 [2019]). We nevertheless conclude that defendant explicitly waived that contention, which implicates a court's preliminary jurisdiction as opposed to a court's trial jurisdiction, inasmuch as defense counsel informed the court at a prior appearance that he did not intend to make a motion on the ground that the issuing court lacked such authority here (*cf. People v Jackson*, 18 NY3d 738, 741 [2012]; *see also* CPL 1.20 [24-25]; *People v Hickey*, 40 NY2d 761, 762 [1976]; *see generally People v Jones*, 79 AD3d 1665, 1665 [4th Dept 2010]).

We agree with defendant in appeal No. 2, however, that the court erred in ordering civil forfeiture as a component of defendant's resentence (*see People v Carmichael*, 123 AD3d 1053, 1053 [2d Dept 2014]; *People v Sanders*, 289 AD2d 1019, 1020 [4th Dept 2001]). Inasmuch as that portion of the resentence is illegal (*see Sanders*, 289 AD2d at 1020), defendant was not required to preserve his challenge to it (*see generally People v John P.*, 294 AD2d 951, 952 [4th Dept 2002]). We therefore modify the resentence accordingly.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

345

KA 17-02067

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC MITCHELL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered July 25, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree (two counts).

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Same memorandum as in *People v Mitchell* ([appeal No. 2] — AD3d — [July 17, 2020] [4th Dept 2020]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

362

KA 18-00614

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMEL RAGHNAL, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY 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 (Thomas J. Miller, J.), rendered August 29, 2017. The judgment convicted defendant upon a plea of guilty of arson in the second degree, burglary in the second degree, and criminal mischief in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of arson in the second degree (Penal Law § 150.15), burglary in the second degree (§ 140.25 [2]), and criminal mischief in the fourth degree (§ 145.00 [1]). At the outset, we agree with defendant that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019]).

Defendant contends that County Court failed to conduct the requisite inquiry into his complaints regarding his assigned counsel. Although "[t]he right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option . . . , the right to be represented by counsel of one's own choosing is a valued one, and a defendant may be entitled to new assigned counsel upon showing 'good cause for substitution' " (*People v Sides*, 75 NY2d 822, 824 [1990]). Thus, trial courts are required to conduct "at least a 'minimal inquiry' " when a defendant requests substitution of counsel and voices " 'seemingly serious' " complaints about his or her assigned counsel (*People v Porto*, 16 NY3d 93, 100 [2010], quoting *Sides*, 75 NY2d at 824-825; *see People v Edwards*, 173 AD3d 1615, 1616 [4th Dept 2019]).

Here, defendant sent letters to the court on January 23, 2017 and

March 28, 2017, each containing allegations of various shortcomings in assigned counsel's performance. Neither of those letters, however, contained a request that the court provide defendant with substitute counsel, and thus defendant, through those letters, failed to preserve his contention for review (*see generally People v Alexander*, 132 AD3d 1412, 1413 [4th Dept 2015], *lv denied* 27 NY3d 1148 [2016]). In any event, the record establishes that the court sufficiently inquired into defendant's complaints at a subsequent appearance on March 31, 2017, and ensured that defendant and defense counsel had resolved the alleged issues that had been raised in the January 23, 2017 and March 28, 2017 letters.

Defendant thereafter sent another letter to the court on April 11, 2017, again raising certain complaints regarding counsel's performance. Like the prior letters, however, defendant did not request that the court assign substitute counsel, and thus the April 11, 2017 letter failed to preserve the issue for review (*see generally Alexander*, 132 AD3d at 1413). In any event, even if defendant had requested substitute counsel in that letter, defendant "failed to proffer specific allegations of a 'seemingly serious request' that would require the court to engage in a minimal inquiry" (*Porto*, 16 NY3d at 100; *see generally Edwards*, 173 AD3d at 1616).

In May 2017, and as the scheduled date of defendant's trial approached, defendant sent two additional letters to the court. Those letters, however, did not contain a request that the court assign substitute counsel, and instead indicated that, in defendant's estimation, he and his attorney were not ready for trial. Likewise, at the next court appearance, at which defendant ultimately pleaded guilty, defendant requested an adjournment of the scheduled trial, but did not request substitute counsel. Thus, defendant's letters of May 2017 and his statements at the following court appearance did not preserve his contention for review "inasmuch as the record reflects that both defendant and the court understood that defendant sought an adjournment . . . and did not request new assigned counsel" (*People v Johnson*, 94 AD3d 1496, 1497 [4th Dept 2012], *affd* 20 NY3d 990 [2013]; *see generally Alexander*, 132 AD3d at 1413).

We reject defendant's further contention that the court abused its discretion in denying his request for an adjournment. It is well settled that "[t]he court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice" (*People v Resto*, 147 AD3d 1331, 1332 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017] [internal quotation marks omitted]), and defendant made no such showing here, inasmuch as he makes only a general assertion that he and his attorney required additional time to prepare his defense (*see generally People v Peterkin*, 81 AD3d 1358, 1360 [4th Dept 2011], *lv denied* 17 NY3d 799 [2011]).

We likewise reject defendant's contention that the court erred in denying his motion to withdraw his guilty plea on the ground of ineffective assistance of counsel. The court properly denied the motion inasmuch as, aside from defendant's unsupported allegations of

deficient representation, " 'nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Watkins*, 77 AD3d 1403, 1404 [4th Dept 2010], *lv denied* 15 NY3d 956 [2010]; *see generally People v Kurkowski*, 117 AD3d 1442, 1443-1444 [4th Dept 2014]). Defendant's further contention that the plea should be vacated based on the court's purported misstatement of defendant's possible sentencing exposure is not preserved for our review because defendant failed to move to withdraw his plea on that ground (*see generally People v Carlisle*, 50 AD3d 1451, 1451 [4th Dept 2008], *lv denied* 10 NY3d 957 [2008]).

Defendant's sentence is not unduly harsh or severe. We agree with defendant, however, that the certificate of conviction incorrectly reflects that defendant was convicted of two counts of criminal mischief in the fourth degree, and it must therefore be amended to reflect that he was convicted of only one count of criminal mischief in the fourth degree.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

492

CA 19-02157

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

IN THE MATTER OF TOWN OF OGDEN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LOUIS LAVILLA, RESPONDENT-APPELLANT.

THE LAW OFFICES OF MATTHEW ALBERT, ESQ., BUFFALO (MATTHEW ALBERT OF COUNSEL), FOR RESPONDENT-APPELLANT.

DANIEL G. SCHUM, TOWN ATTORNEY, SPENCERPORT, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Monroe County Court (Sam L. Valleriani, J.), entered May 17, 2019. The order affirmed an order of the Justice Court of the Town of Ogden (Michael Schiano, J.) entered November 30, 2018, which determined that respondent's dog is a dangerous dog and directed that the dog be euthanized.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part affirming the order of the Justice Court of the Town of Ogden insofar as it directed that respondent's dog be euthanized, and the matter is remitted to the Justice Court of the Town of Ogden for further proceedings in accordance with the following memorandum: On appeal from an order of County Court that affirmed an order of Justice Court (court) directing, among other things, euthanasia of respondent's dog Brady, respondent contends that the court misapprehended and misapplied Agriculture and Markets Law § 123. We agree.

A "dangerous dog," insofar as is relevant here, is one that "without justification attacks a person . . . and causes physical injury" (Agriculture and Markets Law § 108 [24] [a] [i]), i.e., "impairment of physical condition or substantial pain" (§ 108 [28]). The burden of proof is on the petitioner, who must prove by clear and convincing evidence that the dog meets the criteria of a dangerous dog (*see* § 123 [2]). If, after a hearing, the court is satisfied that the petitioner has met that burden, the court must order spaying or neutering, microchipping, and at least one of several enumerated options "as deemed appropriate under the circumstances and . . . necessary for the protection of the public" (*id.*). Those options are the evaluation of the dog by a board certified veterinary behaviorist and completion of training as recommended by that expert, humane confinement, leashing, muzzling, and maintenance of an insurance

policy (*see* § 123 [2] [a]-[e]; *People v Jornov*, 65 AD3d 363, 366-367 [4th Dept 2009]).

"The court lacks the power to order the most drastic measure, i.e., euthanasia, unless the petitioner establishes the existence of one of the aggravating circumstances enumerated in the statute" (*Matter of Workman v Dumouchel*, 175 AD3d 895, 900 [4th Dept 2019, Troutman, J., dissenting]; *see* Agriculture and Markets Law § 123 [3]). Such circumstances include where the dog, without justification, attacked a person, causing serious physical injury (*see* § 123 [3] [a]), i.e., "physical injury which creates a substantial risk of death, or which causes death or serious or protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (§ 108 [29]). As relevant to this case, "disfigurement" is "that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen or imperfect or deforms in some manner" (*People v McKinnon*, 15 NY3d 311, 315 [2010] [internal quotation marks omitted]). "A 'protracted' disfigurement is one that is prolonged in duration" (*Workman*, 175 AD3d at 900-901), and "[a] person is 'seriously' disfigured when a reasonable observer would find [his or] her altered appearance distressing or objectionable" (*McKinnon*, 15 NY3d at 315). The nature of the injury is relevant, but "the injury must be viewed in context, considering its location on the body and any relevant aspects of the victim's overall physical appearance" (*id.*). Emotional trauma is not a factor in determining whether the victim has been disfigured (*see id.* at 316-317).

Even if the petitioner establishes the existence of an aggravating circumstance, euthanasia is not required (*see* Agriculture and Markets Law § 123 [3]). The Agriculture and Markets Law provides that the municipal court "*may* order humane euthanasia or permanent confinement of the dog if one of the . . . aggravating circumstances is established at the judicial hearing" (*id.* [emphasis added]). The language is permissive, not mandatory. Thus, even if an aggravating circumstance is established, the municipal court may direct appropriate measures—such as spaying, neutering, microchipping, or training as recommended by a veterinary expert—if the court deems such measures necessary and adequate for the protection of the public (*see* § 123 [2], [3]).

Here, the court repeatedly misstated the applicable law. Before the hearing commenced, the court stated that, if it determined Brady was a dangerous dog, the court had only "two options"— euthanasia or permanent confinement. After the hearing, before delivering its decision from the bench, the court stated that it "can" order euthanasia "upon a finding the dog is dangerous." Those statements are subtly different, and both are in error. As discussed above, mere dangerousness does not empower the court to order euthanasia or permanent confinement, which may be imposed only upon the establishment of an aggravating circumstance. Even where an aggravating circumstance is established, euthanasia and permanent confinement are not the court's only options (*see* Agriculture and

Markets Law § 123 [2], [3]). As a result of its mistaken understanding of the applicable law, the court ordered euthanasia without determining whether petitioner had established the existence of an aggravating circumstance and without considering other available relief.

We therefore modify County Court's order by vacating that part affirming the order of the Justice Court insofar as it directed that respondent's dog be euthanized, and we remit the matter to the Justice Court for a determination whether petitioner established the existence of an aggravating circumstance and for the imposition of remedial measures as permitted by statute and "as deemed appropriate under the circumstances" (Agriculture and Markets Law § 123 [2]).

Respondent's remaining contentions do not warrant reversal or further modification of County Court's order. Specifically, we conclude that respondent received proper notice of the proceeding (*see* Agriculture and Markets Law § 123 [2]) and that the court's determination is not against the weight of the evidence with respect to whether the dog bite constituted an attack (*see generally Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

561

KA 19-00111

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HANNAH L. JONES, DEFENDANT-APPELLANT.

CARR SAGLIMBEN LLP, OLEAN (JAY D. CARR OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered August 23, 2018. The judgment convicted defendant, upon her plea of guilty, of attempted burglary in the second degree.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

563

KA 19-00498

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CARRIEANN M. GILLIAM, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered December 13, 2018. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

564

KA 19-00499

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CARRIEANN M. GILLIAM, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered December 13, 2018. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the third degree.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

565

KA 19-00608

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CARRIEANN M. GILLIAM, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered December 13, 2018. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

566

KA 18-01261

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CODY JEFFORDS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered February 1, 2017. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of imprisonment of 19 years and five years of postrelease supervision, and as modified the judgment is 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 he did not validly waive his right to appeal. We agree. The better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*People v Thomas*, 34 NY3d 545, 567 [2019], citing NY Model Colloquies, Waiver of Right to Appeal, http://www.nycourts.gov/judges/cji/8-Colloquies/Waiver%20of%20Right%20to%20Appeal.pdf). Here, in describing the nature of defendant's right to appeal and the breadth of the waiver of that right, County Court incorrectly stated that defendant could not "appeal this case to a higher court; it would end here at the time of sentence" and that defendant was "waiving any appellate issues . . . [i.e.,] any and all legal issues." Although no "particular litany" is required for a waiver of the right to appeal to be valid (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Johnson* [appeal No. 1], 169 AD3d 1366, 1366 [4th Dept 2019], *lv denied* 33 NY3d 949 [2019]), defendant's waiver of the right to appeal was invalid because the court mischaracterized it as an "absolute bar" to the taking of an appeal (*Thomas*, 34 NY3d at 565).

Additionally, we are unable to determine whether the written

appeal waiver purportedly signed by defendant at the plea colloquy corrected any defects in the court's oral colloquy because it was not included in the record on appeal. In any event, "[t]he court did not inquire of defendant whether he understood the written waiver or whether he had even read the waiver before signing it" (*People v Bradshaw*, 18 NY3d 257, 262 [2011]; *see People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]).

Defendant contends that the court did not make an appropriate inquiry into his request for a substitution of counsel. Assuming, arguendo, that this contention is not foreclosed by his guilty plea because it "implicates the voluntariness of the plea" (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]), we nevertheless conclude that "defendant abandoned his request for new counsel when he 'decid[ed] . . . to plead guilty while still being represented by the same attorney' " (*People v Guantero*, 100 AD3d 1386, 1387 [4th Dept 2012], *lv denied* 21 NY3d 1004 [2013]; *see People v Coleman*, 178 AD3d 1377, 1378 [4th Dept 2019]; *People v Barr*, 169 AD3d 1427, 1427-1428 [4th Dept 2019], *lv denied* 33 NY3d 1028 [2019]).

We agree with defendant, however, that the 24-year determinate sentence is unduly harsh and severe considering, inter alia, defendant's background, genuine show of remorse, and lack of prior criminal history. Thus, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of imprisonment of 19 years and five years of postrelease supervision, which falls within the sentence range negotiated by the parties (*see* CPL 470.15 [6] [b]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

567

KA 17-01719

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARKILO HAYES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO 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 (Deborah A. Haendiges, J.), rendered April 28, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from two judgments entered in a single plea proceeding, each convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We note at the outset that we dismiss the appeal from the judgment in appeal No. 2 because defendant raises no contentions with respect thereto (*see People v White*, 173 AD3d 1852, 1852 [4th Dept 2019]; *People v Scholz*, 125 AD3d 1492, 1492 [4th Dept 2015], *lv denied* 25 NY3d 1077 [2015]).

With respect to appeal No. 1, defendant contends that his waiver of the right to appeal is invalid. We agree. "It is well settled that, for a waiver of the right to appeal to be valid, the plea minutes must establish that it was knowingly, voluntarily and intelligently entered" (*People v Ware*, 159 AD3d 1401, 1401 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]), and the court "must make certain that a defendant's understanding of the terms and conditions of a plea agreement is evident on the face of the record" (*People v Lopez*, 6 NY3d 248, 256 [2006]). Here, we agree with defendant that Supreme Court failed to ensure that he understood the rights he was surrendering. The court's initial explanation of the waiver of appeal and the written waivers suggested that defendant's waiver was intended to cover all waivable aspects of the conviction arising from both the 2015 and 2016 indictments (*see People v Kemp*, 94 NY2d 831, 833 [1999];

see also People v Sampson, 156 AD3d 1484, 1484 [4th Dept 2017], *lv denied* 31 NY3d 1017 [2018]). The prosecutor appeared to narrow the scope of the waiver, however, by stating during the court's explanation that the waiver "includes the pretrial suppression issue, specifically on the 2016 case," addressed at a "hearing . . . involving a vehicle stop in the Bennett High School parking lot where the gun was recovered," which suggested that the waiver of appeal would not include the pretrial suppression issue on the 2015 case. The court's repetition of the prosecutor's statements perpetuated the confusion, and we reject the People's contention that the written waivers clarified the court's oral colloquy.

Nevertheless, defendant's contention in appeal No. 1 that he was "unlawfully arrested in his home without an arrest warrant in violation of *Payton v New York* (445 US 573 [1980]) is unpreserved for our review inasmuch as he failed to raise it before [the court]" (*People v Britton*, 113 AD3d 1101, 1101 [4th Dept 2014], *lv denied* 22 NY3d 1154 [2014]; *see People v Smith*, 55 NY2d 888, 890 [1982]). We note that defendant failed to make the threshold demonstration of standing inasmuch as he failed to allege a privacy interest in the residence where the arrest occurred (*see generally People v Rodriguez*, 69 NY2d 159, 161-163 [1987]).

Finally, to the extent defendant contends in appeal No. 1 that he was denied effective assistance of counsel because his attorney failed to move to suppress his statements on the ground that they were "made after the warrantless arrest at [defendant's] residence," that contention does not survive defendant's guilty plea because he failed to demonstrate that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v VanVleet*, 140 AD3d 1633, 1633 [4th Dept 2016], *lv denied* 28 NY3d 938 [2016] [internal quotation marks omitted]; *see People v Russell*, 55 AD3d 1314, 1314 [4th Dept 2008], *lv denied* 11 NY3d 930 [2009]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

568

KA 17-01720

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARKILO HAYES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO 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 (Deborah A. Haendiges, J.), rendered April 28, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Hayes* ([appeal No. 1] — AD3d — [July 17, 2020] [4th Dept 2020]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

570

KA 17-00077

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARIEN J. MCMILLIAN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DANIELLE C. WILD 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 (William K. Taylor, J.), rendered October 17, 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 agree with defendant that his waiver of the right to appeal is invalid. The written waiver of the right to appeal signed by defendant and the verbal waiver colloquy conducted by Supreme Court (Moran, J.) together improperly characterized the waiver as "an absolute bar to the taking of a direct appeal and the loss of attendant rights to counsel and poor person relief," as well as to "all postconviction relief separate from the direct appeal" (*People v Thomas*, 34 NY3d 545, 565 [2019]).

Defendant failed to preserve for our review his contention that his plea was not voluntarily, knowingly, or intelligently entered inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction pursuant to CPL article 440 (*see People v Jimenez*, 177 AD3d 1326, 1326 [4th Dept 2019], *lv denied* 34 NY3d 1078 [2019]; *People v Reddick*, 175 AD3d 1788, 1789 [4th Dept 2019], *lv denied* 34 NY3d 1162 [2020]). This case does not fall within the narrow exception to the preservation requirement inasmuch as defendant's contention is premised on a possible justification defense to which defendant alluded in statements he made during the preparation of the presentence report (*see People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]; *see also People v Garcia-Cruz*, 138 AD3d 1414, 1414-1415 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]). Finally,

the sentence is not unduly harsh or severe.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

578

CAF 19-00905

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

IN THE MATTER OF JULIANNE MARIE COUSINEAU,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FRANK STEVEN RANIERI, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Onondaga County (William W. Rose, R.), entered April 22, 2019 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: Respondent appeals from an order of protection issued in a proceeding pursuant to Family Court Act article 8 upon a finding that he committed family offenses against petitioner. The family offenses occurred during the time when petitioner sought to break off a five-year relationship with respondent and have him move out of her residence. Contrary to respondent's contention, reversal is not mandated on the ground that Family Court based its determination, in part, on incidents not alleged in the petition. Inasmuch as respondent has failed to make any showing of prejudice, we exercise our discretion pursuant to CPLR 3025 (c) to deem the petition amended to conform to the proof presented at the hearing (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Matter of Pittsford Gravel Corp. v Zoning Bd. of Town of Perinton*, 43 AD2d 811, 812 [4th Dept 1973], *lv denied* 34 NY2d 618 [1974]; *Harbor Assoc. v Asheroff*, 35 AD2d 667, 668 [2d Dept 1970], *lv denied* 27 NY2d 490 [1970]; *see also Matter of Oksoon K. v Young K.*, 115 AD3d 486, 487 [1st Dept 2014], *lv denied* 24 NY3d 902 [2014], *rearg denied* 24 NY3d 1029 [2014]).

The record supports the court's determination that petitioner met her burden of establishing by a preponderance of the evidence that respondent committed the family offense of harassment in the second degree (Penal Law § 240.26 [1]; *cf. Matter of Marquardt v Marquardt*, 97 AD3d 1112, 1113-1114 [4th Dept 2012]). Petitioner testified that respondent pushed her twice during an argument, and respondent himself admitted one of the pushes. The record further supports the court's determination that respondent committed the family offense of stalking

in the fourth degree (§ 120.45 [1]) by engaging in a course of conduct he should have reasonably known would likely cause reasonable fear of material harm to the physical health, safety, or property of petitioner. Evidence supporting the course of conduct included testimony that respondent twice violated a temporary order of protection issued by the court, that he pushed petitioner down on a bed to kiss her, and that he threatened to burn down petitioner's house and to beat her physically to the point that she would require hospitalization.

We agree with respondent that petitioner's testimony of the above verbal threats, without more, cannot establish that he committed the family offense of menacing in the third degree (Penal Law § 120.15) inasmuch as the statute "requires 'physical menace' " (*Matter of Akheem B.*, 308 AD2d 402, 403 [1st Dept 2003], *lv denied* 1 NY3d 506 [2004]). We nevertheless conclude that the course of conduct supporting the determination that respondent committed stalking in the fourth degree also supports the determination that respondent committed the family offense of menacing in the second degree (§ 120.14 [2]). The fact that petitioner was placed in " 'reasonable fear of physical injury' " by respondent's course of conduct "can readily be inferred from [the] conduct and the . . . circumstances" surrounding the dissolution of the parties' relationship (*People v Ullah*, 130 AD3d 759, 760 [2d Dept 2015], *lv denied* 26 NY3d 1043 [2015]).

In light of the evidence supporting the three family offenses, petitioner established that an order of protection in her favor was warranted (*see* Family Ct Act § 812 [1]). Contrary to respondent's final contention, we conclude that the court did not abuse its discretion in issuing the order of protection for a duration of two years (*see* §§ 841 [d]; 842; *see generally Matter of Beck v Butler*, 87 AD3d 1410, 1411 [4th Dept 2011], *lv denied* 18 NY3d 801 [2011]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

579

CAF 19-01556

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

IN THE MATTER OF SCOTT W. DAVIS,
PETITIONER-APPELLANT,

V ORDER

LINDA S. BURTON, RESPONDENT-RESPONDENT.

TRACY L. PUGLIESE, CLINTON, FOR PETITIONER-APPELLANT.

DANIEL M. GRIEBEL, TONAWANDA, FOR RESPONDENT-RESPONDENT.

ROBERT C. BALDWIN, BARNEVELD, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Herkimer County (John J. Brennan, J.), dated April 4, 2019 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

582

CA 19-00899

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

DAVID M. BONCZAR, PLAINTIFF-APPELLANT,

V ORDER

AMERICAN MULTI-CINEMA, INC., DOING BUSINESS AS AMC THEATRES WEBSTER 12 (AS SUCCESSOR IN INTEREST TO LOEWS BOULEVARD CINEMAS, INC., FORMERLY KNOWN AS LOEW'S BOULEVARD CORPORATION AND/OR LOEWS THEATER MANAGEMENT CORP.), DEFENDANT-RESPONDENT.

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

RUSSO & TONER, LLP, NEW YORK CITY (JOSH H. KARDISCH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 25, 2019. The judgment, entered upon a jury verdict in favor of defendant, dismissed plaintiff's complaint.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

587

CA 19-01230

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF EDWARD T., CONSECUTIVE NO. 345241, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER, PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (STEVEN J. HUNTZINGER OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Oneida County Court (Michael L. Dwyer, J.), entered May 14, 2019 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, continued petitioner's confinement to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order of County Court, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]). We affirm.

We reject petitioner's contention that the evidence is legally insufficient to establish that he is a dangerous sex offender requiring confinement. Pursuant to the Mental Hygiene Law, a person may be found to be a dangerous sex offender requiring confinement if that person "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control [his or her] behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]). The Mental Hygiene Law defines a mental abnormality as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that

results in that person having serious difficulty in controlling such conduct" (§ 10.03 [i]).

Here, viewing the evidence in the light most favorable to respondent (*see Matter of State of New York v John S.*, 23 NY3d 326, 348 [2014]), we conclude that it is legally sufficient to establish by clear and convincing evidence " 'the predisposition prong of the mental abnormality test' " (*Matter of State of New York v Anthony B.*, 180 AD3d 688, 691 [2d Dept 2020]; *see also Matter of Vega v State of New York*, 140 AD3d 1608, 1608-1609 [4th Dept 2016]). Respondent's expert diagnosed petitioner with pedophilic disorder, zoophilia, alcohol use disorder, and cannabis use disorder, which, when viewed in combination, predisposed petitioner to commit sex offenses and were sufficiently connected to his sex offending behavior (*see Matter of State of New York v Richard TT.*, 132 AD3d 72, 76-77 [3d Dept 2015], *affd* 27 NY3d 718 [2016], *cert denied* — US — , 137 S Ct 836 [2017]; *Matter of State of New York v Peters*, 144 AD3d 1654, 1654-1655 [4th Dept 2016]). We reject petitioner's argument that any failure by respondent's expert to adhere strictly to each criterion listed in the Diagnostic and Statistical Manual of Mental Disorders rendered her diagnosis of pedophilic disorder insufficient to support the court's determination (*see generally Peters*, 144 AD3d at 1655; *Matter of State of New York v Pierce*, 79 AD3d 1779, 1780 [4th Dept 2010], *lv denied* 16 NY3d 712 [2011]).

We further conclude that the evidence is legally sufficient to establish by clear and convincing evidence that petitioner has "serious difficulty in controlling" his sexual conduct (Mental Hygiene Law § 10.03 [i]; *see Matter of State of New York v James R.C.*, 165 AD3d 1612, 1613 [4th Dept 2018]; *Matter of Allan M. v State of New York*, 163 AD3d 1493, 1494 [4th Dept 2018], *lv denied* 32 NY3d 908 [2018]). Respondent established that petitioner has made very little progress in sex offender treatment based on his sporadic attendance and superficial participation. In general, petitioner has shown a lack of interest in meaningfully discussing his prior offenses and has not been able to develop insight into his offense cycle (*see Allan M.*, 163 AD3d at 1494; *Matter of Pierce v State of New York*, 148 AD3d 1619, 1621 [4th Dept 2017]).

Respondent's expert also established that by not understanding his sex offense cycle and by failing to create a relapse prevention plan, petitioner did not reduce the risk that he would reoffend (*see Matter of Billinger v State of New York*, 137 AD3d 1757, 1758 [4th Dept 2016], *lv denied* 27 NY3d 911 [2016]). For that and the aforementioned reasons, we also conclude that respondent met its burden of establishing that petitioner has "such an inability to control [his] behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.03 [e]; *see generally Matter of State of New York v Michael M.*, 24 NY3d 649, 658-659 [2014]).

Finally, we conclude that the court's determination is not against the weight of the evidence because there is "no basis to

disturb [the court's] decision to credit the testimony of [respondent's] expert over that of [petitioner's expert]" (*Matter of State of New York v Connor*, 134 AD3d 1577, 1578 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016] [internal quotation marks omitted]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

588.3

KA 18-02222

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V ORDER

RICKY B. WOODS, DEFENDANT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered November 30, 2017. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, kidnapping in the second degree and criminal possession of a weapon in the second degree.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

590

TP 20-00003

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

IN THE MATTER OF DAVIDE COGGINS, 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 December 26, 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: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

592

KA 17-01490

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAQUEY BRIDGES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered July 28, 2017. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). The case arose from an incident outside a nightclub in which the victim sustained a fatal gunshot wound to the chest. Just prior to the shooting, spectators had gathered around a fistfight involving the victim. After shots were fired, the spectators fled on foot. Video footage from outside the club appears to depict defendant fleeing while carrying an object in each hand. The object in his left hand appears to be a cell phone, while the object in his right hand is consistent with a handgun. At trial, an eyewitness testified that defendant ran past him with a chrome gun clasped in his hands. Another witness testified that he had been in jail with defendant, and that defendant confessed to him that he was guilty of committing the murder.

Defendant contends that the verdict is against the weight of the evidence. 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]), and according deference to the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 644 [2006]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that County Court erred in denying his

application pursuant to *Batson v Kentucky* (476 US 79 [1986]) because the prosecutor failed to offer a race-neutral reason at step two of the *Batson* inquiry (*see People v Pescara*, 162 AD3d 1772, 1774 [4th Dept 2018]). We reject that contention. "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' " (*People v Smouse*, 160 AD3d 1353, 1355 [4th Dept 2018]). Here, the prosecutor stated that she peremptorily struck the juror in question because he had been prosecuted by her office previously, and because he failed to disclose any history of prior arrests or convictions during voir dire. Although defendant contends that the juror had, in fact, accurately disclosed that information, we conclude that the prosecutor offered at least one race-neutral reason, i.e., that the juror had been prosecuted by her office previously (*see People v Knowles*, 79 AD3d 16, 19-20 [3d Dept 2010], *lv denied* 16 NY3d 896 [2011]; *People v McCoy*, 266 AD2d 589, 591 [3d Dept 1999], *lv denied* 94 NY2d 905 [2000]).

Contrary to defendant's additional contention, the court did not abuse its discretion in denying him access to certain mental health records of a witness after reviewing those records in camera. "[C]onfidential psychiatric records should be disclosed only when their confidentiality is significantly outweighed by the interests of justice" (*People v Fullen*, 133 AD3d 1235, 1236 [4th Dept 2015], *lv denied* 27 NY3d 997 [2016] [internal quotation marks omitted]; *see People v Toledo*, 270 AD2d 805, 806 [4th Dept 2000], *lv denied* 95 NY2d 858 [2000]). On the record before us, we conclude that defendant failed to establish that his need for the records outweighed the need to preserve their confidentiality (*see Toledo*, 270 AD2d at 806). We similarly reject defendant's further contention that the court erred in refusing to subpoena additional mental health records of the same witness. "Inasmuch as the records [in question] pertain solely to the credibility of [that] witness, the court did not abuse its discretion in denying defendant's subpoena request" with respect to them (*People v Robinson*, 112 AD3d 1349, 1350 [4th Dept 2013], *lv denied* 23 NY3d 1042 [2014]; *see People v Gissendanner*, 48 NY2d 543, 548 [1979]).

Defendant failed to preserve his challenge to the admission of alleged hearsay testimony because he failed to object on the specific grounds he now raises on appeal (*see People v Reibel*, 181 AD3d 1268, 1269 [4th Dept 2020]). 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]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

594

KA 19-00377

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

REGINALD BOYKINS, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Yates County Court (William F. Kocher, A.J.), rendered September 25, 2018. Defendant was resentenced upon his conviction of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

597

KA 19-00108

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MONTREAL HERNANDEZ, DEFENDANT-APPELLANT.

ANDREW G. MORABITO, EAST ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered September 26, 2018. The judgment convicted defendant upon a plea of guilty of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that Supreme Court erred in accepting his plea. We agree. Although we agree with the People that defendant failed to preserve his contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Rosario*, 166 AD3d 1498, 1498 [4th Dept 2018]), this case nevertheless falls within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]; *Rosario*, 166 AD3d at 1498). Where a defendant's recitation of the facts "negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that [the] defendant understands the nature of the charge and that the plea is intelligently entered" (*Lopez*, 71 NY2d at 666; *see People v Homer*, 233 AD2d 934, 935 [4th Dept 1996]; *People v Freville*, 226 AD2d 1100, 1100-1101 [4th Dept 1996]; *see generally People v Mox*, 20 NY3d 936, 938-939 [2012]).

Here, defendant's factual recitation negated at least one element of the crime. Specifically, defendant negated the "intent to commit a crime therein" element of burglary (Penal Law § 140.25) because his factual recitation contradicted any allegation that "he intended to commit a crime in the apartment other than his trespass" (*People v*

Lewis, 5 NY3d 546, 552 [2005]; *see* § 140.25). Criminal trespass in the second degree "cannot itself be used as the sole predicate crime in the 'intent to commit a crime therein' element of burglary" (*Lewis*, 5 NY3d at 551). The court thus had a duty to conduct an inquiry to ensure that defendant understood the nature of the crime (*see Lopez*, 71 NY2d at 666). Instead, the court stated, "I just want to make sure . . . [that] you still accept [the plea deal], because you have an absolute right to go to trial . . . I think you understand . . . [t]hat your defense of you going to the bathroom may be a difficult sell to a jury." Because that minimal inquiry by the court did not clarify the nature of the crime in order to ensure that the plea was intelligently entered, the court erred in accepting the guilty plea. We therefore reverse the judgment, vacate the plea, and remit the matter to Supreme Court for further proceedings on the indictment (*see Rosario*, 166 AD3d at 1499).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

602

CA 19-00365

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF STEVEN M., CONSECUTIVE NO. 549617, FROM
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO
MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered January 18, 2019 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, continued petitioner’s commitment to a secure treatment facility.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

610

KA 16-01622

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CARLOS E. MARQUEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered July 26, 2016. The judgment convicted defendant, upon a plea of guilty, of robbery in the first degree and robbery in the second degree.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

612

KA 18-00849

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZACHERY AROIX, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 16, 2018. The judgment convicted defendant, upon a plea of guilty, of attempted murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). Preliminarily, we note that defendant's waiver of the right to appeal is invalid (*see People v Cole*, 181 AD3d 1329, 1330 [4th Dept 2020]; *People v Alston*, 163 AD3d 843, 844-845 [2d Dept 2018], *lv denied* 32 NY3d 1062 [2018]). Contrary to defendant's contention on the merits, however, County Court did not abuse its discretion in declining to grant him youthful offender status (*see People v Nicorvo* [appeal No. 2], 177 AD3d 1408, 1409 [4th Dept 2019]), and we decline to exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see id.*). Any misconception by the court during the plea hearing regarding defendant's eligibility for youthful offender status was rectified at sentencing, during which the court explicitly found that defendant was eligible for youthful offender treatment and articulated the correct legal standard in declining to exercise its discretion to afford him such treatment (*cf. People v Dhillon*, 143 AD3d 734, 734-736 [2d Dept 2016]; *People v Crimm*, 140 AD3d 1672, 1673-1674 [4th Dept 2016]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

613

KA 18-01870

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MOLLIE PIERCE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY 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 (Gordon J. Cuffy, A.J.), rendered May 3, 2018. The judgment convicted defendant, upon her plea of guilty, of identity theft in the first degree and endangering the welfare of an incompetent or physically disabled person in the first degree.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

615

KA 18-02411

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JODIE L. ROMEISER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered December 18, 2018. The judgment convicted defendant upon a jury verdict of assault in the third 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 and on the law, the indictment is dismissed and the matter is remitted to Ontario County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting her upon a jury verdict of two counts of assault in the third degree (Penal Law § 120.00 [2]), defendant contends that the conviction is not supported by legally sufficient evidence with respect to the element of recklessness. Defendant failed to preserve that contention for our review, however, "because [her] motion for a trial order of dismissal 'was not specifically directed at the ground[] advanced on appeal' " (*People v Johnson*, 78 AD3d 1548, 1548 [4th Dept 2010], *lv denied* 16 NY3d 743 [2010]; *see People v Hawkins*, 11 NY3d 484, 492 [2008]; *People v Gray*, 86 NY2d 10, 19 [1995]). We nevertheless exercise our power to review her challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We agree with defendant that the conviction of both counts of assault in the third degree is not supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The evidence submitted by the People is insufficient to establish that defendant acted recklessly, "i.e., that [s]he perceived a substantial and unjustifiable risk of [injury] and that [her] conscious disregard of that risk constituted a gross deviation from the standard of conduct that a reasonable person would observe in that situation"

(*People v Roth*, 256 AD2d 1206, 1207 [4th Dept 1998]; *see* Penal Law § 15.05 [3]; *cf. People v Crosby*, 151 AD3d 1184, 1187-1188 [3d Dept 2017]; *People v Miller*, 286 AD2d 981, 981 [4th Dept 2001], *lv denied* 97 NY2d 657 [2001]).

Defendant's remaining contentions are academic in light of our determination.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

617

KA 19-00215

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAQUAN COBB, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered June 27, 2017. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment, rendered upon a jury verdict, convicting defendant of promoting prison contraband in the first degree (Penal Law § 205.25 [2]). We agree with defendant that County Court erred in denying defendant's challenge for cause to prospective juror number 6 (prospective juror).

"It is well established that 'prospective jurors who give some indication of bias but do not provide an unequivocal assurance of impartiality must be excused for cause' " (*People v Hernandez*, 174 AD3d 1352, 1353 [4th Dept 2019], quoting *People v Nicholas*, 98 NY2d 749, 750 [2002]; *see People v Arnold*, 96 NY2d 358, 362 [2001]; *People v Johnson*, 94 NY2d 600, 614 [2000]). Here, the prospective juror gave "some indication of bias" (*Nicholas*, 98 NY2d at 750) by stating that her friendship with a prosecution witness "might" "affect [her] ability to be fair and impartial in this case" and that serving as a juror "might be awkward" in light of that friendship (*see People v Malloy*, 137 AD3d 1304, 1305 [2d Dept 2016], *lv dismissed* 27 NY3d 1135 [2016]; *People v Walton*, 51 AD3d 1148, 1148 [3d Dept 2008]; *People v Moorer*, 77 AD2d 575, 576 [2d Dept 1980]; *cf. People v Collazo*, 294 AD2d 102, 103 [1st Dept 2002], *lv denied* 98 NY2d 767 [2002]).

Contrary to the court's determination, the prospective juror did not give an unequivocal assurance of impartiality by merely stating, during follow-up questioning, that she would not feel compelled to "answer" to the witness for her verdict. The fact that a prospective

juror would not feel compelled to answer to another person for their verdict does not necessarily mean that such prospective juror "can be *fair*" (*Arnold*, 96 NY2d at 362 [emphasis added]). Indeed, a person could be unable to judge a case impartially while simultaneously being confident that he or she would not have to answer for the verdict to any other person. Thus, the prospective juror's assurances that she would not feel compelled to answer to the witness for her verdict does not constitute the unequivocal assurance of impartiality required by law.

Inasmuch as defendant peremptorily challenged the prospective juror and thereafter exhausted all available peremptory challenges, we must reverse the judgment and grant defendant a new trial (*see* CPL 270.20 [2]; *People v Mateo*, 21 AD3d 1392, 1392-1393 [4th Dept 2005]). Defendant's remaining contentions are academic in light of our determination.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

618

KA 18-00262

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES W. SCHILLING, II, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (KAITLYNN E. SCHMIT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered November 3, 2017. The judgment convicted defendant upon a jury verdict of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). The case arises from two incidents in 2015. On November 16, defendant appeared at the bedside of the victim, his girlfriend, while she was sleeping and startled her awake. Defendant told her to be quiet so as not to wake her father. They left the home of the victim and her father and got into the victim's truck. While the victim drove, defendant repeatedly asked the victim if she had made a pornographic video. Each time that she denied it, he struck her. During the incident, defendant struck the victim in the eye, nose, and lip, and he bit her arm. After the incident, the victim sought medical attention for her injuries. Photos of the injuries were received in evidence at trial. On November 26, defendant appeared at the victim's porch while her father was away. After trying to smash in the front door, defendant gained access to the home by kicking down a door to the garage. Defendant again accused the victim of making a pornographic video. The victim retrieved a gun and, when defendant went into her bedroom to get her computer, she fled. Defendant pursued her outside and, during the ensuing chase, the victim fell. With defendant bearing down on her, she shot him in the leg. A grand jury indicted defendant on a count of criminal trespass in the second degree (§ 140.15 [1]) for the November 16 incident and on a count of burglary in the second degree for the November 26 incident. After trial, the jury acquitted defendant of the former count, but convicted him of the latter count.

Defendant contends that he was denied his right to be present at all material stages of the trial because the record does not establish that he was present for sidebar conferences during jury selection. We reject that contention. " '[A] sidebar interview that concerns a juror's background, bias or hostility, or ability to weigh the evidence objectively is a material stage of trial at which a defendant has a right to be present . . . , and a waiver by defendant [of that right] will not be inferred from a silent record' " (*People v Cohen*, 302 AD2d 904, 905 [4th Dept 2003]; *see* CPL 260.20; *People v Antommarchi*, 80 NY2d 247, 250 [1992], *rearg denied* 81 NY2d 759 [1992]). " 'There is[, however,] a presumption of regularity that attaches to judicial proceedings, and that presumption may be overcome only by substantial evidence to the contrary' " (*People v Hawkins*, 113 AD3d 1123, 1125 [4th Dept 2014], *lv denied* 22 NY3d 1156 [2014]; *see People v Velasquez*, 1 NY3d 44, 48 [2003]). We conclude that defendant failed to overcome the presumption of regularity with substantial evidence of his absence from the sidebar conferences in question because the record establishes that he was present at the beginning of jury selection and there is no indication that he was absent from those sidebar conferences (*see Hawkins*, 113 AD3d at 1125).

We reject defendant's contention that evidence was admitted in violation of *People v Molineux* (168 NY 264 [1901]). The victim's testimony concerning defendant's prior conduct and the photographs depicting the injuries that she sustained during the November 16 incident were relevant to establish that, when defendant entered the home on November 26, he "inten[ded] to commit a crime therein" (Penal Law § 140.25; *see generally People v Alvino*, 71 NY2d 233, 241-242 [1987]). We reject defendant's related contention that he was denied effective assistance of counsel. Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence because his motion for a trial order of dismissal was not specifically directed at the alleged error (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we " 'necessarily review the evidence adduced as to each of the elements of the crime[] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Cartagena*, 149 AD3d 1518, 1518 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017], *reconsideration denied* 30 NY3d 1018 [2017]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

623

CA 19-00281

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

A.J.R. EQUITIES, INC., ET AL., PLAINTIFFS,

V ORDER

SCOUT CONSTRUCTION MANAGEMENT, LLC, ET AL.,
DEFENDANTS.

SCOUT CONSTRUCTION MANAGEMENT, LLC,
THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT,

V

JILL FUDO, THIRD-PARTY
DEFENDANT-APPELLANT-RESPONDENT,
ET AL., THIRD-PARTY DEFENDANT.
(APPEAL NO. 1.)

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 24, 2019. The order, among other things, granted in part and denied in part the motion of third-party defendant Jill Fudo to dismiss the third-party complaint against her.

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: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

624

CA 19-02133

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

CHRISTINE WAGNER, PLAINTIFF-APPELLANT,

V ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a statement for judgment of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered July 30, 2019. The statement for judgment awarded plaintiff money damages upon a nonjury verdict.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

628

CA 19-01285

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

A.J.R. EQUITIES, INC., ET AL., PLAINTIFFS,

V ORDER

SCOUT CONSTRUCTION MANAGEMENT, LLC, ET AL.,
DEFENDANTS.

SCOUT CONSTRUCTION MANAGEMENT, LLC, THIRD-PARTY
PLAINTIFF-APPELLANT,

V

JILL FUDO, THIRD-PARTY DEFENDANT-RESPONDENT,
ET AL., THIRD-PARTY DEFENDANT.
(APPEAL NO. 2.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered July 3, 2019. The order denied the motion of third-party plaintiff for leave to reargue and renew its opposition to third-party defendant Jill Fudo's motion to dismiss the third-party complaint against her.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]) and the order is affirmed without costs.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

631

KA 16-01367

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS GONZALEZ, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK 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 (Anthony F. Aloi, J.), rendered August 1, 2016. The appeal was held by this Court by order entered April 26, 2019, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (171 AD3d 1502 [4th Dept 2019]). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court to make and state for the record a determination of whether defendant is a youthful offender (*People v Gonzalez*, 171 AD3d 1502, 1503 [4th Dept 2019]; *see generally People v Middlebrooks*, 25 NY3d 516, 525-527 [2015]). On remittal, the court denied defendant youthful offender treatment. Specifically, the court found no mitigating circumstances that bore directly on the manner in which the crime was committed and, therefore, defendant was not an eligible youth upon his conviction of assault in the first degree (Penal Law § 120.10 [1]), an offense in which he was the sole participant (*see* CPL 720.10 [2] [a] [ii]; [3]; *People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]). The court did not thereby abuse its discretion (*see People v Agee*, 140 AD3d 1704, 1704 [4th Dept 2016], *lv denied* 28 NY3d 925 [2016]).

We agree with defendant that his waiver of the right to appeal is invalid inasmuch as there is no indication that the court obtained a knowing and voluntary waiver of that right at the time defendant entered the plea (*see People v Carroll*, 148 AD3d 1546, 1546-1547 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]). Here, the oral colloquy with respect to the purported waiver occurred at sentencing (*see People v Brown*, 148 AD3d 1562, 1562-1563 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *People v Sims*, 129 AD3d 1509, 1510 [4th Dept 2015],

lv denied 26 NY3d 935 [2015]) and, although the written waiver bears the same date as the plea proceeding, the court did not obtain from defendant an acknowledgment that he had signed it or that he was aware of and understood its contents (*see People v McIlwain*, 158 AD3d 1177, 1177-1178 [4th Dept 2018]; *People v Hibbard*, 148 AD3d 1538, 1539 [4th Dept 2017]). Moreover, we note that the written waiver is inadequate inasmuch as it did not distinguish the right to appeal from the other rights given up when pleading guilty (*see People v Norton*, 96 AD3d 1651, 1652 [4th Dept 2012], *lv denied* 19 NY3d 999 [2012]).

Nevertheless, the sentence is not unduly harsh or severe.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

635

KA 18-01709

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KRISTINA GREGORY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EDWARD P. DUNN OF COUNSEL), FOR DEFENDANT-APPELLANT.

KRISTINA GREGORY, DEFENDANT-APPELLANT PRO SE.

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 January 19, 2018. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree, assault in the second degree (two counts), unlawful imprisonment in the first degree, grand larceny in the fourth degree, menacing in the second degree and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of, inter alia, two counts of assault in the second degree (Penal Law § 120.05 [2], [6]). As defendant contends in her main brief and the People correctly concede, defendant did not validly waive her right to appeal because County Court's oral colloquy conflated the right to appeal with those rights automatically forfeited by the guilty plea (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Rogers*, 159 AD3d 1558, 1558-1559 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]). Nevertheless, we reject defendant's contention in her main and pro se supplemental briefs that the sentence is unduly harsh and severe.

Finally, we have considered the remaining contentions in defendant's pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

636

KA 18-00619

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEFAN HILL, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EDWARD P. DUNN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered November 27, 2017. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

638

KA 16-01589

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEYMOUR S. ATKINSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Erie County Court (David W. Foley, A.J.), rendered September 6, 2016. The judgment convicted defendant upon a plea of guilty of assault in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [7]). In appeal No. 2, defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of a weapon in the second degree (§ 265.03 [3]). We affirm in each appeal.

Defendant contends in appeal No. 2 that County Court erred in refusing to suppress a pistol seized after he was pursued by police officers. We reject that contention. Based upon defendant's physical and temporal proximity to the scene of the reported shooting incident and the fact that defendant's physical characteristics and clothing matched the description of one of the individuals involved in the incident, we conclude that the officers had a founded suspicion that criminal activity was afoot, thereby justifying their initial common-law inquiry of defendant (*see People v Gayden*, 126 AD3d 1518, 1518 [4th Dept 2015], *affd* 28 NY3d 1035 [2016]; *People v McKinley*, 101 AD3d 1747, 1748 [4th Dept 2012], *lv denied* 21 NY3d 1017 [2013]; *see generally People v De Bour*, 40 NY2d 210, 223 [1976]). Contrary to defendant's contention, the court properly determined that the officers thereafter had the requisite reasonable suspicion to pursue and detain him based on the combination of the abovementioned specific circumstances indicating that defendant may have been engaged in criminal activity and his flight in response to the approach by the

officers (*see People v Parker*, 32 NY3d 49, 56-57 [2018]; *Gayden*, 126 AD3d at 1518; *People v Nance*, 148 AD3d 1566, 1567 [4th Dept 2017], *lv denied* 29 NY3d 1084 [2017]).

We also reject defendant's contention in appeal No. 2 that the court erred in granting the People's request at the charge conference that the court consider accessorial liability. "An indictment charging a defendant as a principal is not unlawfully amended by the admission of proof and instruction to the [factfinder] that a defendant is additionally charged with acting-in-concert to commit the same crime, nor does it impermissibly broaden a defendant's basis of liability, as there is no legal distinction between liability as a principal or criminal culpability as an accomplice" (*People v Rivera*, 84 NY2d 766, 769 [1995]; *see People v Duncan*, 46 NY2d 74, 79-80 [1978], *rearg denied* 46 NY2d 940 [1979], *cert denied* 442 US 910 [1979], *rearg dismissed* 56 NY2d 646 [1982]; *People v Gigante*, 212 AD2d 1049, 1049 [4th Dept 1995], *lv denied* 85 NY2d 909 [1995]). Here, by determining that it would consider accessorial liability, the court "did not introduce any new theory of culpability into the case that was inconsistent with that in the indictment, and thus [defendant's] indictment as a principal provided him with fair notice of the charge against him" (*People v Young*, 55 AD3d 1234, 1235 [4th Dept 2008], *lv denied* 11 NY3d 901 [2008]; *see Rivera*, 84 NY2d at 770-771). Contrary to defendant's assertion, we conclude that the evidence presented at trial supports a charge based on accessorial liability, and thus the court did not err in granting the People's request to consider that theory (*see People v Guitierrez*, 74 AD3d 1834, 1834 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]; *People v Usera*, 233 AD2d 270, 270 [1st Dept 1996], *lv denied* 89 NY2d 989 [1997]).

Defendant further contends in appeal No. 2 that the verdict is against the weight of the evidence. That contention lacks merit. Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]), it cannot be said that the court failed to give the evidence the weight it should be accorded (*see People v Jackson*, 162 AD3d 1567, 1567 [4th Dept 2018], *lv denied* 32 NY3d 938 [2018]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, by failing to move to withdraw the plea or vacate the judgment of conviction, defendant failed to preserve for our review his challenges to the voluntariness of the plea in appeal No. 1 (*see People v McCracken*, 138 AD3d 1147, 1147 [2d Dept 2016], *lv denied* 27 NY3d 1135 [2016]; *see generally People v Delorbe*, 35 NY3d 112, — [2020]). In any event, defendant's challenges are without merit inasmuch as the record establishes that the plea was knowingly, intelligently and voluntarily entered (*see People v Scott*, 151 AD3d 1702, 1702 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]; McCracken, 138 AD3d at 1147).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

639

KA 16-01590

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEYMOUR S. ATKINSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Erie County Court (David W. Foley, A.J.), rendered September 6, 2016. The judgment convicted defendant upon a nonjury verdict of criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Atkinson* ([appeal No. 1] — AD3d — [July 17, 2020] [4th Dept 2020]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

640

KA 18-01266

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVANTE SPENCER, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, SPECIAL PROSECUTOR, ROCHESTER (WENDY LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered December 20, 2017. The judgment convicted defendant upon a jury verdict of gang assault in the first degree, assault in the first degree and promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of gang assault in the first degree (Penal Law § 120.07), assault in the first degree (§ 120.10 [1]), and promoting prison contraband in the first degree (§ 205.25 [2]). Although defendant was offered the opportunity to plead guilty to one count of assault in the second degree in exchange for a determinate term of seven years' incarceration to run concurrently to the much longer sentence that he was already serving, defendant rejected that offer. After trial, defendant was sentenced to a combination of consecutive and concurrent sentences that aggregated to 23 to 26 years of incarceration, to run *consecutively* to any undischarged term of incarceration.

Defendant contends that the jury instruction on accessorial liability given by County Court failed to convey that it applied to the count of assault in the first degree instead of the count of promoting prison contraband in the first degree. By failing to object to the "jury charge as given," however, defendant failed to preserve his contention for our review (*People v Clark*, 142 AD3d 1339, 1340 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]; *see People v Keegan*, 133 AD3d 1313, 1315 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]; *see generally* CPL 470.05 [2]). In any event, we conclude that "the charge as a whole adequately conveyed to the jury the appropriate standards"

(*People v Adams*, 69 NY2d 805, 806 [1987]) and did not otherwise change the prosecutor's theory of the case (*see generally People v Rivera*, 84 NY2d 766, 769 [1995]; *People v Duncan*, 46 NY2d 74, 79-80 [1978]).

We reject defendant's further contention that the court erred in refusing his request for a substitution of assigned counsel. The court fulfilled its duty to inquire into those complaints about defense counsel that were supported by sufficiently specific factual allegations and were of sufficient seriousness (*see generally People v Porto*, 16 NY3d 93, 99-100 [2010]; *People v Medina*, 44 NY2d 199, 207 [1978]) and did not abuse its discretion in determining that defendant had not established "good cause for substitution" (*People v Sides*, 75 NY2d 822, 824 [1990]). Defendant's remaining complaints consisted of vague and conclusory allegations of conflicts and disagreements with defense counsel that were "not sufficiently specific to require a minimal inquiry by the court, and certainly did not warrant a grant of his [request]" (*Porto*, 16 NY3d at 101).

Defendant next contends that his attorney was ineffective in failing to, among other things, adequately communicate with him about the People's plea offer. That contention involves "discussions between defendant and his attorney outside the record on appeal, and it must therefore be raised by way of a motion pursuant to CPL 440.10" (*People v Manning*, 151 AD3d 1936, 1938 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]; *see People v Dale*, 142 AD3d 1287, 1290 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]; *People v Stachnik*, 101 AD3d 1590, 1591 [4th Dept 2012], *lv denied* 20 NY3d 1104 [2013]). Although defendant has a variety of other complaints about defense counsel's performance at trial, viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

641

KA 18-01265

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIHEEM SWIFT, DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, 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 March 30, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

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

The evidence at the suppression hearing established that a police officer stopped the vehicle that defendant was driving after observing that its rear driver's side window was tinted in violation of Vehicle and Traffic Law § 375 (12-a) (b) (3). After speaking with defendant and having him step out of the vehicle, the police officer (first officer) learned that another police officer had observed a handgun behind the driver's seat on the floor of the passenger compartment through the partially lowered rear driver's side window. After restraining defendant, the first officer confirmed, through the partially open window, that there was a gun on the floor behind the driver's seat. After the stop, the first officer confirmed that the window tint was unlawful by using his personal tint meter. The handgun was thereafter seized from the vehicle.

We reject defendant's contention that the vehicle stop was invalid. It is well settled "that the police may lawfully stop a vehicle for a traffic infraction of excessively tinted windows" (*People v Collins*, 105 AD3d 1378, 1379 [4th Dept 2013], *lv denied* 21 NY3d 1003 [2013]; *see People v Estrella*, 48 AD3d 1283, 1285 [4th Dept 2008], *affd*

10 NY3d 945 [2008], *cert denied* 555 US 1032 [2008]; *People v Bacquie*, 154 AD3d 648, 649 [2d Dept 2017], *lv denied* 30 NY3d 1113 [2018], *cert denied* — US — , 139 S Ct 102 [2018]). Here, as noted, the first officer's testimony established that he observed an excessively tinted window in violation of Vehicle and Traffic Law § 375 (12-a) (b) (3) and that he measured the tint after the stop, thereby confirming that it was excessive. The court was entitled to credit the first officer's testimony under these circumstances and properly concluded that the initial stop of the vehicle was justified (*see generally People v Prochilo*, 41 NY2d 759, 761 [1977]; *People v Mills*, 137 AD3d 1690, 1691 [4th Dept 2016], *lv denied* 27 NY3d 1136 [2016]).

Defendant contends that the court, in determining that the vehicle stop was lawful, improperly relied on inadmissible photographs of the vehicle that were presented by the People. Specifically, he argues that those photographs were improperly admitted in evidence because the People did not lay an adequate foundation establishing their authenticity. We reject that contention. "With respect to photographs, [courts] have long held that the proper foundation should be established through testimony that the photograph 'accurately represent[s] the subject matter depicted' " (*People v Price*, 29 NY3d 472, 477 [2017], quoting *People v Byrnes*, 33 NY2d 343, 347 [1974]). To that end, " '[r]arely is it required that the identity and accuracy of a photograph be proved by the photographer. Rather, [because] the ultimate object of the authentication requirement is to insure the accuracy of the photograph sought to be admitted into evidence, *any person* having the requisite knowledge of the facts may verify' . . . that the photograph has not been altered" (*id.* [emphasis added]). Here, the People laid a proper foundation with respect to the photographs through the testimony of defendant's girlfriend, who testified to her familiarity with the vehicle in question and who acknowledged that the People's photographs accurately depicted the vehicle in question. She also testified that the photographs appeared to show some tinting of the vehicle's windows (*see People v Jordan*, 181 AD3d 1248, 1249-1250 [4th Dept 2020]). Thus, the court properly considered the People's photographic exhibits when it decided to credit the first officer's testimony that the vehicle's rear driver's side window was excessively tinted.

Contrary to defendant's further contention, the credible testimony at the suppression hearing supported the determination that the police lawfully viewed the handgun on the floor of the vehicle through the partially lowered rear driver's side window. We conclude that, having lawfully stopped the vehicle, the police were permitted to seize the handgun in the vehicle because it was observed in plain view on the floor behind the driver's seat of the vehicle (*see People v East*, 119 AD3d 1370, 1371 [4th Dept 2014]; *People v Woods*, 303 AD2d 1031, 1031-1032 [4th Dept 2003]; *see generally People v Sanders*, 26 NY3d 773, 777 [2016]).

We have considered defendant's remaining contentions and conclude

that none warrants reversal or modification of the judgment.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

643

CAF 19-00176

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

IN THE MATTER OF IAN D. FRASER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JESSICA M. FRASER, RESPONDENT-APPELLANT.

SUSAN E. GRAY, CANANDAIGUA, FOR RESPONDENT-APPELLANT.

SHARON P. O'HANLON, MANLIUS, FOR PETITIONER-RESPONDENT.

DONNA M. CATHY, WATERLOO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered October 1, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole legal custody of the parties' biological children to petitioner and granted guardianship of respondent's biological daughter to petitioner.

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

Memorandum: In this Family Court Act article 6 proceeding, respondent mother appeals from an order that, inter alia, granted petitioner father sole legal custody and primary physical placement of their biological children and guardianship of the mother's biological daughter, with supervised visitation to the mother. We agree with the Attorney for the Children that the mother's notice of appeal was not timely. Pursuant to Family Court Act § 1113, an appeal from a Family Court order "must be taken no later than thirty days after the service by a party or the child's attorney upon the appellant of any order from which the appeal is taken, thirty days from receipt of the order by the appellant in court or thirty-five days from the mailing of the order to the appellant by the clerk of the court, whichever is earliest." "When service of the order is made by the court, the time to take an appeal shall not commence unless the order contains [a statutorily required] statement and there is an official notation in the court record as to the date and the manner of service of the order" (*id*.).

Here, Family Court's order complied with the statutory requirements of the Family Court Act. Further, the court served its order on the parties and counsel in court on September 24, 2018, and the notice of appeal was not filed until November 2, 2018. Consequently, the mother's appeal is untimely (*see Matter of Miller v*

Mace, 74 AD3d 1442, 1443 [3d Dept 2010], *lv denied* 15 NY3d 705 [2010]; *see generally Matter of Arkadian S. [Crystal S.]*, 130 AD3d 1457, 1458 [4th Dept 2015], *lv dismissed* 26 NY3d 995 [2015]), and we therefore must dismiss it because we "lack jurisdiction to consider her appeal" (*Miller*, 74 AD3d at 1444).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

644

CAF 19-02051

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

IN THE MATTER OF AMBER W.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIE COUNTY CHILDREN'S SERVICES,
RESPONDENT-RESPONDENT.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-APPELLANT.

REBECCA HOFFMAN, BUFFALO, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered April 30, 2019 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition with prejudice.

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

Memorandum: In a prior proceeding pursuant to Social Services Law § 384-b, Family Court terminated the parental rights of the mother with respect to the subject child on the ground of abandonment and placed the child in the custody and guardianship of Erie County Department of Social Services (DSS) (*Matter of Armani W. [Adifah W.]*, 167 AD3d 1569 [4th Dept 2018]). Thereafter, petitioner, who is the child's maternal aunt, commenced this proceeding pursuant to Family Court Act article 6 seeking custody of the child. Petitioner appeals from an order dismissing the petition with prejudice. We affirm.

Where, as here, a court has terminated parental rights and committed a child's custody and guardianship to an authorized agency thereby freeing the child for adoption, "adoption bec[o]me[s] the sole and exclusive means to gain care and custody of the child" and, thus, the court at that point "is without authority to entertain custody . . . proceedings commenced by a member of the child's [extended] family" (*Matter of Genoria SS. v Christina TT.*, 233 AD2d 827, 828 [3d Dept 1996], *lv denied* 89 NY2d 811 [1997]; *see* Social Services Law § 384-b [10], [11]; *Matter of Boyd v Westchester County Dept. of Social Servs.*, 149 AD3d 1069, 1070 [2d Dept 2017]; *Matter of Mu'Min v Mitchell*, 19 AD3d 1116, 1117 [4th Dept 2005]; *see also Matter of Peter L.*, 59 NY2d 513, 518-519 [1983]). Under these circumstances, petitioner's "recourse was to seek adoption, and not mere custody, of the . . . child" (*Boyd*, 149 AD3d at 1070; *see Matter of Herbert PP. v Chenango County Dept. of Social Servs.*, 299 AD2d 780, 781 [3d Dept

2002]). Thus, “in view of the termination of the [mother’s] parental rights and the commitment of the child’s custody and guardianship to [DSS],” we conclude that, contrary to petitioner’s contention, the court properly dismissed the petition without conducting a hearing (*Mu'Min*, 19 AD3d at 1117; *see Boyd*, 149 AD3d at 1070).

In light of our determination, petitioner’s remaining contention is academic.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

650

CAF 19-00414

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

IN THE MATTER OF WILLIS C. COUNTRYMAN, JR.,
PETITIONER-APPELLANT,

V ORDER

MARY E. CONLEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

TODD G. MONAHAN, LITTLE FALLS, FOR RESPONDENT-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered November 28, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that respondent was in willful violation of a court order.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

651

CAF 19-00415

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

IN THE MATTER OF WILLIS C. COUNTRYMAN, JR.,
PETITIONER-APPELLANT,

V ORDER

MARY E. CONLEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

TODD G. MONAHAN, LITTLE FALLS, FOR RESPONDENT-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered November 28, 2018 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking to modify a prior custody order.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

656

CAF 19-00357

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

IN THE MATTER OF NATIZ J.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

MARIA R., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

DEANA D. GATTARI, ROME, FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered February 4, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had abused the subject child.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

657

CAF 19-01111

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

IN THE MATTER OF JANET F.C.,
PETITIONER-RESPONDENT,

V ORDER

JAZMINE E.R., ONEIDA COUNTY DEPARTMENT OF
SOCIAL SERVICES, RESPONDENTS-RESPONDENTS,
AND MARIA F.R., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

DEANA D. GATTARI, ROME, FOR RESPONDENT-RESPONDENT ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered March 22, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded joint legal custody of the subject child to petitioner and respondent Jazmine E.R.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

658.2

KA 16-02113

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEVIN WILKINS, DEFENDANT-APPELLANT.

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

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (DANIEL R. MAGILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered June 21, 2016. The judgment convicted defendant, upon a plea of guilty, of criminal sale of a controlled substance in the third degree (three counts) and criminal possession of a controlled substance in the third degree (three counts).

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

659

KA 17-02224

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RICHARD EVANS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 20, 2017. The judgment convicted defendant, upon a plea of guilty, of robbery in the first 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.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

665

KA 18-00858

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID K. ATKINSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON L. KEHL-WIERZBOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered December 21, 2017. The judgment convicted defendant upon a jury verdict of criminal sexual act in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal sexual act in the first degree (Penal Law § 130.50 [1]), defendant contends that he was deprived of a fair trial by prosecutorial misconduct. According to defendant, the prosecutor improperly shifted the burden of proof to the defense during summation, vouched for or bolstered the testimony of prosecution witnesses, and used inflammatory statements when asking questions and during summation. Defendant objected to only one instance of alleged misconduct, thus failing to preserve his contentions with respect to the remaining instances (*see People v Manigault*, 145 AD3d 1428, 1430 [4th Dept 2016], *lv denied* 29 NY3d 950 [2017]*; People v Simmons*, 133 AD3d 1275, 1277 [4th Dept 2015], *lv denied* 27 NY3d 1006 [2016]; *People v Meagher*, 4 AD3d 828, 829 [4th Dept 2004], *lv denied* 3 NY3d 644 [2004]).

In any event, many of defendant's contentions lack merit. Although we agree with defendant that the prosecutor should not have said during summation that defendant had to "explain" a certain fact in the case or to "convince" the jury of his defense (*see e.g. People v Rupnarine*, 140 AD3d 1204, 1205 [3d Dept 2016]; *People v Mitchell*, 129 AD3d 1319, 1321 [3d Dept 2015], *lv denied* 26 NY3d 1041 [2015]), we conclude that those isolated improprieties were not so egregious as to deprive defendant of a fair trial, especially considering that the prosecutor and County Court repeatedly made clear to the jury that the

burden of proof rested with the People and never shifted to the defense (*see Mitchell*, 129 AD3d at 1321; *People v Matthews*, 27 AD3d 1115, 1116 [4th Dept 2006]; *see also People v Benton*, 106 AD3d 1451, 1452 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013]). "[T]he jury is presumed to have followed the court's instruction" (*People v Spencer*, 108 AD3d 1081, 1081 [4th Dept 2013], *lv denied* 22 NY3d 1159 [2014]).

Defendant also failed to preserve for our review his contention that the court abused its discretion in allowing the victim to testify in rebuttal with respect to collateral matters (*see People v Humphrey*, 109 AD3d 1173, 1174 [4th Dept 2013], *lv denied* 24 NY3d 1044 [2014]; *People v Comerford*, 70 AD3d 1305, 1305-1306 [4th Dept 2010]) and, given the innocuous nature of the victim's rebuttal testimony, we decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Humphrey*, 109 AD3d at 1174).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although defense counsel highlighted various inconsistencies in the victim's testimony, "the jury's resolution of credibility issues with respect to the victim's testimony is entitled to great deference" (*People v McFarley*, 77 AD3d 1282, 1282 [4th Dept 2010], *lv denied* 15 NY3d 954 [2010]; *see People v Farrington*, 171 AD3d 1538, 1541-1542 [4th Dept 2019], *lv denied* 34 NY3d 930 [2019]). We also note that the victim's testimony was amply corroborated by other evidence.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

668

CAF 19-00933

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

IN THE MATTER OF MARILYN K. KOWALEWSKI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANDRIANA NAQUA DENICE RUSHING, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (Karen Stanislaus, R.), entered April 19, 2019 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to refrain from committing criminal offenses against petitioner.

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

Memorandum: Petitioner commenced this Family Court Act article 8 proceeding, alleging in her petition that respondent committed the family offenses of aggravated harassment in the second degree, assault in the second or third degree, and menacing in the second or third degree and seeking, among other things, an order of protection. Family Court determined that respondent committed the family offense of disorderly conduct, an offense not specified in the petition and, inter alia, issued an order of protection. Respondent appeals.

Here, the petition does not adequately plead that respondent committed disorderly conduct, and the court therefore erred in refusing to dismiss the petition (*see Matter of Rohrback v Monaco*, 173 AD3d 1774, 1774 [4th Dept 2019]; *see generally Matter of Brazie v Zenisek*, 99 AD3d 1258, 1259 [4th Dept 2012]).

In light of our determination, we decline to reach respondent's remaining contentions.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

669

CAF 19-00245

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

IN THE MATTER OF JEFFREY M. DESHANE,
PETITIONER-RESPONDENT,

V ORDER

NIKKIA B. MACKEY, RESPONDENT-APPELLANT.

IN THE MATTER OF NIKKIA B. MACKEY,
PETITIONER-APPELLANT,

V

JEFFREY M. DESHANE, RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

LYNNE M. BLANK, WEBSTER, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered January 25, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, directed that the parties shall continue to have joint legal custody of the subject child with petitioner-respondent having primary physical custody.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

676

CA 18-01182

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

IN THE MATTER OF CIRITO CORDERO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DISTRICT ATTORNEY OF ERIE COUNTY,
RESPONDENT-RESPONDENT.

CIRITO CORDERO, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered January 22, 2018 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 was previously convicted upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96) and this Court affirmed (*People v Cordero*, 110 AD3d 1468 [4th Dept 2013], *lv denied* 22 NY3d 1137 [2014]). Petitioner thereafter made a request to respondent, pursuant to the Freedom of Information Law (Public Officers Law art 6), seeking a copy of two photographs of the victim and a copy of the victim's medical records held by respondent in connection with petitioner's jury trial. Respondent denied the request, and petitioner commenced this CPLR article 78 proceeding to compel production. Petitioner appeals from a judgment dismissing the petition, and we affirm.

"All government records are presumptively open for public inspection unless specifically exempt from disclosure" by state or federal statute (*Matter of Karlin v McMahon*, 96 NY2d 842, 843 [2001], *rearg denied* 98 NY2d 693 [2002], citing Public Officers Law § 87 [2]). Contrary to petitioner's contention, the requested materials are exempt from disclosure pursuant to Civil Rights Law § 50-b (1), which provides that "[n]o report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies . . . a victim [of a sex offense defined by Penal Law article 130] shall be made available for public inspection." This exemption applies regardless of petitioner's contention that he requires the material to support his application for postconviction

relief (*see Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 747-748 [2001]; *Matter of Crowe v Guccione*, 171 AD3d 1170, 1171-1172 [2d Dept 2019]). Contrary to petitioner's further contention, because the medical records are exempt from disclosure pursuant to state statute, respondent is "not obligated to provide the records [in redacted form] even though redaction might remove all details which 'tend to identify the victim' " (*Karlin*, 96 NY2d at 843, citing Civil Rights Law § 50-b [1]; *see Matter of Xao He Lu v New York City Police Dept.*, 143 AD3d 616, 617 [1st Dept 2016]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

677

CA 19-01559

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

IN THE MATTER OF ROGER EDWARDS,
PETITIONER-APPELLANT,

V 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 July 10, 2019 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal from the judgment insofar as it dismissed that part of the petition challenging the time assessment is unanimously dismissed as moot (*see Matter of Adams v New York State Div. of Parole*, 89 AD3d 1267, 1267-1268 [3d Dept 2011]) and the judgment is affirmed without costs.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

680.2

CAF 19-01595

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

IN THE MATTER OF ITALIANA P.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

JAYMIE W.-E., RESPONDENT-APPELLANT,
AND ANTHONY P., RESPONDENT.

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

ASHLEY J. WEISS, MOUNT MORRIS, FOR PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Livingston County (Dennis S. Cohen, J.), entered July 23, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged the subject child to be neglected.

Now, upon reading and filing the stipulation of discontinuance signed by respondent-appellant on May 21, 2020 and by the attorneys for the parties on May 18 and 20, and June 8, 2020,

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

683

KA 19-01306

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS M. BAXTER, DEFENDANT-APPELLANT.

NICHOLAS B. ROBINSON, 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 from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered May 20, 2019. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]). Preliminarily, we agree with defendant that his waiver of the right to appeal is invalid (*see People v Cole*, 181 AD3d 1329, 1330 [4th Dept 2020]). Nevertheless, defendant's contention that County Court failed to conduct a sufficient inquiry before terminating his interim probation is unpreserved for appellate review (*see People v Alsaaidi*, 173 AD3d 1836, 1837 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]; *People v Wissert*, 85 AD3d 1633, 1633-1634 [4th Dept 2011], *lv denied* 17 NY3d 956 [2011]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

691

CA 19-02302

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

LESLEY M. NICKLES, PLAINTIFF-APPELLANT,

V ORDER

JASON J. ACKERMAN AND JORDAN Z. ACKERMAN,
DEFENDANTS-RESPONDENTS.

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

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (LAUREN A. GAUTHIER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered December 10, 2019. The order and judgment, among other things, denied in part plaintiff's motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 20, 2020,

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

695.1

KA 19-01376

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL FEDESON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered May 22, 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 for reasons stated in the decision at County Court.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

696

TP 19-02278

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

ALFONSO RIZZUTO, PETITIONER,

V ORDER

J.E. HARPER, DSS, ACTING SUPERINTENDENT,
MOHAWK CORRECTIONAL FACILITY, RESPONDENT.
(PROCEEDING NO. 2.)

ALFONSO RIZZUTO, 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, Oneida County [David A. Murad, J.], entered June 4, 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 the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

698

KA 17-00740

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRIAN DOUGLAS, 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 March 14, 2017. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

706

CA 19-02358

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

STEPHEN YACOUB, PLAINTIFF-RESPONDENT,

V ORDER

ANDREA VOGT, DEFENDANT-APPELLANT.

MICHAEL D. SCHMITT, ROCHESTER, FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered June 14, 2019. The order granted plaintiff's motion to dismiss the order to show cause filed by defendant.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

714.2

KA 19-01427

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BEUFORD RICHARDSON, 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 (Christopher S. Ciaccio, J.), entered May 17, 2019. 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 for reasons stated in the decision at County Court.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

714

CA 19-01087

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

PATTI ANN JANKOWSKI, PLAINTIFF-RESPONDENT,

V ORDER

RP EXCAVATING & LANDSCAPING, INC., AND
DENASA EXCAVATION, INC., DEFENDANTS-APPELLANTS.

NASH CONNORS, P.C., BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT RP EXCAVATING & LANDSCAPING, INC.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (DANIEL J. CERCONE OF COUNSEL), FOR DEFENDANT-APPELLANT DENASA EXCAVATION, INC.

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

Appeals from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 20, 2019. The order denied the motions of defendants for summary judgment.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

718

KA 15-01443

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES E. JACKSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WILLIAM CLAUSS, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered July 8, 2015. The judgment convicted defendant upon a jury verdict of robbery in the first degree, attempted robbery in the first degree, robbery in the second degree (two counts), criminal possession of a weapon in the second degree (two counts) and criminal use of a firearm in the first degree.

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

Memorandum: Defendant appeals in appeal No. 1 from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]), and in appeal No. 2 from a judgment convicting him upon his plea of guilty of burglary in the second degree (§ 140.25 [2]). We affirm in both appeals.

In appeal No. 1, defendant contends that County Court erred in denying his *Batson* application. We reject that contention. The court properly determined that the prosecutor's explanation that the prospective juror in question "is a pastor" is a race-neutral reason for using a peremptory challenge to strike that prospective juror (*see People v Holland*, 179 AD2d 822, 824 [2d Dept 1992], *lv denied* 79 NY2d 1050 [1992]; *see also People v Schumaker*, 136 AD3d 1369, 1371-1372 [4th Dept 2016], *lv denied* 27 NY3d 1075 [2016], *reconsideration denied* 28 NY3d 974 [2016]). Insofar as defendant contends that the prosecutor's stated reasons were not that the juror was a pastor, but rather were unspecified "other reasons," that contention is raised for the first time on appeal and thus is unpreserved for our review (*see People v Pescara*, 162 AD3d 1772, 1774 [4th Dept 2018]). Insofar as defendant contends that the court erred in failing to make a determination with respect to pretext at step three of the *Batson* analysis, his contention is similarly unpreserved for our review (*see*

People v Massey, 173 AD3d 1801, 1802 [4th Dept 2019]).

Defendant further contends that he was denied effective assistance of counsel because defense counsel based his opening statement in part on what defendant would "assert" to the jury, and defendant did not take the witness stand in his own defense. We reject that contention inasmuch as "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that [defense counsel] provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]). We note that, "[o]n its own, the decision not to call a witness after promising to do so does not establish ineffective assistance of counsel as a matter of law" (*People v Lopez-Mendoza*, 33 NY3d 565, 572 [2019]; *see People v Benevento*, 91 NY2d 708, 714-715 [1998]).

Defendant next contends that the court abused its discretion in denying his application to present expert testimony concerning the factors that affect the reliability of eyewitness identifications. We reject that contention because the identifications by the eyewitnesses were corroborated by evidence linking defendant to the possession of the stolen vehicle (*see People v Lee*, 96 NY2d 157, 163 [2001]; *see generally People v Harrington*, 182 AD3d 1000, 1002 [4th Dept 2020]). Specifically, the police found defendant exiting the stolen vehicle mere minutes after the robbery.

In both appeals, defendant contends that, after the court imposed an aggregate sentence of imprisonment for both convictions that was lower than the aggregate sentence agreed upon in the plea bargain in appeal No. 2, the court lacked the power to resentence him and impose the bargained-for sentence. We reject that contention. Courts have inherent authority to resentence a defendant where, as here, " 'it clearly appears that a mistake or error occurred at the time a sentence was imposed' " (*People v Gammon*, 19 NY3d 893, 895 [2012]). After the jury verdict in appeal No. 1 finding defendant guilty of robbery in the first degree and other crimes, defendant pleaded guilty in appeal No. 2 to an unrelated count of burglary in the second degree on the understanding that the court would impose a sentence including an aggregate prison term of 20 years. Thus, when the court discovered on the day of the initial sentencing that it had mistakenly imposed an aggregate prison term that was lower than the bargained-for sentence, it properly convened resentencing that same day to correct its mistake.

Contrary to defendant's contention in both appeals, defendant's bargained-for sentence is not unduly harsh or severe. Defendant's remaining contention in appeal No. 2 is academic in light of our determination.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

719

KA 15-01789

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES E. JACKSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WILLIAM CLAUSS, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered July 8, 2015. The judgment convicted defendant upon his plea of guilty of burglary in the second degree.

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

Same memorandum as in *People v Jackson* ([appeal No. 1] — AD3d — [July 17, 2020] [4th Dept 2020]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

720

KA 16-01274

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GREGORY DAVIS, 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 (Thomas J. Miller, J.), rendered December 2, 2015. The judgment convicted defendant, upon a plea of guilty, of burglary in the first degree.

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

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

725

KA 18-02443

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COURTNEY A. WILLIAMS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON L. KEHL-WIERZBOWSKI 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 (Richard C. Kloch, Sr., A.J.), rendered April 27, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Niagara County Court for further proceedings in accordance with the following 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 County Court erred in failing to determine whether he should be afforded youthful offender status. Pursuant to CPL 720.10 (2) (a) (ii) and (3), because defendant was convicted of an armed felony offense (*see* CPL 1.20 [41]), he is ineligible for a youthful offender adjudication unless the court determines that one of two mitigating factors is present. "If the court, in its discretion, determines that neither of the CPL 720.10 (3) factors is present and states the reasons for that determination on the record, then no further determination is required" (*People v Gonzalez*, 171 AD3d 1502, 1503 [4th Dept 2019]; *see People v Middlebrooks*, 25 NY3d 516, 527 [2015]). "If, on the other hand, the court determines that one or more of those factors are present, and therefore defendant is an eligible youth, the court then must determine whether he is a youthful offender" (*Gonzalez*, 171 AD3d at 1503). As the People correctly concede, the court failed to follow the procedure set forth in *Middlebrooks*. We therefore hold the case, reserve decision, and remit the matter to County Court to make and state for the record a determination whether defendant is an eligible youth within the meaning of CPL 720.10 (3) and, if so, whether defendant should be afforded youthful offender status (*see People v*

Little, 126 AD3d 1478, 1479 [4th Dept 2015]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

726

CAF 18-02177

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

IN THE MATTER OF JAZMINE M.

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

MEMORANDUM AND ORDER

WILLIE R., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered October 18, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents's parental rights with respect to the subject child.

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

Memorandum: Respondent father appeals from an order by which Family Court, inter alia, terminated the father's parental rights based upon his admission that he permanently neglected the subject child. We reject the father's contention that the court abused its discretion in denying his request for an adjournment of the dispositional hearing. Initially, we conclude that the father preserved his contention inasmuch as he requested the adjournment (*cf. Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]; *see generally Matter of Cassini*, 182 AD3d 1, 5-8 [2d Dept 2020]). Nevertheless, "[t]he granting [or denial] of an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Anthony M.*, 63 NY2d 270, 283 [1984]), and we conclude that the court did not abuse its discretion in adjourning the dispositional hearing for 10 weeks rather than the four months that the father requested.

Contrary to the father's further contention, the court properly denied his request for a suspended judgment. A suspended judgment is a "brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311 [1992]).

Although the father participated in several programs in prison, "he had not made progress sufficient to warrant any further prolongation of the [child's] unsettled familial status" (*Matter of Valentina M.S. [Darrell W.]*, 154 AD3d 1309, 1311 [4th Dept 2017] [internal quotation marks omitted]; *see Matter of Lennox M. [Sarah M.-S.]*, 173 AD3d 1668, 1670 [4th Dept 2019]), and "even if the [father] were to be released from incarceration in the near future, []he would still need to address the issues that led to the [child's] removal in the first instance" (*Lennox M.*, 173 AD3d at 1670).

We reject the further contention of the father that he was denied effective assistance of counsel inasmuch as he "did not demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [4th Dept 2015] [internal quotation marks omitted]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

727

CAF 19-00157

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

IN THE MATTER OF MADALYNN W.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHAWN W., RESPONDENT-APPELLANT.

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

JEFFERY G. TOMPKINS, CAMDEN, FOR PETITIONER-RESPONDENT.

CATHERINE M. SULLIVAN, BALDWINSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (James K. Eby, J.), entered January 4, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent derivatively abused the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order that, inter alia, granted that part of petitioner's motion for summary judgment seeking a determination that the father derivatively abused the subject child, who was born after the father's underlying acts of severe abuse against another child. We affirm.

"In determining whether a child born after underlying acts of abuse or neglect should be adjudicated derivatively abused or neglected, the determinative factor is whether, taking into account the nature of the conduct and any other pertinent considerations, the conduct which formed the basis for a finding of abuse or neglect as to one child is so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still exists" (*Matter of Elijah L.J. [LaToya J.]*, 173 AD3d 1184, 1185-1186 [2d Dept 2019] [internal quotation marks omitted]; *see Matter of Dana T. [Anna D.]*, 71 AD3d 1376, 1376 [4th Dept 2010]; *Matter of Seth G.*, 50 AD3d 1530, 1531 [4th Dept 2008]). "In such a case, the condition is presumed to exist currently and the respondent has the burden of proving that the conduct or condition cannot reasonably be expected to exist currently or in the foreseeable future" (*Elijah L.J.*, 173 AD3d at 1186). Here, petitioner established its entitlement to summary judgment by submitting, inter alia, evidence that the father had admitted to

severely abusing the other child and evidence of the father's criminal conviction arising from that conduct. Under the circumstances of this case, the evidence of the father's conduct established that "the father had an impaired level of parental judgment so as to create a substantial risk of harm to any child residing in his care" (*Matter of Jovon J.*, 51 AD3d 1395, 1396 [4th Dept 2008] [internal quotation marks omitted]). The father failed to rebut the presumption that the impaired level of parental judgment that led to the underlying abuse continued to exist at the time petitioner initiated this proceeding (*see Elijah L.J.*, 173 AD3d at 1186), especially inasmuch as approximately only two months elapsed between the father's underlying severe abuse of the other child and the commencement of this proceeding.

By failing to request an additional adjournment at the appearance at which Family Court heard petitioner's motion for summary judgment, the father failed to preserve for our review his contention that the court should have granted him an additional adjournment so that he could more fully respond to that motion (*see generally Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]). The record belies the father's further contention that the court prevented him from presenting additional evidence in opposition to petitioner's motion. To the contrary, prior to deciding the motion, the court asked the father's counsel whether there was "anything else [counsel] want[ed] to add," and the father's counsel replied in the negative.

Lastly, we reject the father's contention that the court erred in denying his request for visitation with the child while the father is incarcerated. Although the rebuttable presumption in favor of visitation with a noncustodial parent applies even when the parent seeking visitation is incarcerated (*see Matter of Granger v Misercola*, 21 NY3d 86, 90-91 [2013]; *Matter of Kelly v Brown*, 174 AD3d 1523, 1524 [4th Dept 2019], *lv denied* 34 NY3d 907 [2020]), that presumption was rebutted here by evidence that the child had no relationship with the father, that it would be difficult for the child to travel to see the father, and that, in light of the child's especially young age, visitation at the correctional facility would not serve the child's best interests (*see Kelly*, 174 AD3d at 1524; *Matter of Carroll v Carroll*, 125 AD3d 1485, 1486 [4th Dept 2015], *lv denied* 25 NY3d 907 [2015]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

729

CAF 19-00794

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

IN THE MATTER OF CARMELA H. AND DOMINICK H.

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

MEMORANDUM AND ORDER

DANIELLE F., AND JAMES H.,
RESPONDENTS-APPELLANTS.

ANTHONY BELLETIER, SYRACUSE, FOR RESPONDENT-APPELLANT DANIELLE F.

TODD G. MONAHAN, LITTLE FALLS, FOR RESPONDENT-APPELLANT JAMES H.

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

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

Appeals from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered April 18, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights with respect to the subject children.

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

Memorandum: Respondents, the biological parents of the subject children, appeal from an order of fact-finding and disposition that, among other things, terminated their parental rights to the children. We affirm.

Respondents contend that, during the fact-finding hearing, Family Court abused its discretion in receiving in evidence notes prepared by two of petitioner's caseworkers. As an initial matter, contrary to the assertions of petitioner and the Attorney for the Children, we conclude that respondents preserved for our review their challenges to the admission in evidence of the notes. Respondents objected to the notes of the first caseworker on the grounds that they now raise on appeal, thereby preserving their contentions with respect to that set of notes (*cf. Matter of Brooklyn S. [Stafania Q.—Devin S.]*, 150 AD3d 1698, 1700 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]). The court overruled respondents' objections, definitively rejecting their challenges to the admission of the first caseworker's notes, and thus respondents were not required to repeat the same arguments in order to

preserve their contentions with respect to the second caseworker's notes (*see People v Finch*, 23 NY3d 408, 413 [2014]).

Nevertheless, we reject respondents' contentions on the merits. In a proceeding to terminate parental rights pursuant to Social Services Law § 384-b, the admission of agency records is governed by CPLR 4518, which provides that reports are admissible as long as a sufficient foundation is laid (*see Matter of Leon RR*, 48 NY2d 117, 122-123 [1979]; *Matter of Chloe W. [Amy W.]*, 148 AD3d 1672, 1673 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]). An agency seeking to admit in evidence a record created by one of its employees must demonstrate that it was "within the scope of the [employee's] business duty to contemporaneously record the acts, transactions or occurrences sought to be admitted, and each participant in the chain producing the record . . . was acting within the course of regular business conduct" (*Matter of Breeana R.W. [Antigone W.]*, 89 AD3d 577, 578 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]; *see* CPLR 4518 [a]). Here, a proper foundation for the admission of the caseworkers' notes was laid by the caseworkers' respective supervisors, who were familiar with petitioner's record-keeping practices (*see Matter of James M.B. [Claudia H.]*, 155 AD3d 1027, 1030 [2d Dept 2017]; *see generally Breeana R.W.*, 89 AD3d at 578). Nevertheless, even if petitioner did not meet the foundational requirements for admission of the notes, any error in their admission would be harmless because "the result reached herein would have been the same even had [they] been excluded" (*Chloe W.*, 148 AD3d at 1673 [internal quotation marks omitted]).

We have reviewed respondents' remaining contentions and we conclude that they do not require reversal or modification of the order.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

731

CA 19-01953

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

SUSAN L. BURGESS, PLAINTIFF-APPELLANT,

V ORDER

TERRI BAVIS, SUPERINTENDENT OF SCHOOLS, WATERLOO CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, MICHAEL SHORES, PRESIDENT, NICOHL SWARTLEY, JOHN BUTLAK, VICE PRESIDENT, CHARLES BRONSON, ELLEN HUGHES, COREEN LOWRY, COLBY O'BRIEN, TERRI REESE, WATERLOO CENTRAL SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

KIRWAN LAW FIRM, P.C., SYRACUSE (TERRY J. KIRWAN, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FERRARA FIORENZA PC, EAST SYRACUSE (CHARLES E. SYMONS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered April 15, 2019. The order granted the motion of plaintiff for leave to reargue and, upon reargument, adhered to a prior order granting the motion of defendants-respondents to dismiss the complaint against them and denying plaintiff's cross motion for leave to serve a late notice of claim.

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: July 17, 2020

Mark W. Bennett
Clerk of the Court

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

734

CAF 19-00133

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

IN THE MATTER OF CHRISTOPHER HERSHBERGER,
PETITIONER-APPELLANT,
LOIS ELLEN YOUNG AND ASHLE ALEXANDER,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

LONIETTE BROWN, RESPONDENT-RESPONDENT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR PETITIONER-APPELLANT.

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

ELIZABETH deV. MOELLER, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered November 8, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject child to petitioner Ashle Alexander.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, petitioner Christopher Hershberger, the subject child's father (father), appeals from an order of Family Court that, inter alia, granted sole custody of the subject child to petitioner Ashle Alexander, the child's adult sister. We affirm for reasons stated in the decision at Family Court and write only to address the contention of the father that the court improperly assumed the role of an advocate and aided Alexander during the hearing. We reject the father's contention that the court improperly allowed Alexander, who appeared pro se, to consult with the attorney for respondent, the subject child's mother. Rather, the record establishes that the court admonished Alexander and respondent's attorney during the two instances when they began to consult, and the consultations ceased.

The father failed to preserve for our review his contentions that the court improperly aided Alexander during her testimony and inappropriately examined the witnesses during the hearing (*see Matter of Robinson v Robinson*, 158 AD3d 1077, 1077-1078 [4th Dept 2018]; *Matter of Gallo v Gallo*, 138 AD3d 1189, 1190 [3d Dept 2016]) and, in

any event, we conclude that they are without merit. The court's questions during its examination of the witnesses properly " 'advance[d] the goals of truth and clarity' " (*Matter of Veronica P. v Radcliff A.*, 126 AD3d 492, 492 [1st Dept 2015], *lv denied* 25 NY3d 911 [2015]), and the court made permissible "reasonable efforts to facilitate the ability of unrepresented litigants to have their matters fairly heard" (22 NYCRR 100.3 [B] [12]).

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court