SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 7, 2013

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

914

CA 12-00577

PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND MARTOCHE, JJ.

JOANNE WILK, AS ADMINISTRATRIX OF THE ESTATE OF STEVEN R. WILK, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID M. JAMES, M.D., KALEIDA HEALTH, DOING BUSINESS AS MILLARD FILLMORE HEALTH SYSTEM-THREE GATES CIRCLE HOSPITAL, SADIR ALRAWI, M.D., MERCY AMBULATORY CARE CENTER, CATHOLIC HEALTH SYSTEM, INC., BUFFALO EMERGENCY ASSOCIATES, LLP, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN P. DANIEU OF COUNSEL), FOR DEFENDANT-APPELLANT KALEIDA HEALTH, DOING BUSINESS AS MILLARD FILLMORE HEALTH SYSTEM-THREE GATES CIRCLE HOSPITAL.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (RYAN P. CRAWFORD OF COUNSEL), FOR DEFENDANTS-APPELLANTS SADIR ALRAWI, M.D. AND BUFFALO EMERGENCY ASSOCIATES, LLP.

RICOTTA & VISCO, ATTORNEYS & COUNSELORS AT LAW, BUFFALO (K. JOHN BLAND OF COUNSEL), FOR DEFENDANT-APPELLANT DAVID M. JAMES, M.D.

DAMON MOREY LLP, BUFFALO (JAMES E. BALCARCZYK, II, OF COUNSEL), FOR DEFENDANTS-APPELLANTS MERCY AMBULATORY CARE CENTER AND CATHOLIC HEALTH SYSTEM, INC.

HAMSHER & VALENTINE, BUFFALO (RICHARD P. VALENTINE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered July 14, 2011 in a medical malpractice action. The order denied the motions of defendants David M. James, M.D., Kaleida Health, doing business as Millard Fillmore Health System-Three Gates Circle Hospital, Sadir Alrawi, M.D., Mercy Ambulatory Care Center, Catholic Health System, Inc., and Buffalo Emergency Associates, LLP for summary judgment dismissing the amended complaint and all cross claims against them.

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

Memorandum: Plaintiff commenced this medical malpractice and wrongful death action seeking damages for the conscious pain and suffering, and death of Steven R. Wilk (decedent) as a result of the alleged failure by defendants to diagnose and treat decedent's aortic dissection in a timely manner. The death certificate revealed that the immediate cause of death was a "cerebral infarct with herniation[,] . . . due to or as a consequence of . . . shock with intestinal ischemia[,] . . . due to or as a consequence of . . . aortic dissection." Defendants-appellants (defendants) moved for summary judgment dismissing the amended complaint and all cross claims against them and, although Supreme Court concluded that defendants met their initial burden on their respective motions, the court determined that plaintiff's submissions raised issues of fact. Thus, the court denied the motions. We affirm.

On February 13, 2004, decedent was transported by ambulance to the emergency room operated by defendant Kaleida Health, doing business as Millard Fillmore Health System-Three Gates Circle Hospital (Kaleida), and was treated by defendant David M. James, M.D. and Kaleida's staff. The ambulance record indicated that decedent's "chief complaint" was "severe back pain" that, according to the "subjective assessment" entry on that record, started at 9:30 a.m. and felt like someone "hit [him with a] baseball bat." However, the "comments" section of the ambulance record contains an entry stating that the pain started "2 days ago." The triage nurse at Kaleida, a hospital employee, documented a "2 day [history] of lower back pain," but did not document decedent's complaint that the severe back pain started within 90 minutes of his arrival at the emergency room. Thus, decedent's report of the sudden onset of severe back pain was not carried forward from the ambulance record to the triage note in his medical chart at Kaleida. It is undisputed that the sudden onset of severe back pain is a telltale symptom of aortic dissection.

The nurse practitioner who initially assessed decedent upon his arrival at the emergency room testified at her deposition that she reviewed the triage note to obtain information about the history of decedent's onset of pain and that it did not indicate that the pain had started suddenly at 9:30 a.m. that morning. The nurse practitioner did not recall whether she reviewed the ambulance record when she saw decedent in the emergency room. The nurse practitioner also testified that decedent's symptoms supported a differential diagnosis of aortic dissection. She agreed that the appropriate diagnostic test to rule out an aortic dissection was a CT scan with contrast. Nonetheless, a CT scan was neither ordered nor performed, and decedent was discharged with a diagnosis of "thoracic spine strain." The nurse practitioner explained at her deposition that she abandoned the differential diagnosis of aortic dissection because, in her experience, patients who "have had a dissecting aneurism, do not have pain for two days prior to ending up in the emergency room." Notably, defendants do not dispute that decedent was suffering from an aortic dissection on February 13, 2004. Instead, they contend that they did not deviate from the applicable standards in their care and treatment of decedent. The record contains a consultation note from a cardiac surgeon on March 1, 2004 stating that decedent had an "old"

aortic dissection that was in existence "at least to 2/15." Further, defendants do not dispute on this record that, with a timely diagnosis of aortic dissection and appropriate treatment, decedent would have had a substantial likelihood of avoiding catastrophic injury and premature death.

Two days after his initial visit, decedent returned to the emergency room at Kaleida and was again treated by James. Decedent complained of back pain that was at a level of severity of "10/10" and felt as though "a baseball bat hit [him]." Decedent was discharged by James 30 minutes later with a "diagnosis" of "sciatica." Forty-four minutes later, while waiting for his wife to pick him up from the emergency room, decedent experienced "excruciating sudden [right] flank and [left] abdominal pain[]" and returned to the emergency room. Ultimately, James ordered a CT scan without contrast. The CT scan did not confirm James's preliminary diagnosis of kidney stones, and the radiologist's report recommended that the test be repeated with contrast. Notwithstanding that recommendation, James did not order another CT scan. Although the CT scan performed without contrast did not reveal the presence of any kidney stones, James discharged decedent from the emergency room with the "impression" that decedent had "sciatica/[left] renal stones."

One day later, decedent was admitted to defendant Mercy Ambulatory Care Center, a member facility of defendant Catholic Health System, Inc. (collectively, Mercy/CHS). The triage information sheet incorrectly documented that decedent had seen and was catheterized by his urologist the day before. In fact, decedent had not seen his urologist the day before, but had been catheterized at his second emergency room visit at Kaleida in three days after presenting at both visits with severe back pain. Under the section entitled "past medical history," the triage information sheet referenced urinary retention, a coronary artery bypass graft a "few years ago" and eczema, but contained no reference to the back pain that led to decedent's two prior emergency room visits. Decedent was treated by defendant Sadir Alrawi, M.D., an employee of defendant Buffalo Emergency Associates, LLP (BEA). Alrawi did not note a "chief complaint" in decedent's emergency room treatment record (chart). However, under the section of the chart entitled "[d]uration," Alrawi noted that decedent was experiencing "severe pain in the supra pubic area." Decedent's two recent emergency room visits were not described in the chart. Alrawi catheterized decedent's bladder and discharged him with a "secondary diagnosis" of urinary retention. No "[p]rimary diagnosis" or "[d]ifferential diagnosis" was entered in decedent's chart by Alrawi or the staff at Mercy/CHS.

On February 18, 2004, decedent returned to the emergency room operated by Kaleida with complaints of lower back pain and the inability to feel or move his legs. Imaging studies established that decedent had extensive internal bleeding in the area of his lumbar-thoracic spine with "mild mass effect on the adjacent spinal cord." Ultimately, a CT scan with contrast performed on March 1, 2004 revealed an aortic dissection from the "proximal ascending aorta to [the] mid-abdomen." Decedent's condition worsened over the next two

days, and he died on March 3, 2004.

We conclude that, although defendants met their initial burden on their respective motions, plaintiff raised triable issues of fact whether defendants deviated from the accepted standards of medical care and whether those deviations caused decedent's injuries and ultimate death. We note at the outset that Kaleida does not contend on appeal that it cannot be held vicariously liable for the acts of James, even though he was not a hospital employee (*see Mduba v Benedictine Hosp.*, 52 AD2d 450, 452). Thus, Kaleida is deemed to have abandoned any such contention (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). With respect to James, plaintiff submitted the affidavit of a physician who is board certified in emergency medicine, in which the physician opined that aortic dissection is a "life-threatening" condition and should be promptly ruled out through further testing where, as here, the patient presents with a constellation of symptoms that are typical of that condition. He further opined that, given the information available to James, James's failure to consider and pursue a diagnosis of aortic dissection was a deviation from the relevant standard of care. Plaintiff's expert further opined that, on February 13 and 15, 2004, James departed from good and acceptable medical practice by, inter alia, failing to elicit a proper medical history from decedent and failing to include and pursue aortic dissection as a differential diagnosis for decedent. In particular, plaintiff's expert opined that the failure to order a CT scan with contrast on February 13 and 15 was a clear deviation from the accepted standards of medical care that deprived decedent of the opportunity for an accurate diagnosis and timely surgical intervention. The opinion of plaintiff's expert raised a triable issue of fact whether James departed from the accepted standards of medical care (*see Ryan v Santana*, 71 AD3d 1537, 1538; *cf. Imbierowicz v A.O. Fox Mem. Hosp.*, 43 AD3d 503, 505; *Blanar v Dickinson*, 296 AD2d 431, 432; *see generally Carter v New York City Health & Hosps. Corp.*, 47 AD3d 661, 663). Plaintiff's expert further stated that James's departures from the accepted standards of medical care were a substantial factor in causing decedent's injuries and his eventual death, and thereby raised triable issues of fact with respect to causation (*see Daugharty v Marshall*, 60 AD3d 1219, 1220-1222). With respect to the liability of Kaleida for the acts or omissions of its employees, plaintiff's expert opined that the failure of the triage nurse to record and report decedent's history of sudden onset of back pain, which began within 90 minutes of decedent's arrival at the emergency room, was a departure from the accepted standards of medical care and that the failure to diagnose and treat the aortic dissection was a direct consequence of that departure. In light of the foregoing, we conclude that the court properly denied the motions of James and Kaleida because the "motion papers presented a credibility battle between the parties' experts, and issues of credibility are properly left to a jury for its resolution" (*Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624; *see generally Imbierowicz*, 43 AD3d at 505).

Mercy/CHS do not contend on appeal that they cannot be held vicariously liable for the alleged negligence of Alrawi (*see Mduba*, 52 AD2d at 454), and thus they are deemed to have abandoned any such

contention (*see Ciesinski*, 202 AD2d at 984). With respect to the treatment provided by the employees of Mercy/CHS, plaintiff's board certified emergency medicine expert opined that the triage nurse's inaccurate documentation of decedent's urology treatment history and symptoms, together with her failure to ascertain that decedent had experienced a sudden onset of back pain three days earlier resulting in two emergency room visits during that time frame, were deviations from the accepted standards of medical care. With respect to the treatment of decedent on February 16, 2004 that was provided by Alrawi, as an employee of BEA, at Mercy/CHS, plaintiff's expert opined that Alrawi incorrectly noted that decedent had a history of multiple catheters for urinary retention and failed to elicit an accurate medical history from decedent. Plaintiff's expert opined that, as a result, Alrawi incorrectly diagnosed decedent as having a "known case of [benign prostatic hypertrophy]." Further, plaintiff's expert opined that Alrawi failed to elicit an accurate and thorough history regarding decedent's two recent emergency room visits. Decedent's chart from the Mercy/CHS visit does not contain any indication that he was at the Kaleida emergency room on February 13, 2004. Although the Mercy/CHS chart indicates that decedent went to the Kaleida emergency room the day before, there is no indication of the reason why decedent was in the emergency room that day or what the discharge diagnosis was, if any. Further, Alrawi incorrectly wrote on decedent's chart that, when decedent was catheterized at the Kaleida emergency room, "no urine" was obtained. The Kaleida medical chart for decedent's February 15, 2004 visit, however, indicates that "1400 cc[s]" of urine were obtained from decedent as a result of the catheterization that day. According to plaintiff's expert, these deviations from the accepted standards of medical care resulted in Alrawi's failure to learn of decedent's prior complaints of severe lower back pain, Alrawi's misdiagnosis of "urinary retention," and his alleged negligent failure to diagnose and provide appropriate treatment for decedent's aortic dissection. We conclude that plaintiff's submissions raised a credibility dispute between the parties' experts and that the court properly concluded that issues of fact precluded summary judgment in favor of Alrawi, BEA, and Mercy/CHS (*see Barbuto*, 305 AD2d at 624).

We reject defendants' contention that the opinions of plaintiff's expert were conclusory, unfounded and speculative. The affidavits of plaintiff's expert with respect to each defendant were based upon the expert's review of decedent's medical records, medical history and the discovery material exchanged. Each of those affidavits "attest[ed] to a departure from accepted practice and contain[ed] the attesting [expert's] opinion that [the respective defendants'] omissions or departures were a competent producing cause of" decedent's injuries and death (*Latona v Roberson*, 71 AD3d 1498, 1499 [internal quotation marks omitted]; *see Bell v Ellis Hosp.*, 50 AD3d 1240, 1242; *Menzel v Plotnick*, 202 AD2d 558, 559).

In determining a summary judgment motion, "[i]ssue-finding, rather than issue-determination, is the key to the procedure" (*Esteve v Abad*, 271 App Div 725, 727; *see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941), and we respectfully

submit that our dissenting colleague engaged in issue determination rather than issue finding. We note that our dissenting colleague relies upon the *absence* of entries in decedent's medical records with respect to an aortic dissection to support the theory that defendants did not deviate from accepted standards of emergency room care in their diagnosis and evaluation of decedent's symptoms. The entire crux of plaintiff's case, however, is that defendants prematurely abandoned or failed to pursue an appropriate differential diagnosis of aortic dissection. Thus, in our view, the absence of any reference in decedent's medical records to an aortic dissection is consistent with a claim of failure to diagnose.

Although the relevant medical care of decedent began on February 13, 2004, the first reference to an aortic dissection in his medical records is in a cardiothoracic surgeon's consultation note of March 1, 2004. Plaintiff's expert opined that, "[h]ad a dissection been diagnosed, cardio thoracic surgeons would be called to the ER to evaluate the patient," and, "[e]ven . . . 48 hours [after February 13, 2004], there was still a significant likelihood that surgery would have prevented hemorrhage into his spinal column and would have avoided the catastrophic injuries which [decedent], eventually, sustained, including his premature death." Although the dissent relies upon the cardiothoracic surgeon's consultation note to criticize the opinion of plaintiff's expert on causation, we note that the same consultation note states that the aortic dissection existed as early as February 15, 2004. We also note that our dissenting colleague concludes that the death certificate "contradicts" the opinion of plaintiff's expert. We conclude, however, that such "contradiction" supports our conclusion that there is a clear issue of fact.

We base our determination that plaintiff raised an issue of fact on the record as a whole; whereas, our dissenting colleague relies on select portions of decedent's medical records to support her conclusion that plaintiff failed to raise an issue of fact in opposition to the motions. For example, we note that, in criticizing the opinion of plaintiff's expert that the aortic dissection existed as early as February 13, 2004, the dissent relies on the entry in the death certificate stating that the aortic dissection existed for only a period of "days" prior to decedent's death on March 3, 2004.

We also note that the dissent fails to mention that decedent described his severe back pain, which started at 9:30 a.m. on February 13, 2004, as feeling like someone "hit [him with a] baseball bat." According to plaintiff's expert, the *sudden onset* of back pain of that nature and intensity is a telltale symptom of aortic dissection. Instead, the dissent discusses only that portion of the record wherein decedent also reported experiencing back pain that was of a qualitatively different nature and intensity two days earlier, and concludes that defendants acted reasonably in relying only upon that significantly different symptom.

In sum, we conclude that plaintiff raised issues of fact sufficient to defeat the motions for summary judgment dismissing the

amended complaint (*see Zuckerman v City of New York*, 49 NY2d 557, 562).

All concur except PERADOTTO, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent. In my view, defendants-appellants (defendants) met their initial burden of establishing the absence of medical malpractice on their respective motions for summary judgment dismissing the amended complaint and all cross claims against them, and plaintiff failed to raise a triable issue of fact in opposition to the motions. I would therefore reverse the order, grant the motions, and dismiss the amended complaint and all cross claims against defendants.

This matter arises from the care and treatment rendered to Steven R. Wilk (decedent) during four hospital visits that occurred over a period of six days in February 2004, which culminated in his admission to the hospital on February 18, 2004 and his death two weeks later.

On February 13, 2004, decedent was transported via ambulance to the emergency room at defendant Kaleida Health, doing business as Millard Fillmore Health System-Three Gates Circle Hospital (Kaleida). According to the ambulance record, decedent complained of lower back pain that began two days earlier and became "severe about 9:30" that morning. He reported experiencing some relief with pain medication. Decedent was triaged at the hospital shortly after 11:00 a.m., and complained of sharp, constant pain in his lower back that increased with movement and radiated down both legs. His prior medical history included coronary artery disease, coronary artery bypass graft surgery, aortic valve replacement, and hypertension. Decedent's medications included Coumadin, an anticoagulant that was prescribed after his open heart surgery, and Lisinopril, which was prescribed to treat heart disease and hypertension.

At approximately 11:35 a.m., decedent was assessed by a nurse practitioner who was working under the supervision of defendant David M. James, M.D. The nurse practitioner's notes indicate that decedent "complain[ed] of back pain which started suddenly two days ago after turning suddenly." Decedent rated his pain as an 8 out of 10 on the pain scale, and indicated that it increased with movement and radiated down both legs. Decedent reported that he had taken pain medication at 9:30 a.m., which had resulted in some relief, but that his pain persisted. His "review of systems" was negative except for back pain, and his physical examination was normal.

The nurse practitioner ordered that decedent be given intravenous administration of pain medication, Prothrombin Time and International Normalized Ratio (PT/INR) testing to rule out an epidural bleed, and a thoracic spine X ray to rule out a fracture. Decedent's INR level was "slightly . . . subtherapeutic," meaning that he was not at an increased risk of bleeding. The X ray revealed moderate degenerative changes in decedent's thoracic spine, osteopenia, and "anterior wedging of T9 and L1 vertebral bodies." By 12:00 p.m., decedent was walking without difficulty, and he reported that the pain medication had an "excellent effect" and that his pain level was a 1 out of 10.

He was discharged shortly thereafter with a diagnosis of thoracic strain, and was directed to follow up with his primary care physician within three to four days and to return to the hospital if his symptoms worsened or if he experienced loss of bladder or bowel control, which could indicate a neurological problem.

Two days later, on February 15, 2004, decedent returned to Kaleida complaining of lower back pain that radiated into his legs and was evaluated by Dr. James. Decedent reported that the pain medication and muscle relaxer that had been prescribed at the prior hospital visit "[p]rovided relief," but that on February 15 "[he] felt he had more pain into both upper thighs." Dr. James's review of systems was negative with the exception of back pain and, upon physical examination, Dr. James determined that decedent was in no acute distress and exhibited no sensory deficits. Dr. James noted possible diagnoses of sciatica or kidney stones. Decedent was discharged shortly thereafter with a prescription for a steroid to reduce inflammation. At the time of discharge, decedent reported a pain level of 3 out of 10, and his condition was described as stable.

While waiting for his wife to pick him up, decedent complained of sudden right flank and left abdominal pain. Dr. James ordered urinalysis and a CT scan of decedent's abdomen and pelvis, without contrast, to check for kidney stones. The CT scan revealed, inter alia, "[a] unilaterally enlarged left kidney with perinephric stranding"; atherosclerotic changes in the aortic, iliac, and femoral arteries; and a "[l]arge urinary bladder with mildly enlarged prostate, suggestive of outlet obstruction." As a result, Dr. James ordered that decedent have a Foley catheter inserted, after which 1,400 cubic centimeters of urine were released. Shortly thereafter, decedent reported that he "felt well," and he was discharged with a direction to follow up with his primary care doctor within one to two days.

The next day, decedent complained to his treating urologist that he was unable to urinate. Because it was after business hours, the urologist instructed decedent to go to the hospital to have a Foley catheter inserted. Decedent arrived at defendant Mercy Ambulatory Care Center, Inc., a member of defendant Catholic Health System (collectively, Mercy/CHS), at approximately 7:00 p.m. on February 16, 2004. Decedent told the triage nurse that he had been unable to urinate for more than 24 hours, and he reported a prior medical history of urinary retention. He further complained of pressure in his suprapubic area. Decedent was hemodynamically stable, with the exception that his blood pressure was elevated. Within 10 minutes of decedent's arrival at Mercy/CHS, a nurse inserted a Foley catheter and 1,000 cubic centimeters of urine were released.

Decedent was thereafter evaluated by defendant Sadir Alrawi, M.D., an employee of defendant Buffalo Emergency Associates, LLP. Dr. Alrawi's notes indicate that decedent was a "known case of BPH [benign prostatic hyperplasia]," i.e., enlarged prostate, and that he had been catheterized at Kaleida the day before. Decedent complained of severe pain in his suprapubic area——the area above his bladder——and an

inability to urinate. Dr. Alrawi spoke to the on-call physician in the office of decedent's treating urologist, who indicated that decedent should remain catheterized and follow up with his urologist. Following catheterization, decedent's blood pressure returned to normal. He was discharged at 10:30 p.m. in an "improved" condition and was instructed to "follow-up with [his urologist] in [the] morning."

Decedent did not follow up with his urologist as directed. On February 18, 2004, decedent returned to Kaleida complaining of increased lower back pain that radiated into both legs and an inability to move his legs. Upon evaluation, decedent reported a fever, fatigue, back and neck pain, paresthesias, gait disturbance, and focal weakness. Decedent was admitted to the hospital under the care of a neurosurgeon with a principal diagnosis of paraplegia and secondary diagnoses of spinal hematoma and infarct, coagulopathy (bleeding disorder), and rheumatic heart disease. Decedent had a significantly elevated INR level, and he was treated with vitamin K and fresh frozen plasma. MRIs of decedent's spine, which were performed with and without contrast, revealed "extensive intraspinal signal abnormality suggesting an extensive hemorrhage." That evening, decedent underwent a laminectomy in order to evacuate intradural clots in his thoracic and lumbar spine.

After the surgery, decedent experienced "transient improvement and then subsequently the loss of function bilaterally." Imaging revealed "cord signal changes most consistent with swelling or infarction" and "an area of residual clot at the T10-11 level on the left-hand side, as well as an area within the [spinal column] and about the L3 level with suggestion of mass effect." As a result, decedent underwent a second surgery on February 20, 2004 for a reevaluation of his thoracic and lumbar spine, and further removal of subdural hematomas. Progress notes indicate that decedent improved somewhat after the second surgery and that decedent was to be transferred to a spinal cord rehabilitation center. On March 1, 2004, however, decedent became acutely disoriented and short of breath. A pulmonary embolism was suspected, and a head and chest CT scan with contrast was ordered. The CT scan ruled out a pulmonary embolism, but revealed an aortic dissection. There was, however, no hematoma, rupture, or leak around the aorta. A cardiothoracic surgery consult note states that decedent's altered mental status likely resulted from "a thrombus (blood clot) on his mechanical aortic valve causing a small cerebral embolus." The blood clot, in turn, resulted from a "lack of anticoagulation."

Decedent's condition deteriorated over the next two days, and he died on March 3, 2004. The death certificate lists the immediate cause of death as "cerebral infarct with herniation" occurring within "hours" of decedent's death. The cerebral infarct was "due to or as a consequence of" shock with intestinal ischemia beginning "days" before decedent's death which, in turn, was "due to or as a consequence of" aortic dissection, which likewise began "days" prior to decedent's death. The certificate also lists "spinal cord infarct [secondary to] hematoma" as another "significant condition contributing to death but

not related to" the other listed causes.

Plaintiff commenced this medical malpractice and wrongful death action seeking damages for decedent's wrongful death and conscious pain and suffering. In her bills of particulars, plaintiff broadly alleged that defendants were negligent in, inter alia, failing to adequately assess and monitor decedent, failing to properly examine and test decedent in a timely manner, and failing to properly diagnose decedent's condition.

After discovery, defendants moved for summary judgment dismissing the amended complaint and all cross claims against them. As plaintiff correctly conceded below, each of the defendants met their initial burden on their respective motions of establishing "either the absence of any departure from good and accepted medical practice or that any departure was not the proximate cause of [decedent]'s alleged injuries" (*Shichman v Yasmer*, 74 AD3d 1316, 1318; *see O'Shea v Buffalo Med. Group, P.C.*, 64 AD3d 1140, 1140, *appeal dismissed* 13 NY3d 834). Each defendant submitted the affidavit of an expert in which the expert opined that defendants did not deviate from accepted medical practice in their care and treatment of decedent, and that any acts or omissions on their part did not cause or contribute to decedent's death (*see Lake v Kaleida Health*, 59 AD3d 966, 966; *Darling v Scott*, 46 AD3d 1363, 1364). In their affidavits, the experts directly addressed each of the allegations of negligence in plaintiff's bills of particulars (*see Abbotoy v Kurss*, 52 AD3d 1311, 1312, *lv denied* 55 AD3d 1421), and their opinions were supported by decedent's medical records and the deposition testimony of the medical professionals who treated decedent (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325).

For example, with respect to the treatment rendered at Kaleida on February 13 and 15, 2004, Dr. James submitted the affidavit of a physician who is board certified in emergency medicine. In the affidavit, the expert opined that the diagnosis of thoracic strain on February 13, 2004 was appropriate based on decedent's presentation, symptoms, and X ray results. The expert noted that decedent's pain improved significantly upon the administration of non-narcotic pain medications—decedent had a pain level of 8 out of 10 upon arrival and a pain level of 1 out of 10 upon discharge—and that he was walking without difficulty at the time of discharge. Decedent's INR level was "subtherapeutic," indicating that he was "not at risk for complications arising from the use of anticoagulation medication, such as bleeding." Dr. James also submitted the deposition testimony of the nurse practitioner who treated decedent on February 13, 2004. The nurse practitioner stated that decedent "presented with a classic history for muscle spasms," i.e., a sharp, sudden onset of pain that was constant and increased with movement.

As for the treatment rendered on February 15, 2004, the expert for Dr. James noted that decedent's neurological examination was normal, and that Dr. James properly referred to and relied upon decedent's INR reading from February 13. According to the expert, the symptoms decedent experienced on February 15—urinary retention, flank pain, and abdominal pain—are consistent with a diagnosis of kidney

stones and that a CT scan without contrast is the proper test to confirm or rule out such a diagnosis. The expert opined that decedent's CT scan results were also consistent with a diagnosis of kidney stones inasmuch as the scan showed an enlarged left kidney, which is indicative of a "recent obstruction." According to the expert, decedent's "presentation" on February 15, 2004 was "not consistent with an epidural hematoma or aortic dissection."

Additionally, with respect to the treatment rendered to decedent on February 16, 2004 at Mercy/CHS, Dr. Alrawi submitted the affidavit of a physician who is board certified in emergency medicine. The expert opined that it was reasonable for Dr. Alrawi to conclude, based upon decedent's stated history and his physical examination, that decedent's suprapubic pain was the result of urinary retention related to BPH. The expert noted that, after catheterization, decedent's blood pressure returned to normal. The expert opined that, based on decedent's clinical presentation, his history, and the medications he reported taking, there was no reason for Dr. Alrawi to suspect bleeding or a spinal hematoma. The expert further opined with a reasonable degree of medical certainty that "the spinal hematoma that was diagnosed on February 18, 2004 most likely formed quickly and was not present at the time [decedent] was seen by Dr. Alrawi." The expert noted that a pathology report generated from a specimen obtained during decedent's February 18, 2004 laminectomy described an "organizing" blood clot, but did not indicate the presence of "old blood." In the expert's opinion, the pathology results indicate that it was "unlikely" that the spinal hematoma discovered on February 18, 2004 was present 48 hours earlier when decedent was seen at Mercy. The expert thus opined that it was reasonable for Dr. Alrawi to diagnose decedent with urinary retention; to treat that condition with catheterization, antibiotics, and pain medication; and to instruct decedent to follow up with his treating urologist. Indeed, Dr. Alrawi testified at his deposition that the most common cause of urinary retention is a prostatic condition, i.e., BPH.

Thus, inasmuch as defendants met their initial burden on their respective motions, the burden shifted to plaintiff to "raise triable issues of fact by submitting a physician's affidavit both attesting to a departure from accepted practice and containing the attesting [physician's] opinion that the defendant[s'] omissions or departures were a competent producing cause of the injury" (*O'Shea*, 64 AD3d at 1141 [internal quotation marks omitted]; *see Moran v Muscarella*, 85 AD3d 1579, 1580). It is well established that "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant[s'] . . . summary judgment motion[s]" (*Alvarez*, 68 NY2d at 325). Thus, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . [his or her] opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544).

Supreme Court concluded, and the majority agrees, that plaintiff raised a triable issue of fact in opposition to the motions. I

disagree. In my view, the opposing affidavits of plaintiff's expert were conclusory and did not directly address or refute the prima facie showing in the detailed affidavits of defendants' experts (*see Foster-Sturrup v Long*, 95 AD3d 726, 728-729). Moreover, plaintiff's expert relies upon a series of vague and speculative assumptions, which are unsupported or contradicted by the record.

The crux of the opinion of plaintiff's expert is that on February 13, 15, and 16, 2004, i.e., the dates of the alleged negligence herein, decedent was suffering from a "thoracic and abdominal aortic dissection," and that the undetected aortic dissection caused the cascade of medical events commencing with decedent's admission to the hospital on February 18, 2004 and terminating with his death several weeks later. Plaintiff's expert opines that defendants' failure to diagnose that condition in a timely manner "deprived [decedent] of a chance at timely intervention for treatment of his aortic dissection before the vessel started to hemorrhage," and that "[a]ppropriate and timely emergency intervention would have, more probably than not, identified the presence of a dissecting thoracic and abdominal aorta which could have been surgically treated before causing spinal cord injury."

There is simply nothing in the medical records, however, to support the opinion of plaintiff's expert that decedent's symptoms on the dates at issue and his subsequent injuries were caused by a ruptured aortic dissection. The voluminous medical records contain only two references to an aortic dissection, neither of which are specifically referred to in the affidavit of plaintiff's expert: (1) a cardiothoracic surgery consultation note dated March 1, 2004; and (2) decedent's death certificate. On March 1, 2004, which was more than two weeks after defendants' alleged negligence, decedent suddenly became disoriented and short of breath. As a result, decedent underwent a CT scan of his head and chest, with contrast, for the purpose of ruling out a suspected pulmonary embolism. No report from that CT scan appears in the record. According to a handwritten cardiothoracic consultation note, however, the CT scan revealed an aortic dissection. The majority relies upon the first part of the note, which states that a non-contrast CT scan performed approximately two weeks earlier shows "calcification at the center of the aorta at [approximately] diaphragmatic level. This suggests the dissection is old (at least to 2/15)," i.e., the date of the prior CT scan. The remainder of the note, however, concludes that there was "no hematoma, rupture or leak around the aorta" and, indeed, that there was "[n]o evidence of rupture/impending rupture." That statement undercuts the theory of plaintiff's expert that plaintiff's injuries were caused by a hemorrhage or rupture of the aorta. Indeed, the note proceeds to state that the aortic dissection was "probabl[y] old . . . , most likely occurring" after decedent's 2002 aortic valve replacement surgery. According to the note, decedent's altered mental state likely resulted from a cerebral embolus caused by a thrombus, i.e., a blood clot, on decedent's mechanical aortic valve, which in turn resulted from a lack of anticoagulation therapy. Plaintiff's expert fails to address that information. The only other reference to an aortic dissection is found in the death certificate, which lists

"aortic dissection" as one of the secondary causes of death. According to the death certificate, however, that condition existed for only a period of "days" prior to decedent's death on March 3, 2004, which contradicts the conclusion of plaintiff's expert that decedent suffered from an aortic dissection as early as February 13, 2004. Further, the death certificate lists "spinal cord infarct [secondary to] hematoma"—the condition for which decedent was admitted to the hospital on February 18, 2004—as another "significant condition contributing to death *but not related to*" (emphasis added) the primary and secondary causes of death, including the aortic dissection.

Even assuming, arguendo, that decedent's injuries and death were caused by a rupturing aortic dissection and that such condition was present on the relevant treatment dates, it is my view that plaintiff's expert failed to set forth an evidentiary basis for his or her opinion that defendants should have diagnosed the alleged aortic dissection on those dates (*see Bendel v Rajpal*, 101 AD3d 662, 663-664; *Altmann v Molead*, 51 AD3d 482, 483; *Holbrook v United Hosp. Medical Center*, 248 AD2d 358, 358-359). As noted above, an aortic dissection was not "diagnosed" until March 1, 2004, which was 13 days after decedent was admitted to the hospital. During those 13 days, decedent underwent two spinal surgeries, received MRIs with and without contrast of his lumber, cervical, and thoracic spine, and was under the constant care of a neurosurgeon, yet there is no mention in the medical records of an aortic dissection or a dissecting aortic aneurysm during that period. Plaintiff's expert nonetheless concludes that a "[r]eview of all of [decedent's] records confirms that the true cause for the onset of [his] back pain was an aortic dissection."

In support of that conclusion, plaintiff's expert focused on what he or she characterized as a "discrepancy" between the patient history documented on the February 13, 2004 ambulance record and the patient history recorded by Kaleida staff on that date—a characterization that is adopted by the majority. Specifically, plaintiff's expert stated that the Kaleida nurse practitioner ruled out a differential diagnosis of aortic dissection "solely on the basis of an erroneous description of the patient's true history," which resulted in a series of errors culminating in decedent's "premature[] discharge[] on an erroneous diagnosis of thoracic muscle strain." The expert's opinion, however, is based upon the faulty premise that decedent's pain began only 90 minutes prior to his arrival at the emergency room, i.e., at 9:30 a.m. on February 13, 2004. The majority similarly states that decedent's back pain "started at 9:30 a.m." That statement, however, is based upon a misreading of the ambulance record. In fact, the ambulance record states that decedent's pain became "*severe* about 9:30 [a.m.]" (emphasis added). In the "comments" section of the ambulance record, the paramedic further indicated that decedent's pain "started [two] days ago." Thus, when read in its entirety, the ambulance record indicates that decedent's back pain began two days before his first emergency room visit, i.e., on February 11, 2004, and that it increased in intensity on the morning of February 13, 2004, thereby prompting that hospital visit. Indeed, plaintiff's own bills of particulars unequivocally state that decedent's pain began on February 11, 2004.

The nurse practitioner testified at her deposition that, in her experience, patients who "have had a dissecting aneurysm, do not have pain for two days prior to ending up in an emergency room." That testimony was undisputed. In any event, contrary to the assertion of the majority, the nurse practitioner did not rule out an aortic dissection solely on the basis of the reported duration of decedent's pain. Rather, the nurse practitioner testified at her deposition that she excluded an abdominal aortic aneurysm based upon her physical examination of decedent, decedent's description of his pain, and the fact that decedent's pain was relieved by the course of treatment that she prescribed. Decedent reported that the pain began when he turned suddenly, and he described the pain as a sharp, constant pain that increased with movement and radiated into his legs, which the nurse practitioner described as "very spasmatic sounding in nature." By contrast, the nurse practitioner testified that patients suffering from a dissecting aneurysm describe the sensation as a "ripping-like pain and not a sharp, sudden onset [of] pain," and that those patients generally have pain in other areas of their body. Upon physical examination, decedent was in no acute distress and exhibited no neurological or cardiovascular symptoms. Significantly, decedent's abdominal examination was normal with no tenderness or abnormal vascular sounds, including within the aortic vessel. Further, decedent responded well to non-narcotic pain medication, which the nurse practitioner testified was inconsistent with an aortic dissection. Finally, the nurse practitioner testified that decedent's thoracic spine X ray supported her diagnosis. Significantly, plaintiff's expert did not dispute any of that information.

With respect to the treatment rendered to decedent on February 15, 2004, plaintiff's expert concludes that Kaleida deviated from the relevant standard of care in failing to order a CT scan with contrast based upon decedent's "constellation of signs and symptoms." Notably, plaintiff's expert does not opine that the alleged "constellation" of symptoms warranting a CT scan with contrast were signs of an aortic dissection or that a CT scan with contrast performed on that date would have revealed such a dissection. In any event, many of the "signs and symptoms" plaintiff's expert relies upon are simply not supported by the record. For example, the expert averred that decedent had "no history of back trauma" when, in fact, decedent reported that his back pain began when he turned suddenly on February 11, 2004. Also, contrary to the expert's assertion that decedent's "pain was not relieved by prescription pain medications over the preceding [48] hours," the record establishes that decedent's pain improved significantly following the administration of pain medication on February 13, 2004 and February 15, 2004. Finally, plaintiff's expert concluded that a CT scan with contrast was indicated because the non-contrast scan "had ruled-out obstructive kidney stones." Dr. James's expert, however, opined that the CT scan findings suggested a "probable kidney stone" and noted that the report referenced an enlarged left kidney, which is consistent with a recent obstruction. Plaintiff also failed to refute that opinion.

Finally, with respect to the treatment rendered at Mercy/CHS on February 16, 2004, plaintiff's expert opined that "from a

comprehensive review of all of the other records of [decedent]'s treatment, it is clear that, at the time of his [Mercy/CHS] visit, [decedent] was experiencing a thoracic and abdominal aortic dissection. At the two (2) preceding ER visits, he had complained of intractable severe low back pain which is entirely consistent with his severe dissection. But, the [Mercy/CHS] record is devoid of documented physical findings suggestive of this condition. It is inconceivable that this evolving condition did not continue to cause detectable problems for [decedent] on February 16, 2004. When [the Mercy/CHS defendants] made no findings consistent with this problem, and, when all of them remained oblivious to this underlying condition, these facts more likely support a conclusion that the examinations were not properly performed, than that the condition had become asymptomatic."

As discussed in detail with respect to the Kaleida defendants, plaintiff's expert provides no basis for the hindsight determination that decedent was in fact suffering from an aortic dissection on February 16, 2004. Further, plaintiff's expert faults Mercy/CHS for failing to document findings consistent with that condition, i.e., "intractable" back pain, when there is no evidence that decedent had or complained of back pain on that date. Instead, the records reflect that his primary complaint was urinary retention and pain or discomfort in his suprapubic region. Unlike his visits to Kaleida on February 13 and 15, 2004, decedent went to Mercy/CHS as a walk-in patient, upon the direction of his treating urologist, for the purpose of having a Foley catheter inserted in order to relieve his complaints of urinary retention. As noted, at the time of his Mercy/CHS visit, decedent was hemodynamically stable, but for the fact that his blood pressure was elevated before he was catheterized. After the catheter was inserted and 1,000 cubic centimeters of urine were released, decedent's blood pressure returned to normal and his condition improved. Following a consultation with decedent's urologist, Mercy/CHS discharged decedent with the catheter in place and instructed him to follow up with the urologist the next day. Decedent did not do so. Thus, contrary to the opinion of plaintiff's expert, there was nothing to suggest that decedent was suffering from an aortic dissection at that time.

In sum, as the court found and plaintiff concedes, defendants established as a matter of law that they did not deviate from the standard of emergency medical care on February 13, 15, or 16, 2004 and that, in any event, any alleged deviations did not cause decedent's subsequent injuries and his death more than two weeks later. In opposition to the motions, plaintiff submitted the affidavit of an expert in which the expert made conclusory assertions of negligence and proximate cause, which were either unsupported by or contradicted by the record, and thus failed to raise a triable issue of fact (*see Holbrook*, 248 AD2d at 358-359; *see also Mignoli v Oyugi*, 82 AD3d 443, 444; *Altmann*, 51 AD3d at 483; *Hernandez-Vega v Zwanger-Pesiri Radiology Group*, 39 AD3d 710, 711-712). I would therefore reverse the order, grant defendants' respective motions for summary judgment, and dismiss the amended complaint and all cross claims against them (*see*

Moran v Muscarella, 87 AD3d 1299, 1300).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

1315

CA 12-00965

PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ.

MARK W. BOROWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY J. PTAK, DEFENDANT-APPELLANT,
AND KELLY L. MCCULLOCH, DEFENDANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (LAUREN M. YANNUZZI OF COUNSEL), FOR DEFENDANT-APPELLANT.

STAMM LAW FIRM, WILLIAMSVILLE (BRIAN G. STAMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 15, 2012. The order, inter alia, denied the motion of defendant Jeremy J. Ptak for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries he sustained when the vehicle he was operating rear-ended a vehicle operated by Jeremy J. Ptak (defendant), which in turn rear-ended a vehicle operated by defendant Kelly L. McCulloch, which had stopped in traffic. Defendant moved for summary judgment dismissing the complaint against him, and in the alternative he sought a bifurcated trial on liability and damages. Supreme Court denied defendant's motion insofar as it sought summary judgment dismissing the complaint, but granted defendant the alternative relief requested. We affirm.

"A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, [nonnegligent] explanation for the accident" (*Camarillo v Sandoval*, 90 AD3d 593, 593 [internal quotation marks omitted]; *see Roll v Gavitt*, 77 AD3d 1412, 1413; *Johnson v Yarussi Constr., Inc.*, 74 AD3d 1772, 1772-1773).

Although defendant met his initial burden of establishing a prima facie case of negligence on the part of plaintiff inasmuch as it is undisputed that plaintiff's vehicle rear-ended defendant's stopped vehicle, we conclude that plaintiff submitted evidence of an adequate nonnegligent explanation for the collision (*see Camarillo*, 90 AD3d at

593). While other cases have held that a party's testimony that he or she did not "see" the other vehicle's brake lights illuminated before rear-ending that vehicle does not alone establish the requisite nonnegligent explanation for the collision (*see Waters v City of New York*, 278 AD2d 408, 409; *Barile v Lazzarini*, 222 AD2d 635, 636-637), those cases are distinguishable from this case. Here, plaintiff testified at his deposition that he was unable to discern whether defendant's vehicle was stopped because defendant's brake lights were not activated. Plaintiff, however, also submitted the deposition testimony of McCulloch and defendant in which they both described traffic conditions on the date of the accident as "congested" and "stop and go." Additionally, plaintiff submitted evidence that defendant stopped suddenly. Indeed, plaintiff testified at his deposition that defendant apologized to plaintiff for the accident, explaining that McCulloch had stopped suddenly and that defendant "couldn't help it." That evidence, when viewed in the light most favorable to the nonmoving party (*see Nichols v Xerox Corp.*, 72 AD3d 1501, 1502), establishes a sufficient nonnegligent explanation for the collision.

The dissent characterizes defendant's apology for the accident as being exculpatory, rather than an admission of fault. Our differing interpretations of that statement support our conclusion that issues of fact exist that preclude summary judgment. Further, the dissent emphasizes that, although plaintiff contends that the alleged sudden stop of defendant's vehicle provides a nonnegligent explanation for the fact that his vehicle rear-ended defendant's vehicle, plaintiff attempts to establish defendant's negligence by submitting defendant's alleged statement regarding the same nonnegligent explanation, i.e., McCulloch's sudden stop caused defendant to stop suddenly. The dissent's assertion, however, is of no moment inasmuch as defendant, not plaintiff, moved for summary judgment and defendant cannot meet its burden by relying on "claimed deficienc[ies] in plaintiff['s] proof" (*Strzelczyk v Palumbo*, 101 AD3d 1769, 1770).

All concur except SMITH, J.P., and CARNI, J., who dissent and vote to reverse the order in accordance with the following Memorandum: This appeal presents the somewhat novel circumstance of a plaintiff seeking to recover damages for injuries he sustained after his vehicle rear-ended another vehicle, which was driven by Jeremy J. Ptak (defendant). Inasmuch as we conclude that plaintiff has not rebutted the presumption of his own negligence created by the fact that his vehicle rear-ended defendant's vehicle, we respectfully disagree with our colleagues and dissent. We would therefore reverse the order and grant defendant's motion for summary judgment dismissing the complaint and all cross claims against him.

It is not disputed that defendant's vehicle came to a complete stop before being rear-ended by plaintiff's vehicle. Further, defendant submitted the deposition testimony of defendant Kelly L. McCulloch, in which she testified that defendant's vehicle was at a complete stop for "[a]bout half a minute to a minute" before it was struck by plaintiff's vehicle. Plaintiff offered no testimony or competent evidence as to how long defendant's vehicle had been stopped

before his vehicle rear-ended defendant's vehicle. Instead, plaintiff testified at his deposition that he did not see defendant's vehicle until "a few seconds" before the impact. Remarkably, plaintiff testified that he had "no idea" if defendant's vehicle had been traveling in front of his vehicle in the same lane before the accident. Plaintiff also testified that the accident occurred during "rush hour traffic" conditions, and both McCulloch and defendant described the traffic conditions in their deposition testimony as "congested" and "stop and go."

We conclude that plaintiff failed to submit the requisite nonnegligent explanation for the collision and thus, as noted above, plaintiff failed to rebut the presumption of his negligence created by the fact that his vehicle rear-ended defendant's vehicle (*see Greene v Sivret*, 43 AD3d 1328, 1328). Even assuming, arguendo, that plaintiff is correct that defendant's brake lights were not working at the time of the accident, we conclude that under the circumstances presented here the alleged malfunctioning brake lights "would not adequately rebut the inference of [plaintiff's] negligence" (*Farrington v New York City Tr. Auth.*, 33 AD3d 332, 332; *see Greene*, 43 AD3d at 1329). Moreover, plaintiff's deposition testimony that he did not "see" any illuminated brake lights on defendant's vehicle before the collision is not the equivalent of a factual assertion that defendant's brake lights were malfunctioning. The fact that plaintiff did not observe any illuminated brake lights on defendant's vehicle is also insufficient to establish a triable issue of fact precluding summary judgment in defendant's favor (*see Waters v City of New York*, 278 AD2d 408, 409; *Barile v Lazzarini*, 222 AD2d 635, 636-637).

Finally, we respectfully disagree with the implicit conclusion of our colleagues that plaintiff, through what the majority characterizes as an "apology," submitted competent evidence of an admission of fault by defendant. Plaintiff testified at his deposition that, at the scene of the accident, defendant stated "I'm sorry. [McCulloch] stopped all of a sudden. I couldn't help it." We do not interpret those statements as an admission of fault by defendant for causing plaintiff's vehicle to rear-end defendant's vehicle. Inasmuch as it is undisputed that defendant safely stopped his vehicle without rear-ending McCulloch's vehicle and that defendant's vehicle remained at a complete stop for a half of a minute to a minute before being rear-ended by plaintiff's vehicle, we conclude that defendant's statements fail to raise a triable issue of fact as to defendant's alleged negligence. In our view, and when taken in context, defendant's statements are more fairly characterized as exculpatory in that they assign blame to McCulloch rather than express an admission of fault on the part of defendant. Moreover, we find it notable that, although plaintiff contends that the alleged sudden stop of defendant's vehicle provides a nonnegligent explanation for the fact that his vehicle rear-ended defendant's vehicle, plaintiff attempts to establish defendant's negligence by submitting defendant's alleged statement regarding the same nonnegligent explanation, i.e., McCulloch's sudden stop caused defendant to stop suddenly.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

201

KA 11-01989

PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND E. ALLARD, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 6, 2011. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the periods of postrelease supervision imposed shall run concurrently and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him, following his plea of guilty, of two counts of rape in the second degree (Penal Law § 130.30 [1]), defendant contends that County Court erred in its "determination" that he is a "sex offender." We reject that contention. The Correction Law requires that a defendant convicted under Penal Law § 130.30 be classified as a sex offender (*see* Correction Law § 168-a [2] [a] [i]). Defendant's reliance on *People v Allen* (64 AD3d 1190, 1191, *lv denied* 13 NY3d 794) is misplaced. Unlike here, the defendant in *Allen* was convicted under, inter alia, Penal Law § 250.45 (3) (a). The Correction Law does not require that a defendant convicted under that section of the Penal Law be classified as a sex offender if, upon a motion by the defendant, the sentencing court determines that such a classification would be "unduly harsh and inappropriate" (Correction Law § 168-a [2] [e]). Finally, although not raised by defendant, we conclude that the court erred in imposing consecutive periods of postrelease supervision. Penal Law § 70.45 (5) (c) requires that the periods of postrelease supervision merge and are satisfied by the service of the longest unexpired term (*see People v Kennedy*, 78 AD3d 1477, 1479, *lv denied* 16 NY3d 798). Because we cannot allow an illegal sentence to stand (*see People v Davis*, 37 AD3d 1179, 1180, *lv denied* 8 NY3d 983), we modify

the judgment accordingly.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

223

KA 11-01825

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN E. RIOS, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN E. RIOS, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered May 5, 2011. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree, aggravated unlicensed operation of a motor vehicle in the first degree, driving while intoxicated, a class E felony, criminal contempt in the second degree, aggravated unlicensed operation of a motor vehicle in the second degree and petit larceny (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing that part convicting defendant of grand larceny in the fourth degree under count seven of the indictment and dismissing that count, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count each of grand larceny in the fourth degree (Penal Law § 155.30 [8]), aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [iii]), driving while intoxicated as a felony (§§ 1192 [3]; 1193 [1] [d] [4] [i]), criminal contempt in the second degree (Penal Law § 215.50 [3]), and aggravated unlicensed operation of a motor vehicle in the second degree (Vehicle and Traffic Law § 511 [2] [a] [ii]), and two counts of petit larceny (Penal Law § 155.25). Contrary to defendant's contention, County Court properly denied his motion to sever those counts of the indictment relating to the incidents occurring on May 2009 from those counts relating to the incidents occurring on September 2009 because he failed to show "good cause for severance" (*People v Gaston*, 100 AD3d 1463, 1465; *see* CPL 200.20 [3]). Here, "the evidence as to the [May and September 2009 incidents] was presented separately and was readily capable of being segregated in

the minds of the jury. The incidents occurred on different dates and the evidence as to each incident was presented through entirely different witnesses" (*People v Ford*, 11 NY3d 875, 879), and defendant failed to establish that there was a " 'substantial likelihood' that the jury would be unable to consider the proof of each offense separately" (*People v Santana*, 27 AD3d 308, 309, *lv denied* 7 NY3d 794). Moreover, the fact that defendant was acquitted of three charges "indicates that the jury was able to consider the proof concerning each count separately" (*Gaston*, 100 AD3d at 1465). Defendant also failed to make a "convincing showing" that he had important testimony to provide concerning the September 2009 incidents and a strong need to refrain from testifying as to the May 2009 incidents (*People v Lane*, 56 NY2d 1, 8 [internal quotation marks omitted]). Defendant's burden to establish that the court abused its discretion in denying the severance motion was "a substantial one" (*People v Mahboubian*, 74 NY2d 174, 183), and he did not meet that burden here.

We agree with defendant, however, that the verdict with respect to the grand larceny in the fourth degree count (Penal Law § 155.30 [8]) is against the weight of the evidence, and we therefore modify the judgment accordingly. The conviction of that crime was based upon defendant's alleged theft of his former girlfriend's Jeep. The record establishes that, in May 2009, defendant's relationship with his former girlfriend had deteriorated. Consequently, defendant agreed to leave his girlfriend's house and never return if she "sign[ed] that [Jeep] over to him" and gave him the title to the Jeep. The girlfriend agreed and signed over the title to defendant. Defendant packed up the Jeep, drove around the block, and returned to the house 10 minutes later. Because defendant had violated their agreement, the girlfriend told defendant that "the deal was off," took the title out of the Jeep without defendant's knowledge, and drove a different car to a friend's house. The girlfriend left the Jeep at her house with defendant. It is undisputed that the girlfriend did not remove the license plates or proof of insurance from the Jeep, nor did she remove the Jeep's keys from the house. The girlfriend also testified that defendant believed that he had a right to possess the Jeep and that she did not inform him otherwise.

Defendant was arrested for petit larceny and driving while intoxicated on May 17, 2009, and he remained in jail until September 16, 2009, at which time he returned to the girlfriend's house. Defendant observed a "for sale" sign on the Jeep and demanded that the girlfriend remove it because she was not allowed to sell "his" Jeep. The girlfriend finally convinced defendant to leave the house but, the next morning, defendant took the Jeep without her knowledge. That night defendant drove the Jeep while intoxicated and rolled it onto its side. Defendant was thereafter arrested for driving while intoxicated and for stealing the Jeep.

It is well established that "a good faith claim of right is properly a defense—not an affirmative defense—and thus, 'the people have the burden of disproving such defense beyond a reasonable doubt' " (*People v Zona*, 14 NY3d 488, 492-493, quoting Penal Law §

25.00 [1]; *see* § 155.15 [1]). A defendant is not required to "establish that he previously owned or possessed the property at issue in order to assert the claim of right defense" (*Zona*, 14 NY3d at 494). The test is whether a defendant had a "subjective[,] good faith" belief that he or she had a claim of right to the relevant property, not whether defendant's belief was reasonable (*id.* at 493). Based on the testimony of defendant's former girlfriend, which is the only evidence that relates to the claim of right issue, we conclude that it was unreasonable for the jury to conclude that the People established beyond a reasonable doubt that defendant did not have a subjective, good faith basis for believing that the Jeep was his, and thus the verdict with respect to the grand larceny in the fourth degree count is against the weight of the evidence (*see generally People v Danielson*, 9 NY3d 342, 348). The only support for that count is the girlfriend's statement to defendant that the agreement to transfer title to him was "off." The girlfriend, however, then left the house without saying anything else about the Jeep, left the keys to the Jeep in the house, and took the title out of the Jeep without informing defendant that she had done so. Although, arguably, the girlfriend's statement to defendant retracting the agreement to transfer title should have indicated to defendant that the Jeep was not his, that evidence did not establish beyond a reasonable doubt that defendant did not have a subjective, good faith basis for believing that the Jeep was his (*see generally Zona*, 14 NY3d at 492-493).

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

235

CA 12-01498

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF THE ESTATE OF HARRY O. LEE, DECEASED.

---------- MEMORANDUM AND ORDER

LUCINDA GEORGE, PETITIONER-RESPONDENT;

LISA ANANIAS AND THE ESTATE OF GEORGIA LEE, DECEASED, OBJECTANTS-APPELLANTS.

THE LAMA LAW FIRM, ITHACA (CIANO J. LAMA OF COUNSEL), FOR OBJECTANTS-APPELLANTS.

J. SCOTT PORTER, SENECA FALLS, FOR PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Seneca County (Dennis F. Bender, S.), entered October 31, 2011. The decree admitted to probate the last will and testament of Harry O. Lee dated September 14, 2005 and issued letters testamentary to petitioner.

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

Memorandum: Petitioner filed a petition seeking, inter alia, to probate the will of Harry O. Lee (decedent) dated September 14, 2005 (2005 will). Objectants filed objections to the probate of the 2005 will, alleging, inter alia, that the 2005 will was procured by undue influence on the part of petitioner. Following a trial, Surrogate's Court denied the objections, admitted the 2005 will to probate and issued letters testamentary to petitioner. Objectants appeal, and we affirm.

We note as background that decedent had three daughters—petitioner, Georgia Lee and Jennifer Lee-Pryor—and four grandchildren—petitioner's three children and Georgia Lee's daughter, objectant Lisa Ananias. In 2005, decedent made changes to a will he executed in 2002. Decedent's 2002 will provided for a $5,000 bequest to Unity House of Troy and a $10,000 bequest to each of his four grandchildren, and further provided that the remainder of the estate was to be divided equally between his three daughters. Decedent's 2005 will provided for a $5,000 bequest to Unity House of Troy and a $10,000 bequest to only three grandchildren, i.e., to petitioner's children, and provided that the remainder of his estate was to be divided equally between Lee-Pryor and petitioner. The 2005 will stated that decedent made no provisions for his daughter Georgia Lee "not for any lack of affection for her but because [he had] already

made adequate provisions for her in the Harry O. Lee revocable inter vivos trust." The 2005 will also stated that decedent made no provisions for his granddaughter Ananias "not for any lack of affection for her but because she has already received in excess of any other granddaughter during her and [decedent's] lifetime."

We reject objectants' contention that petitioner exercised undue influence over decedent in making the 2005 will. It is well settled that a will contestant seeking to prove undue influence must show 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, *rearg denied* 67 NY2d 647 [internal quotation marks omitted]). "Undue influence must be proved by evidence of a substantial nature . . . , e.g., by evidence identifying the motive, opportunity and acts allegedly constituting the influence, as well as when and where such acts occurred" (*Matter of Makitra*, 101 AD3d 1579, 1581 [internal quotation marks omitted]). "Mere speculation and conclusory allegations, without specificity as to precisely where and when the influence was actually exerted, are insufficient to raise an issue of fact" (*Matter of Walker*, 80 AD3d 865, 867, *lv denied* 16 NY3d 711).

Here, objectants contend that the will was the product of undue influence because petitioner was decedent's power of attorney and controlled every aspect of decedent's life at the time that the 2005 will was executed. There is, however, "no direct evidence that petitioner did anything to actually influence decedent's distribution of [his] assets, and [objectants'] speculative assertions are insufficient" to demonstrate undue influence (*id.* at 868). Additionally, decedent's changes to his will do not constitute an "unexplained departure from a previously expressed intention of decedent" (*Matter of Walther*, 6 NY2d 49, 55). Based upon our review of the record, we see no reason to disturb the Surrogate's findings, "which are entitled to great weight inasmuch as they hinged on the credibility of the witnesses" (*Makitra*, 101 AD3d at 1581 [internal quotation marks omitted]).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

271

CA 12-01177

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

BUYER'S FIRST CHOICE, INC., DOING BUSINESS
AS 2.5 % REAL ESTATE DIRECT,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOANNE SIMME, ALSO KNOWN AS JOANNE SIMME-GOOD,
DOING BUSINESS AS GOOD CHOICE,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

MICHAEL RAKOWSKI, DEPEW, FOR PLAINTIFF-APPELLANT.

WEISS & DETIG, GRAND ISLAND (NORTON T. LOWE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Erie County Court (Thomas P. Franczyk, J.), entered October 12, 2011. The order, among other things, denied the motion of plaintiff for summary judgment.

It is hereby ORDERED that said appeal insofar as it concerns the counterclaim in the answer is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff commenced the instant action seeking damages for defendant's alleged breach of her duty of loyalty to plaintiff while she was associated with plaintiff as an independent contractor/real estate broker. According to plaintiff, defendant breached her duty of loyalty to plaintiff by communicating with an individual and arranging a meeting with her to list and sell her property.

In appeal No. 1, plaintiff appeals from an order that, inter alia, denied its motion for summary judgment on the cause of action for breach of the duty of loyalty and for dismissal of the counterclaim in defendant's answer, and granted defendant leave to amend her answer. In appeal No. 2, plaintiff appeals from an order that denied its motion seeking, inter alia, to dismiss the counterclaim in the amended answer and second amended answer pursuant to CPLR 3211 (a) (7), for failure to state a cause of action.

With respect to appeal No. 1, we note at the outset that plaintiff's appeal from the order insofar as it denied that part of plaintiff's motion to dismiss the counterclaim in defendant's answer

must be dismissed. Inasmuch as the answer in appeal No. 1 was superseded by defendant's subsequent amended answer and second amended answer, "issues involving the original [answer] are moot" (*Sutton Investing Corp. v City of Syracuse*, 12 AD3d 1201, 1201). We otherwise affirm the order in appeal No. 1. We conclude in particular that County Court properly denied that part of plaintiff's motion for summary judgment on the cause of action for breach of the duty of loyalty. There is no written agreement between the parties setting forth the nature of their relationship and the scope of defendant's duties, and we conclude that there are triable issues of fact whether defendant was required to bring all leads concerning potential clients to plaintiff or whether she was to work only with plaintiff's existing clients (*see Bynog v Cipriani Group*, 1 NY3d 193, 198, *rearg denied* 2 NY3d 794; *see also G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, 103, *affd* 10 NY3d 941).

We conclude in appeal No. 2 that the court properly denied that part of plaintiff's motion to dismiss the counterclaim in defendant's second amended answer. Contrary to plaintiff's contention, the counterclaim does not fail to state a cause of action (*see generally* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87-88).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

272

CA 12-01178

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

BUYER'S FIRST CHOICE, INC., DOING BUSINESS
AS 2.5 % REAL ESTATE DIRECT,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOANNE SIMME, ALSO KNOWN AS JOANNE SIMME-GOOD,
DOING BUSINESS AS GOOD CHOICE,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

MICHAEL RAKOWSKI, DEPEW, FOR PLAINTIFF-APPELLANT.

WEISS & DETIG, GRAND ISLAND (NORTON T. LOWE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Erie County Court (Thomas P. Franczyk, J.), entered January 23, 2012. The order denied the motion of plaintiff to dismiss defendant's amended answer and second amended answer.

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

Same Memorandum as in *Buyer's First Choice, Inc. v Simme* ([appeal No. 1] ___ AD3d ___ [June 7, 2013]).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

289

CA 12-01647

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ.

WILLIAM R. THOMPSON,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

SITHE/INDEPENDENCE, LLC, SITHE ENERGIES, INC., DYNEGY ENERGY SERVICES, INC., DYNEGY NORTHEAST GENERATION, INC., DYNEGY, INC. AND SITHE/INDEPENDENCE POWER PARTNERS, LP,
DEFENDANTS-APPELLANTS-RESPONDENTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE, MAURO LILLING NAPARTY LLP, WOODBURY (ANTHONY F. DESTEFANO OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered April 23, 2012. The order, inter alia, denied the motion of plaintiff for partial summary judgment pursuant to Labor Law § 240 (1).

It is hereby ORDERED that the order so appealed from is modified on the law by vacating the fifth ordering paragraph, reinstating the sixth and seventh affirmative defenses, denying plaintiff's motion for leave to amend the bill of particulars to include the violation of 12 NYCRR 23-1.16 as a basis for the Labor Law § 241 (6) claim and granting that part of defendants' cross motion for summary judgment dismissing the Labor Law § 241 (6) claim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from an elevated work site while working at premises owned by defendants. Defendants contracted with plaintiff's employer to replace a diffuser in defendants' power plant. At the time of the accident, plaintiff was attempting to attach a clamp to the diffuser. Plaintiff was provided with a mechanical lift and a safety harness, but he did not believe that he could reach the appropriate location with a mechanical lift. Plaintiff removed his harness and climbed out of the lift, whereupon he fell approximately 10 to 15 feet to the ground. There typically were drop lines above the work area to which plaintiff could attach his safety harness, but in the area in which

plaintiff was working the drop line had been removed. Plaintiff moved for partial summary judgment on liability under Labor Law § 240 (1) and for leave to amend his bill of particulars to assert a violation of 12 NYCRR 23-1.16 as a basis for his Labor Law § 241 (6) claim. Defendants cross-moved for summary judgment dismissing the complaint. Defendants appeal and plaintiff cross-appeals from an order denying plaintiff's motion for partial summary judgment, granting plaintiff's motion for leave to amend the bill of particulars, granting that part of defendants' cross motion with respect to the Labor Law § 200 claim, and sua sponte dismissing defendants' affirmative defenses that plaintiff was a recalcitrant worker and that his conduct was the sole proximate cause of his injuries.

We conclude that Supreme Court properly denied the motion and that part of the cross motion with respect to the Labor Law § 240 (1) claim. Contrary to the parties' contentions, "there are triable issues of fact whether plaintiff was provided with appropriate safety devices" as contemplated by section 240 (1) (*Sistrunk v County of Onondaga*, 89 AD3d 1552, 1552; *see generally Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235-238). Specifically, the record contains conflicting evidence whether plaintiff could safely perform his work with the assistance of the mechanical lift and safety harness and whether a drop line should have been available for plaintiff's use.

We further conclude that summary judgment to either plaintiff or defendants on the issues of whether plaintiff was a recalcitrant worker or whether his conduct was the sole proximate cause of the accident is inappropriate because there is conflicting evidence in the record concerning the availability of appropriate safety equipment (*see generally Miro v Plaza Constr. Corp.*, 9 NY3d 948, 949; *Thome v Benchmark Main Tr. Assoc., LLC*, 86 AD3d 938, 939-940; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553). "[T]he nondelegable duty imposed upon the owner and general contractor under Labor Law § 240 (1) is not met merely by providing safety instructions or by making other safety devices available, but [instead is met] by furnishing, placing and operating such devices so as to give [a worker] proper protection" (*Long v Cellino & Barnes, P.C.*, 68 AD3d 1706, 1707 [internal quotation marks omitted]; *see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10-11). Although plaintiff concedes that he was instructed to use a harness, we conclude that "[d]efendants did not establish [a recalcitrant worker] defense merely by showing that plaintiff was instructed to avoid an unsafe practice" (*Akins v Central N.Y. Regional Mkt. Auth.*, 275 AD2d 911, 912; *see Luna v Zoological Socy. of Buffalo, Inc.*, 101 AD3d 1745, 1746). Because plaintiff is not entitled to summary judgment on those issues, we agree with defendants that the court erred in sua sponte dismissing their affirmative defenses asserting that plaintiff was a recalcitrant worker and that his conduct was the sole proximate cause of the accident. We therefore modify the order accordingly.

Contrary to the further contentions of defendants and plaintiff, we conclude there is a triable issue of fact whether the work in which plaintiff was engaged when he was injured, i.e., replacement of the

diffuser, came within the protection of Labor Law § 240 (1) (*see generally Kostyo v Schmitt & Behling, LLC*, 82 AD3d 1575, 1576; *Pakenham v Westmere Realty, LLC*, 58 AD3d 986, 987-988).

We agree with defendants, however, that the court erred in granting plaintiff's motion for leave to amend the bill of particulars to include the violation of 12 NYCRR 23-1.16 as a basis for the Labor Law § 241 (6) claim inasmuch as that regulation is inapplicable to the facts of this case (*see generally D'Acunti v New York City Sch. Constr. Auth.*, 300 AD2d 107, 107-108). Because there is otherwise no basis for the alleged violation of section 241 (6), we conclude that the court erred in denying that part of defendants' cross motion with respect to that claim. We therefore further modify the order accordingly. Section 23-1.16, which sets forth standards for safety belts, harnesses, tail lines and lifelines, "does not specify *when* such safety devices are required" (*Partridge v Waterloo Cent. Sch. Dist.*, 12 AD3d 1054, 1056 [emphasis added]; *see generally Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619; *D'Acunti*, 300 AD2d at 107-108; *Avendano v Sazerac, Inc.*, 248 AD2d 340, 341).

Finally, we conclude that the court properly granted that part of defendants' cross motion for summary judgment dismissing the Labor Law § 200 claim. Although plaintiff contends that his injury was caused by a defective condition of the premises, "[p]laintiff's account of the accident establishes that there was no dangerous condition on the premises which caused the accident, but rather it was caused by the manner in which [the work] was undertaken" (*Lombardi v Stout*, 80 NY2d 290, 295; *see Ortega v Puccia*, 57 AD3d 54, 62-63).

All concur except WHALEN, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent in part, because I cannot agree with the majority's conclusion regarding plaintiff's Labor Law § 241 (6) claim. I otherwise agree with the remainder of the majority's decision.

Defendants contend, and the majority agrees, that Supreme Court erred in granting plaintiff's motion for leave to amend the bill of particulars to include the violation of 12 NYCRR 23-1.16 as a basis for the Labor Law § 241 (6) claim. I disagree. Although the note of issue and certificate of readiness were filed prior to that motion, plaintiff's reliance upon 12 NYCRR 23-1.16 "raises no new factual allegations or theories of liability and results in no discernible prejudice to defendant[s]" (*Landon v Austin*, 88 AD3d 1127, 1129-1130; *see Ortega v Everest Realty LLC*, 84 AD3d 542, 545; *Ellis v J.M.G., Inc.*, 31 AD3d 1220, 1221). It is clear that "12 NYCRR 23-1.16 is both applicable to the facts of this case and sufficiently specific to support the section 241 (6) claim" (*Farmer v Central Hudson Gas & Elec. Corp.*, 299 AD2d 856, 857, *amended on rearg* 302 AD2d 1017, *lv denied* 100 NY2d 501). The majority concludes that section 23-1.16 is inapplicable to the facts of this case, noting that it sets forth standards for safety belts, harnesses, tail lines and lifelines but " 'does not specify *when* such safety devices are required.' " That conclusion ignores that the record here establishes that there was a

100% tie-off rule when a worker was working six feet or more above the ground. Thus, the "when" is established as anytime a worker was working six feet or more above the ground, as plaintiff was here. The majority also ignores evidence in the record that there were safety devices in the location of plaintiff's fall at some point during the job. While plaintiff is not thereby entitled to summary judgment on the section 241 (6) claim, I conclude that the court properly granted the motion for leave to amend the bill of particulars to allow the issue to be presented to a jury.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

333

CA 12-01631

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

RICHARD WESTGATE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID S. BRODERICK, AS ADMINISTRATOR OF THE ESTATE OF THOMAS D. HOGAN, III, KAREN HOGAN, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered February 14, 2012. The order, among other things, 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 those parts of the motion of defendants David S. Broderick, as administrator of the estate of Thomas D. Hogan, III, and Karen Hogan for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action and reinstating the amended complaint to that extent and by granting that part of plaintiff's cross motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action against defendant David S. Broderick, as administrator of the estate of Thomas D. Hogan, III, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries that he sustained when a ladder jack scaffold collapsed from under him while constructing a house for Thomas D. Hogan, III (decedent) and defendant Karen Hogan in 2007. We agree with plaintiff that Supreme Court erred in granting those parts of the motion of defendants David S. Broderick, as administrator of the estate of Thomas D. Hogan, III, and Karen Hogan (defendants) for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action based on the homeowner exemption. We therefore modify the order accordingly. An "owner" for purposes of the homeowner exemption pursuant to those sections of the Labor Law "has been held to encompass a person who has an interest in the property" where a qualifying injury occurs and is not limited to the

titleholder (*Copertino v Ward*, 100 AD2d 565, 566; *see e.g. Kane v Coundorous*, 293 AD2d 309, 311; *Reisch v Amadori Constr. Co.*, 273 AD2d 855, 856). Here, defendants failed to establish as a matter of law that decedent and Karen Hogan had the requisite interest in the property (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendants presented no evidence of a property interest with respect to decedent, and their submissions with respect to Karen Hogan's alleged property interest raised an issue of fact with respect to her interest in the property. "In order to transfer an ownership interest in real property, there must be a deed, or other 'conveyance in writing' . . . Although it is not necessary that such conveyance be recorded . . . , it is a well-established rule that delivery of the deed with intent to transfer title is required" (*Goodell v Rosetti*, 52 AD3d 911, 913). Defendants attempted to establish Karen Hogan's ownership through her deposition testimony regarding a purported unrecorded deed claimed to be executed by Jean Hogan prior to her death in 2000 conveying the property to Karen. That alleged deed was not produced, although Karen described its size and asserted that a certain attorney never recorded the deed. Defendants further submitted a deed from the estate of Jean Hogan conveying the property to Karen in 2008. However, we conclude that Karen's deposition testimony combined with the later deed was insufficient to establish that Karen was an owner at the time of plaintiff's injury (*cf. Saline v Saline*, 94 AD3d 1080, 1082; *Whalen v Harvey*, 235 AD2d 792, 793, *lv denied* 89 NY2d 816). Indeed, by presenting evidence of both deeds, defendants by their own submissions raised an issue of fact whether Jean Hogan transferred her property interest to Karen prior to her death in 2000 or whether the property was conveyed by Jean's executrix in 2008, after the date on which plaintiff was injured (*see generally Zuckerman*, 49 NY2d at 562). However, we note that, even in the event that Karen ultimately establishes her ownership in the property such that she is entitled to the benefit of the homeowner exemption, the benefit of that ownership would not inure to decedent or his estate based on their relationship as husband and wife (*see Fisher v Coghlan*, 8 AD3d 974, 975, *lv dismissed* 3 NY3d 702).

We further conclude that the court erred in denying that part of plaintiff's cross motion for partial summary judgment on liability with respect to decedent. We therefore further modify the order accordingly. Plaintiff's fall was within the class of those protected by Labor Law § 240 (1) (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8), and the record establishes that decedent was a contractor within the meaning of the statute because he " 'had the power to enforce safety standards and choose responsible subcontractors' " (*Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428). Furthermore, a person's "right to exercise control over the work denotes [the person's] status as a contractor, regardless of whether [he or she] actually exercised that right" (*Milanese v Kellerman*, 41 AD3d 1058, 1061), and here defendants' attorney essentially conceded that decedent had that right. The court properly denied that part of plaintiff's cross motion with respect to Karen, however, because plaintiff failed to establish as a matter of law that she had the requisite control and, in any event, as noted there is an issue of fact whether she is entitled to the benefit of

the homeowner exemption.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

340

KA 09-01766

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered June 30, 2009. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree, rape in the third degree and criminal impersonation in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part convicting defendant of criminal impersonation in the first degree and dismissing count five of the superseding indictment, and by vacating the sentence imposed for rape in the third degree, and the matter is remitted to Onondaga County Court for resentencing on that count, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [1]), rape in the third degree (§ 130.25 [3]), and criminal impersonation in the first degree (§ 190.26 [1], [2]). We reject defendant's contention that the conviction of sexual abuse must be reversed because County Court's jury instructions created a possibility that the jury convicted him upon a theory different from that set forth in the superseding indictment (hereinafter, indictment). Although defendant failed to object to the court's instructions and thus failed to preserve that contention for our review, we have previously "conclude[d] that preservation is not required" with respect to this issue (*People v Greaves*, 1 AD3d 979, 980), because "[t]he right of an accused to be tried and convicted of only those crimes and upon only those theories charged in the indictment is fundamental and nonwaivable" (*People v Rubin*, 101 AD2d 71, 77, *lv denied* 63 NY2d 711). Here, the indictment, as amplified by the bill of particulars, charged defendant with committing the crime of sexual abuse in the first degree by physical force (*see generally* § 130.00 [8] [a]), whereas the court's instructions permitted the jury

to convict defendant upon a finding that he committed the crime by means of an expressed or implied threat (*see generally* § 130.00 [8] [b]). Notwithstanding that error, we conclude that reversal is not required under the circumstances of this case. "Had there been evidence from which the . . . jury could have concluded that defendant accomplished his crimes through the use of express or implied threats that overcame the complainant's will, then the court's instructions—which permitted the jury to consider that uncharged theory—might well have violated defendant's right to be tried only for crimes with which the [g]rand [j]ury had charged him. [Here, to the contrary], there was no such evidence" (*People v Grega*, 72 NY2d 489, 496).

We agree with defendant, however, that the court's jury instructions with respect to the crime of criminal impersonation in the first degree permitted the jury to convict him upon a theory not charged in the indictment, and thus violated his right to be tried for only those crimes charged in the indictment, as limited by the bill of particulars (*see generally Matter of Corbin v Hillery*, 74 NY2d 279, 290, *affd sub nom. Grady v Corbin*, 495 US 508, *overruled on other grounds United States v Dixon*, 509 US 688). Again, we address defendant's contention despite his failure to preserve it for our review (*see Rubin*, 101 AD2d at 77). The fifth count of the indictment alleged that defendant committed the crime of criminal impersonation when he pretended to be a police officer and, "in the course of such pretense, committed or attempted to commit the felony of [r]ape in the first degree." The court's instructions, however, permitted the jury to convict defendant upon finding that he committed any felony in the course of pretending to be a police officer, thus allowing the jury to convict defendant upon a theory not charged in the indictment. We therefore modify the judgment accordingly.

Contrary to defendant's contention, we conclude with respect to the remaining counts that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not contrary to the weight of the evidence with respect to those counts (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that the court erred in denying his request to exercise a peremptory challenge against a prospective juror after both parties had accepted that prospective juror and exhausted their challenges to the alternate juror, and after the court declared jury selection to be complete. "There is nothing in CPL 270.15 that would require a court to grant a defendant's request to exercise a peremptory challenge to a juror who had already been accepted by both sides earlier in jury selection, but who had not yet been sworn" (*People v Smith*, 278 AD2d 75, 76, *lv denied* 96 NY2d 763; *see People v Brown*, 52 AD3d 248, 248, *lv denied* 11 NY3d 735; *People v Smith*, 11 AD3d 202, 203, *lv denied* 4 NY3d 748).

Defendant further contends that he is entitled to a new trial

because of prosecutorial misconduct and because the court erred in several of its evidentiary rulings. Defendant alleges, inter alia, that the prosecutor engaged in misconduct by eliciting testimony regarding defendant's postarrest silence during the People's direct case, and he further alleges that the court erred by permitting the prosecutor to comment on that testimony during her opening and closing statements. We reject those contentions. As a preliminary matter, we reject the People's contention that defendant failed to preserve his contention for our review. Defense counsel objected, albeit belatedly, to the prosecutor's comments on defendant's postarrest silence during her opening statement, and promptly objected several times to questions that elicited testimony concerning defendant's postarrest silence. Although defendant failed to preserve that part of his contention concerning the prosecutor's closing statement, under the circumstances of this case we exercise our power to review that part of defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), particularly because the issue was raised earlier and thus was before the court in any event.

Next, we agree with defendant that those comments by the prosecutor during opening and closing statements were improper and that the court erred in admitting testimony that he refused to answer certain questions and remained silent with respect to others. "Neither a defendant's silence [nor his] invocation of the right against self-incrimination during police interrogation can be used against him on the People's direct case" (*People v Whitley*, 78 AD3d 1084, 1085; *see People v Capers*, 94 AD3d 1475, 1476, *lv denied* 19 NY3d 971). We nevertheless conclude, "in light of the evidence presented, . . . that any such errors were 'harmless beyond a reasonable doubt' inasmuch as there is 'no reasonable possibility that the error[s] might have contributed to defendant's conviction' " (*People v Murphy*, 79 AD3d 1451, 1453, *lv denied* 16 NY3d 862, quoting *People v Crimmins*, 36 NY2d 230, 237; *see Capers*, 94 AD3d at 1476).

With respect to defendant's contention that he was denied effective assistance of counsel, we conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147). Defense counsel, inter alia, appropriately cross-examined the witnesses, gave cogent opening and closing statements, and presented a viable defense theory that resulted in defendant's acquittal of the two most serious charges in the indictment. Furthermore, defendant has failed "to demonstrate the absence of strategic or other legitimate explanations" for his various allegations of ineffectiveness (*People v Rivera*, 71 NY2d 705, 709).

Contrary to defendant's further contention, the court did not abuse its discretion in denying his request for a new attorney or to proceed pro se. "In determining whether good cause [for substitution of counsel] exists, a trial court must consider the timing of the defendant's request, its effect on the progress of the case and whether present counsel will likely provide the defendant with meaningful assistance. Good cause determinations are necessarily

case-specific and therefore fall within the discretion of the trial court" (*People v Linares*, 2 NY3d 507, 510). Furthermore, "good cause does not exist [where, as here,] defendants are guilty of delaying tactics or where, on the eve of trial, disagreements over trial strategy generate discord" (*id.* at 511).

With respect to defendant's contention that the court erred in denying his request to represent himself, the record establishes that his "request to represent himself was not clear and unequivocal. Rather, the record shows that his request was made in connection with applications for substitution of assigned counsel, and in the alternative to those applications. Under those circumstances, the [court] did not improvidently exercise its discretion in denying the . . . request" (*People v Littlejohn*, 92 AD3d 898, 898, *lv denied* 19 NY3d 963; *see generally People v Payton*, 45 NY2d 300, 314, *revd on other grounds* 445 US 573).

We reject defendant's contention that the sentences imposed on the convictions of sexual abuse in the first degree and rape in the third degree must run concurrently, inasmuch "as each count involved a separate sexual act constituting a distinct offense" (*People v Colon*, 61 AD3d 772, 773, *lv denied* 13 NY3d 743; *see People v Stiles*, 78 AD3d 1570, 1570, *lv denied* 16 NY3d 863). The People correctly concede, however, that the indeterminate term of imprisonment imposed upon the conviction of rape in the third degree is illegal. That crime carries a mandatory determinate sentence with a period of postrelease supervision (*see* Penal Law § 70.80 [5] [b] [iv]; *see also* § 70.45 [2-a] [g]). "Although this issue was not raised before the [sentencing] court . . . , we cannot allow an [illegal] sentence to stand" (*People v Price*, 140 AD2d 927, 928; *see People v Thigpen*, 30 AD3d 1047, 1049, *lv denied* 7 NY3d 818). We therefore further modify the judgment by vacating the sentence imposed on that count, and we remit the matter to County Court for resentencing on that count. The remainder of the sentence is not unduly harsh or severe.

We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

343

KA 12-00106

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY LOSTUMBO, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered January 6, 2012. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the third degree, criminal mischief in the fourth degree (two counts), petit larceny (two counts), possession of burglar's tools (two counts) and reckless endangerment in the first degree (four counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing those parts convicting defendant of reckless endangerment in the first degree under counts 10, 11, 13 and 14 of the superceding indictment to reckless endangerment in the second degree (Penal Law § 120.20), and vacating the sentences imposed on those counts and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Onondaga County, for sentencing on those counts.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, one count of criminal mischief in the third degree (Penal Law § 145.05 [2]) and four counts of reckless endangerment in the first degree (§ 120.25) arising out of two incidents in which he vandalized and stole money from vending machines. When the police approached defendant immediately after the second incident, he fled in a dump truck and led numerous law enforcement officers on a 40-minute chase. We agree with defendant that the evidence adduced at trial is legally insufficient to establish that he acted with depraved indifference to human life under Penal Law § 120.25. Defendant's flight from law enforcement in a motor vehicle was not wantonly cruel or brutal behavior evincing " 'an utter disregard for the value of human life' " (*People v Feingold*, 7 NY3d 288, 296; *see People v Lewie*, 17 NY3d 348, 359; *see also People v Suarez*, 6 NY3d 202, 213). Even if defendant had engaged in conduct that created a grave risk of death to identified members of the general public, the Court of Appeals and this Court have held in

similar cases that such conduct does not constitute evidence of depraved indifference (*see People v Prindle*, 16 NY3d 768, 771; *People v Jean-Philippe*, 101 AD3d 1582, 1583). We therefore modify the judgment by reducing the conviction of reckless endangerment in the first degree under counts 10, 11, 13 and 14 of the superceding indictment to reckless endangerment in the second degree (§ 120.20), and we remit the matter to Supreme Court for sentencing on those counts.

We reject defendant's contention that the evidence is legally insufficient to support the conviction of criminal mischief in the third degree on the ground that the People failed to establish that he caused the damage to the property at issue (*see* Penal Law § 145.05 [2]). A witness testified at trial that he observed a man repeatedly striking the vending machine with a crowbar for between three and five minutes. That witness also observed the same man shatter the window of a van and steal a GPS system therefrom, and defendant subsequently confessed to stealing that GPS system. Defendant's girlfriend also testified that defendant repeatedly struck the vending machine with a crowbar, causing the damage. Viewing the evidence in the light most favorable to the prosecution, as we must, we conclude that the evidence is legally sufficient to establish that defendant caused the damage to the property at issue (*see People v Contes*, 60 NY2d 620, 621). Furthermore, viewing the evidence in light of the elements of criminal mischief in the third degree as charged to the jury, we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Danielson*, 9 NY3d 342, 348-349).

Defendant's posttrial motion was inadequate to preserve for our review his further contention that the testimony of an employee of the vending machine maintenance company was insufficient to establish the amount of damage to the vending machine (*see People v Mills*, 28 AD3d 1156, 1157, *lv denied* 7 NY3d 903; *see generally People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit (*see People v Butler*, 70 AD3d 1509, 1509, *lv denied* 14 NY3d 886).

We also reject defendant's contention that he was deprived of his right to a fair trial when the court admitted in evidence a letter that he had written to his girlfriend while incarcerated, in which he requested that she not "hurt" him by testifying to what she had witnessed during both incidents. We conclude that the letter was properly admitted "as an admission inconsistent with defendant's innocence" (*People v McCray*, 227 AD2d 900, 900, *lv denied* 89 NY2d 866).

Defendant failed to preserve for our review his further contention that during deliberations the jury was provided with exhibits that had not been admitted in evidence (*see People v Kalb*, 91 AD3d 1359, 1360, *lv denied* 19 NY3d 963), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Thompson*, 34 AD3d 852, 854, *lv denied* 8 NY3d 885). We note that, "to the extent that the record is not entirely clear on the point, defendant has not met his burden of

presenting a factual record sufficient to permit appellate review" (*People v Turaine*, 227 AD2d 299, 300, *lv denied* 88 NY2d 1025).

Defendant failed to preserve for our review his contention that he was penalized for asserting his right to a trial (*see People v Hurley*, 75 NY2d 887, 888), including his present objection to the court's comment at sentencing that it would impose "twice as much as what was offered pre-indictment" (*see People v Jones*, 2 AD3d 1397, 1399, *lv denied* 2 NY3d 742). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, we note that we are remitting the matter for sentencing on the four counts of reckless endangerment in the second degree, and we conclude that the sentence is not otherwise unduly harsh or severe.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

369

KA 11-01117

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUKE J. WRIGHT, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered May 24, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the first degree (two counts), predatory sexual assault, rape in the first degree, criminal sexual act in the first degree, rape in the second degree, criminal sexual act in the second degree, incest in the third degree, unlawful imprisonment in the first degree as a hate crime and endangering the welfare of an incompetent or physically disabled person.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the conviction of assault in the first degree (Penal Law § 120.10 [1]) under count 3 of the indictment to assault in the second degree (§ 120.05 [2]), reducing the conviction of unlawful imprisonment in the first degree as a hate crime (§§ 485.05 [1] [b]; 135.10) under count 10 of the indictment to unlawful imprisonment in the first degree (§ 135.10), and vacating the sentences imposed on those counts, and by vacating the sentence imposed for the conviction of rape in the second degree (§ 130.30 [2]) under count 7 of the indictment and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for sentencing on the conviction of assault in the second degree and unlawful imprisonment in the first degree and resentencing on the conviction of rape in the second degree.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (two counts) (Penal Law § 120.10 [1]); predatory sexual assault (§ 130.95 [1] [b]) with aggravated sexual abuse in the first degree (§ 130.70 [1] [a]) as the underlying crime; one count each of rape and criminal sexual act in the first degree (§§ 130.35 [1]; 130.50 [1] [forcible compulsion]) and rape and criminal sexual act in the second degree (§§ 130.30 [2];

130.45 [2] [mentally disabled victim]); incest in the third degree (§ 255.25); unlawful imprisonment in the first degree as a hate crime (§§ 135.10, 485.05 [1] [b]); and endangering the welfare of an incompetent or physically disabled person (§ 260.25). We reject defendant's contention that County Court erred in determining after a hearing that defendant was not an incapacitated person (*see* CPL 730.10 [1]). We conclude that the prosecution met its burden of establishing by a preponderance of the evidence that defendant possessed the capacity to understand the nature of the proceedings against him and that he was capable of assisting in his own defense (*see People v Mendez*, 1 NY3d 15, 19-20; *People v Surdis*, 77 AD3d 1018, 1018, *lv denied* 16 NY3d 800). Defendant was examined by two forensic psychiatrists, each of whom concluded that defendant was competent to stand trial, and the hearing court's competency ruling is entitled to great deference (*see Surdis*, 77 AD3d at 1018-1019; *People v Brow*, 255 AD2d 904, 904-905). We reject defendant's further contention that the court erred in failing to reopen the competency hearing based upon the report defendant's psychologist issued following the hearing but based on the result of his examinations of defendant prior to the hearing. We recognize that the court has a continuing duty to inquire into a defendant's competency where facts arise during trial that indicate that the defendant cannot understand the proceedings or assist in his or her defense (*see People v Taylor*, 13 AD3d 1168, 1169, *lv denied* 4 NY3d 836). However, at the time defendant moved to reopen the hearing, defense counsel indicated that he had not observed any change in defendant during the course of his representation. Further, defense counsel made no allegations indicating that there was any change in defendant's conduct after the initial hearing, and the court had the opportunity during trial to observe defendant and his interaction with counsel. Under these circumstances, we conclude that the court did not abuse its discretion in refusing to reopen the competency hearing (*see People v Johnson*, 52 AD3d 1040, 1042, *lv denied* 11 NY3d 833). We note in any event that, during the trial the court permitted defendant's expert, over the objection of the prosecutor, to testify that in his opinion defendant was not competent to stand trial.

Defendant failed to preserve for our review his contention that his waiver of the right to be present at bench conferences during jury selection was not knowingly, voluntarily and intelligently made (*see People v King*, 234 AD2d 391, 391, *lv denied* 89 NY2d 986). In any event, that contention has no merit. Defendant was apprised by the court that it would not conduct bench conferences if he insisted on being present, whereupon defendant expressly waived his right to be present. We conclude that the waiver was knowingly, intelligently and voluntarily made (*see People v Cahill*, 2 NY3d 14, 55-56; *People v Vargas*, 88 NY2d 363, 375-378).

Also contrary to defendant's contention, the court properly allowed the People to amend the indictment. The amendments did not change the theory of the prosecution and did not "otherwise tend to prejudice the defendant on the merits" (CPL 200.70 [1]; *see People v Brink*, 31 AD3d 1139, 1140, *lv denied* 7 NY3d 865). Defendant's contention that certain photographs of the victim were inflammatory

and should not have been admitted in evidence lacks merit. The court had broad discretion in determining whether the probative value of the photographs outweighed any prejudice to defendant (*see People v Law*, 273 AD2d 897, 898, *lv denied* 95 NY2d 965). Here, the photographs were relevant with respect to, inter alia, the nature and extent of the injuries (*see id.*).

Defendant failed to preserve for our review his further contentions that his constitutional rights were violated by the use of the recorded jailhouse telephone conversations between defendant and others (*see* CPL 470.05 [2]), that his consent to provide a DNA sample to the police was not valid (*see People v Adger*, 83 AD3d 1590, 1591, *lv denied* 17 NY3d 857), and that he was denied a fair trial by prosecutorial misconduct (*see People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

By proceeding to trial and failing to raise an objection at trial concerning the court's alleged failure to rule on his request for suppression of his January 22, 2009 statement to the police, defendant abandoned any procedural challenge to that alleged failure (*see People v Nix*, 78 AD3d 1698, 1699, *lv denied* 16 NY3d 799, *cert denied* ___ US ___, 132 S Ct 157; *People v Anderson*, 52 AD3d 1320, 1320-1321, *lv denied* 11 NY3d 733). Even assuming, arguendo, that defendant was in custody when he made one or more of his prearrest statements, we conclude that the statements were made pursuant to valid waivers of his *Miranda* rights (*see People v Williams*, 62 NY2d 285, 287-290; *see also People v Debo*, 45 AD3d 1349, 1350, *lv denied* 10 NY3d 809).

Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence because his motion for a trial order of dismissal was not specifically directed at the grounds advanced on appeal and because he failed to renew his motion after presenting evidence (*see People v Roman*, 85 AD3d 1630, 1630, *lv denied* 17 NY3d 821). Nevertheless, we exercise our power to address that contention with respect to counts 3 and 10 of the indictment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we conclude that the evidence is legally insufficient to support the conviction on those counts (*see generally People v Bleakley*, 69 NY2d 490, 495).

With respect to the third count of the indictment, charging defendant with assault in the first degree (Penal Law § 120.10 [1]), we agree with defendant that the evidence is legally insufficient to support the serious physical injury element of the crime (*see generally People v Stewart*, 18 NY3d 831, 832-833). We therefore modify the judgment by reducing the conviction under count three to assault in the second degree (§ 120.05 [2]; *see People v Snyder*, 294 AD2d 381, 382, *lv denied* 98 NY2d 702]), and we remit the matter to County Court for sentencing on that conviction (*see generally People v Huntsman*, 96 AD3d 1387, 1390, *lv denied* 20 NY3d 1099).

With respect to count 10, charging defendant with unlawful imprisonment in the first degree as a hate crime (Penal Law §§ 135.10, 485.05 [1] [b]), we agree with defendant that the evidence is legally insufficient to support the hate crime element of the conviction. While the victim's disability may have provided the opportunity for defendant to commit the crime of unlawful imprisonment, the People failed to establish that defendant committed the "specified offense" of unlawful imprisonment "in whole or in substantial part because of a belief or perception regarding" such disability (§ 485.05 [1] [b]). We therefore further modify the judgment by reducing the conviction under count 10 to unlawful imprisonment in the first degree (§ 135.10; *cf. People v Ortiz*, 48 AD3d 1112, 1112), and we remit the matter to County Court for sentencing on that conviction as well (*see generally Huntsman*, 96 AD3d at 1390). Based on our resolution of the legal sufficiency issue with respect to counts 3 and 10, we do not address defendant's alternate contentions with respect to those counts. Viewing the evidence in light of the elements of the remaining crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

As the People correctly concede, the indeterminate sentence imposed on the conviction of rape in the second degree under count seven is illegal (*see* Penal Law § 70.80 [1] [3]). We therefore additionally modify the judgment by vacating the sentence imposed on count seven, and we remit the matter to County Court for resentencing on that count. We reject defendant's contention that the imposition of a five-year period of postrelease supervision on the conviction of criminal sexual act in the second degree is illegal (*see* § 70.45 [2-a] [d]). We reject the further contention of defendant that he was denied effective assistance of counsel (*see generally People v Caban*, 5 NY3d 143, 152; *People v Baldi*, 54 NY2d 137, 147). Defendant's sentence is not unduly harsh or severe.

We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

372

CA 12-01132

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF GREEN THUMB LAWN CARE, INC.
AND JOHN KNUTSON, PH.D.,
PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PETER M. IWANOWICZ, ACTING COMMISSIONER, AND NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, RESPONDENTS-DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

MICHAEL A. DEEM, OSSINING, HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ANDREW G. FRANK OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered October 13, 2011 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, inter alia, denied the requests of petitioners-plaintiffs for a declaratory judgment, and declared that 6 NYCRR 325.40 terminated the authority of petitioners-plaintiffs to use notice waivers.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the declaration and dismissing that part of the amended petition/complaint seeking declaratory relief and as modified the judgment is affirmed without costs.

Memorandum: These consolidated appeals arise from an administrative proceeding in which the New York State Department of Environmental Conservation (DEC) alleged that Green Thumb Lawn Care, Inc. (Green Thumb) and its president, John Knutson, had violated statutes and regulations by, inter alia, performing residential lawn care without having a signed contract that specified the dates upon which pesticides would be applied. As a result of that administrative proceeding, the Acting Commissioner of the DEC ruled that Green Thumb and Knutson violated ECL 33-1001, as well as the regulation promulgated by the DEC with respect to that statute (*see* 6 NYCRR 325.40), and, inter alia, assessed a penalty. Petitioners-plaintiffs, Green Thumb and Knutson (hereafter, petitioners), commenced a combined CPLR article 78 proceeding and declaratory judgment action to

challenge that ruling and, in appeal No. 1, they appeal from a judgment that, inter alia, confirmed the Acting Commissioner's determination and issued a declaration in favor of respondents-defendants, the DEC and the Acting Commissioner (hereafter, respondents). Petitioners commenced a second CPLR article 78 proceeding to challenge a policy statement issued by the DEC in 2005 and, in appeal No. 2, they appeal from a judgment dismissing that petition.

With respect to appeal No. 1, petitioners contend that the Acting Commissioner's determination that they violated the statute and regulation was arbitrary and capricious, and thus that Supreme Court erred in confirming it. We reject that contention. In general, judicial review of an administrative determination is limited to whether the administrative action is arbitrary and capricious or lacks a rational basis (*see Matter of Concetta T. Cerame Irrevocable Family Trust v Town of Perinton Zoning Bd. of Appeals*, 6 AD3d 1091, 1092; *see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231). In a situation such as this, however, "where 'the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight' " (*Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Dept. of Envtl. Conservation*, 14 NY3d 161, 176; *see Matter of New York State Superfund Coalition, Inc. v New York State Dept. of Envtl. Conservation*, 18 NY3d 289, 296).

When petitioners applied the products at issue, the statute provided that "[p]rior to any commercial lawn application the applicator shall enter into a written contract with the owner of the property or his agent specifying the approximate date or dates of application, number of applications, and total cost for the service to be provided" (ECL former 33-1001 [1]). In addition, the DEC regulations require that the written contract shall "specify the approximate date or dates of application or applications; . . . state the total cost of the commercial lawn application service to be provided; . . . [and] be signed by both the pesticide applicator or business providing the commercial lawn application and the owner or owner's agent of the property to which the commercial lawn application is to be made; provided, however, the signature of the owner or owner's agent is not required if the pesticide applicator or business possesses a separate document that specifically evidences the owner or owner's agent signature as acceptance of the written contract, such as a copy of a prepayment check, in the exact amount specified in the written contract for the agreed-upon services" (6 NYCRR 325.40 [a] [1], [3], [6]).

The legislative history of the statute establishes that it was enacted for two purposes, to wit, to ensure that commercial lawn care businesses did not apply their products without first having a written

contract that included the full price to be paid by the consumer, and to ensure that residents were aware when possibly hazardous chemicals were going to be applied to their properties. Based upon that history, and the unequivocal wording of the statute and regulation, the Acting Commissioner's conclusion that petitioners' agreement with the owners of the subject property did not meet either requirement was not arbitrary or capricious. The total price to be paid for petitioners' services does not appear anywhere in the agreement, and petitioners concede that it was not the same price as was paid a year earlier pursuant to the contract that petitioners contend was renewed. Furthermore, the dates of application on the document that petitioners sent to the property owner included ranges of dates that encompassed more than half of the calendar year, and thus are patently not approximate dates of application.

Contrary to petitioners' further contention, the Acting Commissioner did not act arbitrarily or capriciously in concluding that petitioners were not permitted to seek a blanket waiver of the approximate dates of application. His conclusion that such waivers would eviscerate one of the core purposes of the legislation is also consistent with the plain wording of the statute and the legislative intent, and thus is neither arbitrary or capricious.

We agree with petitioners' further contention that the court erred in declaring the rights of the parties and instead should have dismissed that part of the amended petition/complaint seeking declaratory relief. We therefore modify the judgment in appeal No. 1 accordingly. Petitioners sought a declaration of the rights of the parties with respect to a 2002 consent order, and also sought further declarations that petitioners had the right to obtain waivers of the right to notification of the approximate dates upon which petitioners would apply products to the property of other customers. Pursuant to CPLR 3001, "[t]he supreme court may render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy." "A declaratory judgment action thus 'requires an actual controversy between genuine disputants with a stake in the outcome,' and may not be used as 'a vehicle for an advisory opinion' " (*Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253, *appeal dismissed* 9 NY3d 1003, quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3001:3 at 259; *see Ramunno v Skydeck Corp.*, 30 AD3d 1074, 1074).

Here, the court, with the consent of the DEC, dismissed all charges related to alleged violations of the 2002 consent order, and thus no active controversy remained with respect to it. Petitioners' remaining requests seek a declaration that petitioners may act in a certain manner in the future when interacting with other, unidentified consumers, and thus "presented hypothetical issues concerning future events which may or may not occur" (*Matter of United Water New Rochelle v City of New York*, 275 AD2d 464, 466). Consequently, no justiciable controversy was presented, and the court was required to dismiss the amended petition/complaint insofar it sought declaratory relief (*see generally Megibow v Condominium Bd. of Kips Bay Towers Condominium, Inc.*, 38 AD3d 265, 266).

Contrary to petitioners' further contention, the court properly dismissed the CPLR article 78 petition in appeal No. 2. In that proceeding, petitioners challenged the promulgation of the DEC's "Policy DSHM-PES-05-11," concerning "Compliance with Certain Provisions of Commercial Lawn Application Regulations" (2005 policy). The court dismissed the proceeding on the ground that it was not ripe for judicial review. The test for ripeness is well settled, to wit, a determination must be final before it is subject to judicial review (*see* CPLR 7801 [1]). "In order to determine whether an agency determination is final, a two-part test is applied. 'First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and[,] second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party' " (*Matter of County of Niagara v Daines*, 79 AD3d 1702, 1704, *lv denied* 17 NY3d 703, quoting *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34, *rearg denied* 5 NY3d 824). Here, the Acting Commissioner declined to apply the 2005 policy to the determination at issue, concluding that it was not yet in effect when petitioners applied the lawn care products at issue. Consequently, inasmuch as no " 'actual concrete injury' " has been inflicted and the injury was in fact " 'prevented or significantly ameliorated by further administrative action' " (*id.*), the matter is not ripe for judicial review.

We have considered petitioners' remaining contentions, and conclude that they are without merit.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

373

CA 12-01133

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF GREEN THUMB LAWN CARE, INC.
AND JOHN KNUTSON, PH.D., PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

MICHAEL A. DEEM, OSSINING, HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR PETITIONERS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ANDREW G. FRANK OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered April 18, 2012 in a CPLR article 78 proceeding. The judgment granted the motion of respondent to dismiss the petition and dismissed the petition.

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

Same Memorandum as in *Matter of Green Thumb Lawn Care, Inc. v Iwanowicz* ([appeal No. 1] ___ AD3d ___ [June 7, 2013).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

393

KA 10-01086

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACK LUKENS, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (COURTNEY E. PETITT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered February 4, 2010. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree and petit larceny.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of grand larceny in the fourth degree (Penal Law § 155.30 [1]) to petit larceny (§ 155.25) and vacating the sentence imposed on count one of the indictment and as modified the judgment is affirmed, and the matter is remitted to Oswego County Court for sentencing on the conviction of petit larceny.

Memorandum: On appeal from a judgment convicting him of grand larceny in the fourth degree (Penal Law § 155.30 [1]) and petit larceny (§ 155.25), defendant contends that County Court's *Sandoval* ruling constitutes an abuse of discretion. We reject that contention. The court permitted the prosecutor to ask defendant whether he had been convicted of criminal possession of a controlled substance in the seventh degree and identity theft in the third degree. The court also permitted the prosecutor to ask defendant whether he had two prior felony convictions and 15 prior misdemeanor convictions without revealing the underlying nature of those offenses, all of which were larcenies or related to larceny. We conclude that the court's determination was not an abuse of discretion inasmuch as it "reflects sensitivity to the particular prejudice that may result when a jury is made aware of the fact that the defendant has previously committed crimes that are similar to the charged crime" (*People v Walker*, 83 NY2d 455, 459).

We also reject defendant's contention that the court erred in allowing the People to introduce evidence of his prior involvement as

an accomplice in an uncharged larceny. The evidence of an uncharged larceny committed by defendant and his codefendent was properly admitted under the intent, common scheme or plan, and identity exceptions to the *Molineux* rule (*see generally People v Ingram*, 71 NY2d 474, 479-480; *People v Molineux*, 168 NY 264, 293-294; *People v Arguinzoni*, 48 AD3d 1239, 1240, *lv denied* 10 NY3d 859).

We reject the further contention of defendant that the court erred in denying his motion to sever the two counts of the indictment and to sever his trial from that of his codefendant. "Defendant's motion was untimely, and defendant failed to show good cause for bringing his motion [eight] months after [his arraignment]" (*People v Wilburn*, 50 AD3d 1617, 1618, *lv denied* 11 NY3d 742; *see* CPL 255.20 [1], [3]). In any event, defendant's contention is without merit. The court did not err in denying defendant's motion to sever the counts of the indictment because "[d]efendant failed to establish that there was '[s]ubstantially more proof on one . . . [of the] joinable offenses than on [the] other[] and there [was] a substantial likelihood that the jury would be unable to consider separately the proof as it relate[d] to each offense' " (*People v Davis*, 19 AD3d 1007, 1007, quoting CPL 200.20 [3] [a]; *see People v Dozier*, 32 AD3d 1346, 1346-1347, *lv denied* 8 NY3d 880). Additionally, the court did not abuse its discretion in denying defendant's motion to sever his trial from that of his codefendant. "The evidence against defendant and his codefendant[] was essentially identical, and the respective defenses were not in irreconcilable conflict" (*People v Buccina*, 62 AD3d 1252, 1253, *lv denied* 12 NY3d 913).

We agree with defendant that his conviction of grand larceny in the fourth degree is not supported by legally sufficient evidence that the value of the stolen property exceeded $1,000 (*see People v Pallagi*, 91 AD3d 1266, 1269-1270). At trial, the People presented a surveillance video showing a male pushing a shopping cart containing merchandise out of a Tractor Supply Company store, and that video provided legally sufficient evidence from which the jury could reasonably conclude that defendant was the male in the video (*see generally People v Bleakley*, 69 NY2d 490, 495). The only items clearly visible in the cart, however, were two bags of dog food, and the People presented no evidence regarding the value of those items. Although the People did present evidence that $1,899 in "pet containment" merchandise was missing from the store on the date in question, no pet containment items are visible in the surveillance video, and there is no other evidence connecting defendant to those missing items. Thus, we cannot on this record conclude " 'that the jury ha[d] a reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold' of $1,000" (*People v Brink*, 78 AD3d 1483, 1484, *lv denied* 16 NY3d 742, *reconsideration denied* 16 NY3d 828). Nevertheless, we conclude that the evidence is legally sufficient to establish that defendant committed the lesser included offense of petit larceny (*see Pallagi*, 91 AD3d at 1270; *see generally Brink*, 78 AD3d at 1484). We therefore modify the judgment by reducing the conviction of grand larceny in the fourth degree to petit larceny (Penal Law § 155.25) and vacating the

sentence imposed on count one of the indictment (*see* CPL 470.15 [2] [a]), and we remit the matter to County Court for sentencing on the conviction of petit larceny (*see* CPL 470.20 [4]).

Defendant's contention that his conviction of petit larceny is based upon legally insufficient evidence is not preserved for our review because defendant did not move for a trial order of dismissal with respect to that count of the indictment (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit (*see generally Bleakley*, 69 NY2d at 495). Furthermore, viewing the evidence in light of the elements of the crime of petit larceny as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to that crime is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Although defendant further contends that he was denied a fair trial based on prosecutorial misconduct during summation, that contention is not preserved for our review because defendant failed to object to the allegedly improper comments during summation (*see People v Balls*, 69 NY2d 641, 642; *People v Sulli*, 81 AD3d 1309, 1311, *lv denied* 17 NY3d 802). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant's contention that he was denied effective assistance of counsel because counsel failed to make a timely motion to sever the indictment is without merit. "Any motion to sever . . . the indictment would have had ' "little or no chance of success," ' and thus counsel's failure to make such a [timely] motion . . . does not indicate ineffectiveness of counsel" (*Dozier*, 32 AD3d at 1347, quoting *People v Caban*, 5 NY3d 143, 152). Moreover, we conclude that the evidence, the law and the circumstances of this case, viewed in totality and as of the time of representation, establish that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). In light of our determination, we do not address defendant's remaining contention.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

404

OP 12-01976

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF GARY D. CUDA, PETITIONER,

V MEMORANDUM AND ORDER

HON. MICHAEL L. DWYER, RESPONDENT.

DOREEN M. ST. THOMAS, UTICA, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to annul the determination of respondent to revoke petitioner's pistol permit.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking his pistol permit. We reject petitioner's contention that he was denied a full and fair opportunity to litigate his claims. "It is well settled that a formal hearing is not required prior to the revocation of a pistol permit [where, as here,] the licensee is given notice of the charges and has an adequate opportunity to submit proof in response" (*Matter of Dlugosz v Scarano*, 255 AD2d 747, 748, *appeal dismissed* 93 NY2d 847, *lv denied* 93 NY2d 809, *cert denied* 528 US 1079; *see Matter of Salem v Geraci*, 27 AD3d 1175, 1176). Petitioner's further contention that the revocation of his permit violates the Second Amendment and the Equal Protection Clause of the United States Constitution is without merit (*see Matter of Demyan v Monroe*, 108 AD2d 1004, 1005). In addition, the court properly denied petitioner's request for his entire pistol permit file (*see Matter of Vale v Eidens*, 290 AD2d 612, 614).

Finally, we reject petitioner's contention that the determination to revoke his permit was arbitrary and capricious. Respondent has broad discretion to resolve factual and credibility issues when determining whether to revoke a pistol permit, and his determination is accorded great weight (*see Matter of Manne v Main*, 8 AD3d 790, 791; *Matter of Gerard v Czajka*, 307 AD2d 633, 633-634). Further, the record establishes that, when petitioner sought to amend his permit to remove certain restrictions, he did not inform the licensing agency that he had been arrested. It is settled that "[t]he failure of [a]

petitioner to report on his [or her] application a prior arrest . . . provide[s] a sufficient basis to deny the application" for a pistol permit (*Matter of DiMonda v Bristol*, 219 AD2d 830, 830). Thus, respondent properly revoked petitioner's pistol permit on that ground (*see Matter of Cohen v Kelly*, 30 AD3d 170, 170; *Ricatto v Kelly*, 303 AD2d 240, 240).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

409

CAF 11-02304

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF MICHELLE CORMIER,
PETITIONER,

V MEMORANDUM AND ORDER

ROXANNE CLARKE, RESPONDENT,
ET AL., RESPONDENT.

IN THE MATTER OF ROXANNE CLARKE,
PETITIONER-APPELLANT,

V

CHRISTOPHER CLARKE, I, RESPONDENT,
AND MICHELLE K. CORMIER,
RESPONDENT-RESPONDENT.

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

LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-RESPONDENT.

JENNIFER L. ROSENBERG, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Oswego County (Bobette J. Morin, R.), entered September 12, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, directed Roxanne Clarke to transport the child for visits with Michelle K. Cormier.

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

Memorandum: As relevant to this appeal, respondent-petitioner, who is the paternal grandmother and primary physical custodian of the subject child (grandmother), filed a petition seeking to modify a prior order of custody and visitation by suspending visitation with the mother at the correctional facility where the mother is incarcerated. Family Court refused to suspend visitation with the mother, but reduced the frequency of that visitation. The grandmother appeals, and we affirm.

Even assuming, arguendo, that the grandmother established " 'a change in circumstances sufficient to warrant an inquiry into whether the best interests of the [child] warranted a change in custody' "

(*Matter of Dingeldey v Dingeldey*, 93 AD3d 1325, 1326; *see Griffin v Griffin*, 104 AD3d 1270, 1271; *Matter of Anderson v Roncone*, 81 AD3d 1268, 1268, *lv denied* 16 NY3d 712), we conclude that, contrary to the grandmother's contention, visitation with the mother at the correctional facility is in the child's best interests. There is a presumption that visitation with the noncustodial parent is in the child's best interests (*see Matter of Granger v Misercola*, ___ NY3d ___, ___ [Apr. 30, 2013]; *Matter of Nathaniel T.*, 97 AD2d 973, 974), and a "parent's incarceration, by itself, does not vitiate" that presumption (*Matter of Flood v Flood*, 63 AD3d 1197, 1198; *see Matter of Fewell v Ratzel*, 99 AD3d 1237, 1237). "Unless there is a compelling reason or substantial evidence that visitation with an incarcerated parent is detrimental to a child's welfare, such visitation should not be" suspended (*Matter of Thomas v Thomas*, 277 AD2d 935, 935). We conclude that the grandmother failed to establish by a preponderance of the evidence that visitation with the mother would be detrimental to the child, and thus she did not overcome the presumption that visitation with the mother is in the child's best interests (*see Granger*, ___ NY3d at ___). We therefore conclude that the court's decision had a sound and substantial basis in the record (*see generally Granger*, 96 AD3d 1694, 1695, *affd* ___ NY3d ___).

Additionally, the grandmother's contention that the court failed to conduct a *Lincoln* hearing is unpreserved for our review inasmuch as she did not request such a hearing (*see Matter of Knuth v Westfall*, 72 AD3d 1642, 1642). "In any event, based on the child's young age, we perceive no abuse of discretion in the court's failure to conduct a *Lincoln* hearing" (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

414

KA 12-01879

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN NOAH, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA, LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 9, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [2]). We agree with defendant that Supreme Court erred in denying his suppression motion. Although the determination of the suppression court is entitled to great weight (*see People v Prochilo*, 41 NY2d 759, 761), we have the fact-finding authority to determine whether the police conduct was justified (*see People v McRay*, 51 NY2d 594, 605). The evidence at the suppression hearing established that the police were alerted to a location in Buffalo by an anonymous 911 call describing a “possibly Hispanic” male in his late 20s who possessed a firearm at a bar. The caller stated that the suspect was of average height, weighed approximately 300 pounds, had a shaved head, and was wearing a burnt orange jacket. The caller also indicated that the man had left the bar but did not indicate where he had gone. When the police arrived at the location of the bar, a bar patron on the patio pointed in the direction of defendant, who was standing in front of a building three doors down from the bar. The police then observed defendant, a 31-year-old non-Hispanic male of average height and significantly lesser weight, with a full head of hair and a long dark coat. Based on the inconsistencies between the

description provided by the anonymous caller and defendant's actual appearance, as well as the ambiguous nature of the patron's pointing in the direction of defendant, we conclude that the police at that time had "at most only the common-law right to inquire" (*People v Benjamin*, 51 NY2d 267, 270; *see People v De Bour*, 40 NY2d 210, 215), and they exceeded the scope of that permissible inquiry.

The officer who approached defendant testified at the suppression hearing that he asked defendant to step away from a group of individuals with whom defendant was socializing. The officer escorted defendant to the curb while physically holding defendant's waistband, and he instructed defendant to face the street and to place his hands on the roof of a civilian vehicle. The officer testified that at that time defendant was not free to leave. Having detained defendant in that manner, the officer then explained to defendant the reason for the police presence. The officer asked defendant if he had any contraband and if defendant would consent to a search of his person. Defendant consented to the search, during which the police obtained the physical evidence sought to be suppressed. In light of the fact that defendant was illegally detained, i.e., without a reasonable suspicion that he was committing or had committed a crime (*see* CPL 140.50 [1]), his consent to the search immediately thereafter cannot be considered voluntary (*see People v Packer*, 49 AD3d 184, 186-188, *affd* 10 NY3d 915).

Although " 'a defendant who challenges the legality of a search and seizure has the burden of proving illegality, the People are nevertheless put to the burden of *going forward* to show the legality of the police conduct in the first instance' " (*People v Lazcano*, 66 AD3d 1474, 1475, *lv denied* 13 NY3d 940). We agree with defendant that the People failed to meet that burden. The court therefore erred in refusing to suppress the physical evidence recovered from defendant's person as the result of the illegal search as well as defendant's subsequent statements to the police (*see Wong Sun v United States*, 371 US 471, 487-488; *People v Hall*, 35 AD3d 1171, 1172, *lv denied* 8 NY3d 923). "[I]nasmuch as the erroneous suppression ruling may have affected defendant's decision to plead guilty . . . , the plea must be vacated" (*People v Ayers*, 85 AD3d 1583, 1585, *lv denied* 18 NY3d 922 [internal quotation marks omitted]).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

415

KA 09-01789

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN S. PAULK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARTIN S. PAULK, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 19, 2009. The judgment convicted defendant, upon a jury verdict, of kidnapping in the first degree and intimidating a victim or witness in the third degree.

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

Memorandum: Defendant appeals from two judgments convicting him, following a consolidated jury trial, of various crimes arising from his criminal sale and criminal possession of a controlled substance and his subsequent kidnapping of a witness to the drug crimes. In December 2006, a confidential informant (hereafter, victim) provided the New York State Police with names of known drug dealers, including defendant, whom the victim had known for several years. The police arranged for two controlled buys in January 2007 and, based on those buys, executed a search warrant of defendant's home later that month. Defendant was arrested and arraigned on a felony complaint, dated January 25, 2007, charging him with criminal possession of a controlled substance in the third degree based on the discovery of cocaine during that search. Approximately a year later, defendant was indicted on 10 counts of criminal possession and sale of a controlled substance, and a trial was scheduled for May 12, 2008.

On the scheduled trial date, the People indicated that they were not ready to proceed because the victim could not be located. The victim was arrested pursuant to a material witness warrant approximately one month later. He alleged that defendant, along with two other men, had kidnapped him at gunpoint on May 7, 2008, held him captive for

approximately five days, and thereafter drove him to Atlanta, where he was ordered, on threat of physical violence against his family, to stay in an apartment with defendant's brother. The jury ultimately convicted defendant, in appeal No. 1, of kidnapping in the first degree (Penal Law § 135.25 [2] [b]) and intimidating a victim or witness in the third degree (§ 215.15 [1]) and, in appeal No. 2, of two counts each of criminal sale of a controlled substance in the third degree (§ 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]).

On appeal, defendant contends in his main and pro se supplemental briefs that his conviction of kidnapping in the first degree is against the weight of the evidence because the victim's testimony was untrustworthy and incredible of belief. While acquittal would not have been unreasonable given the evidence presented at trial, particularly the testimony of the victim (*see People v Danielson*, 9 NY3d 342, 348), it is possible that the jury accepted some parts of the victim's testimony and rejected other parts (*see generally People v Negron*, 91 NY2d 788, 792). If the jury credited the victim's initial abduction testimony, that evidence would have fulfilled each element of the kidnapping charge and, viewing the evidence in light of the elements of that crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict finding defendant guilty of kidnapping in the first degree is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant next contends in his main brief that Supreme Court should have reopened the proof after jury deliberations had begun, when defendant made an offer of proof that the victim had fabricated the kidnapping story. We conclude that the court properly denied defendant's request to reopen the proof to present the exculpatory testimony inasmuch as the proffered testimony related to credibility (*see People v Olsen*, 34 NY2d 349, 355-356; *see also People v Whipple*, 97 NY2d 1, 6-7). To the extent that defendant raises a constitutional issue concerning the reopening of the proof, defendant failed to preserve that issue for our review by not raising it before the trial court (*see People v Lane*, 7 NY3d 888, 889). We decline to exercise our power to review that constitutional issue as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention in his main and pro se supplemental briefs that he was deprived of a fair trial based on prosecutorial misconduct. We note that defendant failed to object to many of the allegedly improper comments made by the prosecutor and thus failed to preserve his contention for our review to that extent (*see* CPL 470.05 [2]). With respect to those allegations of prosecutorial misconduct that are preserved for our review, we conclude that they are either without merit or that they were not so egregious as to deny defendant due process of law (*see generally People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916).

Defendant's contention in his main brief that the court improperly interfered with the examination of witnesses so as to deprive him of a fair trial is not preserved for our review because defendant did not

object at trial to the alleged improprieties (*see* CPL 470.05 [2]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further contention in his main brief, the court did not err in denying his motion pursuant to CPL 330.30 to set aside the verdict based on newly discovered evidence (*see People v Bowers*, 4 AD3d 558, *lv denied* 2 NY3d 796). Defendant failed to meet his burden of demonstrating by a preponderance of the evidence that the testimony of three inmate witnesses was not cumulative to evidence already adduced at trial (*see* CPL 330.30 [3]; *see generally People v Wainwright*, 285 AD2d 358, 360).

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

416

KA 09-01790

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN S. PAULK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARTIN S. PAULK, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 19, 2009. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

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

Same Memorandum as in *People v Paulk* ([appeal No. 1] ___ AD3d ___ [June 7, 2013]).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

420

KA 12-00716

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY WATKINS, DEFENDANT-APPELLANT.

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

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (CHRISTOPHER BOKELMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered January 26, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree (two counts), assault in the second degree and assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of burglary in the first degree (Penal Law § 140.30 [2]), and one count each of assault in the second degree (§ 120.05 [1]) and assault in the third degree (§ 120.00 [1]). Contrary to defendant's contention, County Court did not abuse its discretion in denying his motion to withdraw the plea (*see People v Wolf*, 88 AD3d 1266, 1266-1267, *lv denied* 18 NY3d 863; *People v Tracy*, 77 AD3d 1402, 1403, *lv denied* 16 NY3d 746; *see generally People v Dozier*, 74 AD3d 1808, 1808, *lv denied* 15 NY3d 804). "Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Robertson*, 255 AD2d 968, 968, *lv denied* 92 NY2d 1053; *see People v Zimmerman*, 100 AD3d 1360, 1361, *lv denied* 20 NY3d 1015). Defendant contended in support of his motion that he was induced to plead guilty based on the originally scheduled sentencing date, which allegedly afforded him time to post bail prior to sentencing, and that the court thereafter advanced the date of sentencing such that he was unable to post bail. Inasmuch as the date on which sentencing was to occur was not part of the plea agreement, we conclude that the court did not abuse its discretion in denying defendant's motion to withdraw his plea on the grounds of duress, misrepresentation or fraud (*see* CPL 220.60 [3]; *People v Todd*, 276 AD2d 913, 914). We reject defendant's further contention that, when the court advanced the date for sentencing, it thereby imposed an enhanced sentence or added a condition

to the plea agreement such that defendant should have been allowed to withdraw his plea (*cf. People v Gordon*, 53 AD3d 793, 794; *People v Armstead*, 52 AD3d 966, 967-968).

The record does not support defendant's further contention that the court abused its discretion in denying his motion to withdraw the plea on the ground that the plea was not knowing, voluntary and intelligent in view of his having been on medication at the time of the plea. Defendant failed to submit his own affidavit or any medical evidence to substantiate that contention (*see People v Ashley*, 71 AD3d 1286, 1287, *affd* 16 NY3d 725; *Wolf*, 88 AD3d at 1266-1267), and in any event it "is belied by the record of the plea proceeding" (*People v Hayes*, 39 AD3d 1173, 1175, *lv denied* 9 NY3d 923), which establishes that defendant understood the nature of the proceedings (*see Wolf*, 88 AD3d at 1267). "Furthermore, to the extent that the contention of defendant that he received ineffective assistance of counsel survives his plea of guilty" (*People v Ellis*, 73 AD3d 1433, 1434, *lv denied* 15 NY3d 851), we conclude that defendant's contention lacks merit (*see People v Culver*, 94 AD3d 1427, 1427-1428, *lv denied* 19 NY3d 1025).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

429

CA 12-01495

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ.

IN THE MATTER OF SANDRA BOWMAN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS AND DONNA OWENS, CITY
ADMINISTRATOR, RESPONDENTS-APPELLANTS.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (CHRISTOPHER M. MAZUR OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (E. JOSEPH GIROUX, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered May 14, 2012 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination terminating her employment with the City of Niagara Falls (City) based on her failure to comply with the City's residency requirement, which requires City employees to reside in the City. We agree with respondents that Supreme Court erred in granting the petition.

Initially, we reject respondents' contention that the court should have dismissed the petition because petitioner waived her right to reinstatement by signing a "last chance agreement." The agreement provided, in relevant part, that any future violation of the residency requirement "may result in your termination following a due process hearing. If you are found to have violated the residency requirement at that time, you hereby waive your right to be reinstated, under any circumstances, as identified under Section 5 of the Local Law." Section 5 of Local Law No. 7 (1984) (hereafter, Local Law No. 7), which was removed from the law in 2009, provided that an employee who was forced to resign upon violation of the residency requirement could reestablish residency and thereafter apply for reinstatement to his or her former position. Here, petitioner does not seek reinstatement "as identified under Section 5 of the Local Law," which in any event is no longer in

effect. Rather, petitioner seeks reinstatement on the ground that, inter alia, respondents' determination was arbitrary and capricious and the residency requirement is inconsistently enforced.

We agree with respondents, however, with respect to the merits. As we noted in *Matter of Alexis v City of Niagara Falls* (___ AD3d ___ [May 3, 2013]), the Court of Appeals has written that "the proper standard for judicial review in these cases is whether the . . . determination was arbitrary and capricious or an abuse of discretion (*see* CPLR 7803 [3]). This standard is, of course, an extremely deferential one: The courts cannot interfere [with an administrative tribunal's exercise of discretion] unless there is *no rational basis* for [its] exercise . . . or the action complained of is arbitrary and capricious, [a test which] chiefly relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is *without foundation in fact*" (*Matter of Beck-Nichols v Bianco*, 20 NY3d 540, 559 [internal quotation marks omitted]).

Here, we conclude that respondents' determination that petitioner violated the City's residency requirement was neither arbitrary and capricious nor an abuse of discretion (*see id.*). Local Law No. 7, as amended, defines "residency" as "*the actual principal place of residence* of an individual, where he or she normally sleeps; normally maintains personal and household effects; the place listed as an address on voter registration; and the place listed as his or her address for driver's license and motor vehicle registration, if any" (Local Law No. 7 § 2 [emphasis added]). As we wrote in *Alexis*, we agree with respondents that the phrase "actual principal place of residence" "is akin to, if not synonymous with, the legal concept of 'domicile,' i.e., 'living in [a] locality with intent to make it a fixed and permanent home' " (*id.* at ___, quoting *Matter of Newcomb*, 192 NY 238, 250). We further agree with respondents that they sufficiently established that petitioner's "actual principal place of residence" was in the Town of Niagara (Local Law No. 7 § 2; *see Matter of Adrian v Board of Educ. of City Sch. Dist. of City of Niagara Falls*, 92 AD3d 1272, 1272, *affd sub nom. Beck-Nichols v Bianco*, 20 NY3d 540).

The City hired a surveillance company, which observed petitioner on 22 separate occasions over a 13-day period in October and November 2009, and on two additional occasions in September 2010. On eight of the 10 weekday mornings that petitioner was under surveillance, she was a passenger in a vehicle that was driven from a Town of Niagara (Niagara) address to another Niagara address. Upon arriving at the second address, petitioner opened the garage door, entered her vehicle, and drove to work. On each of those eight mornings, the investigators had arrived at the first Niagara address between 6:30 a.m. and 7:15 a.m. On each of the eight weekday afternoons that petitioner was under observation, she drove from work to the second Niagara address. On one of those afternoons, petitioner was observed driving from work to the first Niagara address and then, at about 6:00 p.m., driving from that address to the second Niagara address, whereupon she parked her vehicle in the garage and entered a different vehicle as a passenger. On the two mornings that petitioner was observed in September 2010, she drove directly from the first Niagara address to work. Both times, the

investigator established that her vehicle was in the driveway of the first Niagara address as of 6:15 a.m. or 6:30 a.m.

Under these circumstances, we conclude that respondents' determination was not arbitrary and capricious because there is substantial evidence, based on the surveillance on 10 out of the 12 mornings in 2009 and 2010, that petitioner actually resided and "normally [slept]" at the first Niagara address. Although petitioner produced documents listing a City residence as her address, "that evidence was not so overwhelming as to support the court's determination granting the petition" (*Adrian*, 92 AD2d at 1273). Rather, under the "extremely deferential" standard applied in reviewing administrative determinations (*Beck-Nichols*, 20 NY3d at 559), the City's determination that petitioner's actual principal place of residence was outside the City is not "*without foundation in fact*" (*id.*), and the City "rationally concluded that [petitioner] did not comply with the residency policy" (*id.* at 561).

Finally, we agree with respondents that the court erred in determining that the residency requirement is unenforceable (*see generally id.* at 557-558).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

439

KA 10-01153

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEBRA SPOSSEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered January 4, 2010. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her, following a plea of guilty, of grand larceny in the fourth degree (Penal Law § 155.30 [1]). We agree with defendant that her waiver of the right to appeal was not knowingly, intelligently, and voluntarily entered (*see People v Bradshaw*, 18 NY3d 257, 262; *see generally People v Lopez*, 6 NY3d 248, 256); thus, it does not encompass defendant's contentions that the award of restitution was not based on evidence in the record and that County Court should have held a hearing with respect to the amount of restitution (*cf. People v Tessitore*, 101 AD3d 1621, 1622, *lv denied* ___ NY3d ___). Defendant, however, failed to preserve for our review those contentions inasmuch as she did not object to the amount of restitution at sentencing, nor did she request a hearing (*see id.*; *People v Lewis*, 89 AD3d 1485, 1486). In any event, defendant conceded "the facts necessary to establish the amount of restitution as part of a plea allocution" (*People v Consalvo*, 89 NY2d 140, 145) and thus waived her right to challenge the amount of restitution. Even assuming, arguendo, that defendant's contention with respect to ineffective assistance of counsel survives the guilty plea (*see generally People v March*, 21 AD3d 1393, 1393, *lv denied* 6 NY3d 778), we further conclude that defendant was not denied effective assistance of counsel by defense counsel's failure to challenge the

amount of restitution (*see generally People v Ford*, 86 NY2d 397, 404).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

442

KA 10-00532

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFFORD GRAHAM, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 2, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the first degree (two counts) and petit larceny (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 two counts each of criminal possession of a forged instrument in the first degree (Penal Law § 170.30) and petit larceny (§ 155.25). We reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The People presented evidence that defendant passed counterfeit $20 bills at two different locations in three separate transactions, and the jury was entitled to reject the testimony of defendant that he was unaware that the bills were counterfeit (*see People v Craven*, 48 AD3d 1183, 1184, *lv denied* 10 NY3d 861; *People v Cotton*, 197 AD2d 897, 897-898, *lv denied* 82 NY2d 893). Defendant failed to preserve for our review his contention that Supreme Court deprived him of a fair trial by failing to sua sponte instruct the jury that defendant was charged in connection with two separate incidents, i.e., the incidents at the two separate locations, and that evidence of guilt with respect to one of the incidents could not be considered as evidence of guilt with respect to the other (*see* CPL 470.05 [2]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We agree with defendant that the court's *Sandoval* ruling constitutes an abuse of discretion. Although the "exercise of a trial

court's *Sandoval* discretion should not be disturbed merely because the court did not provide a detailed recitation of its underlying reasoning" (*People v Walker*, 83 NY2d 455, 459), the court in this case failed to set forth any basis for its *Sandoval* ruling. We thus conclude that the court "abdicated its responsibility to balance the *Sandoval* factors and determine that the probative value of the evidence outweighed the potential prejudice to defendant" (*People v Clark*, 42 AD3d 957, 959, *lv denied* 9 NY3d 960; *see People v Williams*, 56 NY2d 236, 238-240). We conclude, however, that the error is harmless. "[T]he proof of defendant's guilt [of criminal possession of a forged instrument in the first degree and petit larceny] is overwhelming, and there is no significant probability that the jury would have acquitted defendant had it not been for the error" (*People v Arnold*, 298 AD2d 895, 896, *lv denied* 99 NY2d 580; *see generally People v Grant*, 7 NY3d 421, 423-425).

Defendant failed to preserve for our review his further contentions that the court erred in failing to provide limiting instructions with respect to testimony by the People's witness that allegedly infringed upon defendant's right to remain silent and constituted hearsay (*see* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also failed to preserve for our review his contention that the prosecutor deprived him of a fair trial by commenting during summation that defendant refused to sign the statement he gave to the police because he "wouldn't be a rat on paper" (*see* CPL 470.05 [2]). In any event, that contention is without merit (*see generally People v McEathron*, 86 AD3d 915, 916, *lv denied* 19 NY3d 975). The comment in question was within the broad bounds of rhetorical comment permissible during summations or fair comment on the evidence (*see id.*).

Contrary to defendant's further contention, we conclude that, by moving to suppress the statements in issue, he forfeited his right to seek preclusion based upon the People's alleged failure to comply with the notice provisions of CPL 710.30 (*see People v Rodriguez*, 270 AD2d 956, 957, *lv denied* 95 NY2d 870; *People v Robinson*, 225 AD2d 1095, 1095, *lv denied* 88 NY2d 884). Finally, we reject defendant's contention that the court erred in refusing to suppress the statements he made to the police on September 11, 2009. Inasmuch as defendant's counsel was present during the first 20 minutes of the interview and informed the detectives that defendant was willing to cooperate, it was permissible for the officers to infer from defendant's conduct and his attorney's assurances that defendant's waiver of his *Miranda* rights was made on the advice of counsel (*see People v Farrell*, 42 AD3d 954, 955).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

443

CA 12-01959

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF WAYNE DAVIDSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF PENN YAN, MAYOR AND VILLAGE
BOARD OF TRUSTEES OF VILLAGE OF PENN YAN
AND PENN YAN FIRE DEPARTMENT,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

WAYNE DAVIDSON, PETITIONER-APPELLANT PRO SE.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (EDWARD P. HOURIHAN, JR., OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Yates County (Dennis F. Bender, A.J.), entered July 18, 2012 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, dismissed the petition.

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

Memorandum: Petitioner commenced these CPLR article 78 proceedings seeking, inter alia, to annul two resolutions adopted by respondent Village Board of Trustees of Village of Penn Yan (the Board) concerning the establishment of a service awards program for volunteer firefighters pursuant to General Municipal Law article 11-A. Respondents moved to dismiss both petitions on, inter alia, the ground that petitioner lacks standing to challenge the resolutions. Supreme Court granted respondents' motions and dismissed the petitions. Petitioner appeals, and we affirm.

With respect to appeal Nos. 1 and 2, we note that petitioner has failed to demonstrate that he is personally aggrieved by the Board's actions inasmuch as he did not establish that he "sustained special damage, different in kind and degree from the community generally" (*Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 413). "Although the doctrine of common-law taxpayer standing . . . would excuse such lack of personal aggrievement, that doctrine requires a petitioner to establish that the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of [the Board's] action" (*Matter of Seidel v Prendergast*, 87 AD3d 545, 546, *lv denied* 17 NY3d

716 [internal quotation marks omitted]; *see Matter of Colella v Board of Assessors of County of Nassau*, 95 NY2d 401, 410), and petitioner has not made such a showing. We therefore conclude that the court properly granted the motions to dismiss the respective petitions. In light of our determination, we do not address petitioner's remaining contentions.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

446

CA 11-02452

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

DONNELL JEFFERSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOSHUA STUBBE, DEFENDANT-RESPONDENT.

DONNELL JEFFERSON, PLAINTIFF-APPELLANT PRO SE.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (KRISTINE M. CAHILL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered August 3, 2011. The order denied the motion of plaintiff for permission to proceed as a poor person.

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

Memorandum: Plaintiff commenced this action seeking declaratory and other relief based on the alleged negligence of defendant, his former attorney in a criminal matter. Contrary to plaintiff's contention, Supreme Court did not abuse its discretion in denying his motion for permission to proceed as a poor person pursuant to CPLR 1101 (*see generally Matter of Young v Monroe County Clerk's Off.*, 46 AD3d 1379, 1380). Although we agree with plaintiff that he established that he is unable to pay the costs, fees and expenses necessary to prosecute the action (*see* CPLR 1101 [a]), we conclude that the action does not have "arguable merit" (*Nicholas v Reason*, 79 AD2d 1113, 1113; *cf. Popal v Slovis*, 82 AD3d 1670, 1671, *lv dismissed* 17 NY3d 842; *Young*, 46 AD3d at 1380).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

449

CA 12-01960

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF WAYNE DAVIDSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF PENN YAN, MAYOR AND VILLAGE BOARD
OF TRUSTEES OF VILLAGE OF PENN YAN AND PENN
YAN FIRE DEPARTMENT, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

WAYNE DAVIDSON, PETITIONER-APPELLANT PRO SE.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (EDWARD P. HOURIHAN, JR., OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Yates County (Dennis F. Bender, A.J.), entered July 18, 2012 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, dismissed the petition.

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

Same Memorandum as in *Matter of Davidson v Village of Penn Yan* ([appeal No. 1] ___ AD3d ___ [June 7, 2013]).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

457

CA 12-01546

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

ROBERT A. REYNOLDS AND JUDITH E. REYNOLDS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CHRISTOPHER S. FERRANTE, D.C.,
ET AL., DEFENDANTS,
AND GEICO GENERAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR DEFENDANT-APPELLANT.

GRECO TRAPP, PLLC, BUFFALO (DUANE D. SCHOONMAKER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered May 9, 2012. The order denied the motion of defendant Geico General Insurance Company to dismiss the amended complaint.

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

Memorandum: Defendant Geico General Insurance Company (Geico) appeals from an order denying its motion to dismiss the amended complaint pursuant to CPLR 3211 (a) (1) and (7). Plaintiff Robert A. Reynolds (plaintiff) had an insurance policy with Geico and sustained injuries to his neck, back and left shoulder in a motor vehicle accident. Geico scheduled a no-fault examination for plaintiff with a chiropractor through defendant SCS Support Claim Services, Inc. (SCS), an independent contractor for Geico. During the course of that examination, plaintiff's left knee was injured allegedly as a result of the chiropractor's manipulation of the knee. Plaintiffs commenced this action alleging, inter alia, that Geico was negligent in the selection, instruction and supervision of SCS and the chiropractor.

Geico contends that Supreme Court erred in denying its motion because it cannot be held liable for the acts of an independent contractor. We reject that contention. It is well settled that a person who hires an independent contractor may be held liable for negligence in selecting, instructing or supervising that independent contractor (*see Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 258).

We further reject Geico's contention that the allegations in the amended complaint are insufficient to state a cause of action for negligent selection, instruction and supervision against it. On a motion to dismiss pursuant to CPLR 3211, pleadings are to be liberally construed (*see Leon v Martinez*, 84 NY2d 83, 87; *see also* CPLR 3026). The court is to "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 87-88). It is well settled that "the primary function of a pleading is to apprise an adverse party of the pleaders claim . . . and to prevent surprise" (*Cole v Mandell Food Stores*, 93 NY2d 34, 40; *see* CPLR 3013). "Absent such notice, a defendant is prejudiced by its inability to prepare a defense to the plaintiff's allegations" (*Cole*, 93 NY2d at 40). We conclude that the amended complaint is sufficient to advise the court and Geico of the transactions and occurrences on which plaintiffs based their claim and plaintiffs have sufficiently pleaded a cause of action against Geico based upon the alleged negligent selection, instruction and supervision of SCS and the chiropractor (*see generally* CPLR 3013; *Preston v APCH, Inc.*, 89 AD3d 65, 74).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

463

KA 11-01480

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL R. HOYT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered March 16, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [3]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827). Defendant's valid waiver of the right to appeal does not encompass his further contention that County Court erred in failing to take into account the jail time credit to which he is entitled in determining the duration of the order of protection (*see People v Farrell*, 71 AD3d 1507, 1507, *lv denied* 15 NY3d 804). Nevertheless, defendant failed to preserve that contention for our review, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see id.*).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

505

KA 12-00896

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER T. FAETH, DEFENDANT-APPELLANT.

ROBERT TUCKER, PALMYRA, FOR DEFENDANT-APPELLANT.

Appeal from a resentence of the Wayne County Court (John B. Nesbitt, J.), rendered April 19, 2012. Defendant was resentenced upon his conviction of robbery in the first degree.

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

Memorandum: Defendant was convicted, following a jury trial, of murder in the second degree (Penal Law § 125.25 [2]) and robbery in the first degree (§ 160.15 [1]). On a prior appeal, we affirmed defendant's conviction (*People v Faeth*, 298 AD2d 987, *lv denied* 99 NY2d 558), and defendant now appeals from a resentence pursuant to Correction Law § 601-d and Penal Law § 70.45. County Court (Sirkin, J.), originally sentenced defendant as a second felony offender to consecutive terms of incarceration of 25 years to life on the conviction of depraved indifference murder and to a determinate term of incarceration of 20 years on the conviction of robbery, but failed to impose a period of postrelease supervision (PRS) with respect to the robbery conviction as required by Penal Law § 70.45 (1). To remedy that error (*see* Correction Law § 601-d), County Court (Nesbitt, J.) later resentenced defendant to the same 20-year term of incarceration on the robbery conviction, together with a five-year period of PRS.

We reject defendant's contention that the court erred in denying his request for new counsel prior to resentencing him. Defendant " 'did not establish a serious complaint concerning defense counsel's representation and thus did not suggest a serious possibility of good cause for substitution [of counsel]' " (*People v Adger*, 83 AD3d 1590, 1591, *lv denied* 17 NY3d 857; *see People v Austin*, 38 AD3d 1246, 1247, *lv denied* 8 NY3d 981). Even assuming, arguendo, that defendant's contention that there was a conflict of interest constitutes a complaint that there was a "complete breakdown of communication and lack of trust" between defendant and his current attorney, we conclude that such a contention would not necessarily warrant substitution but, rather, the court would be required to conduct a minimal inquiry to

determine whether substitution was appropriate (*People v Sides*, 75 NY2d 822, 825). Contrary to defendant's further contention, the court made the requisite "minimal inquiry" into his reasons for requesting new counsel (*Adger*, 83 AD3d at 1592 [internal quotation marks omitted]; *see People v Porto*, 16 NY3d 93, 99-100).

We further conclude that the court's resentencing of defendant was proper. Correction Law § 601-d "permit[s] [the Department of Correctional Services (DOCS)] to notify sentencing courts that [PRS] had not been properly imposed in certain cases . . . and to have th[o]se defendants returned to the original sentencing courts for modification of their sentences to include PRS" (*People v Williams*, 14 NY3d 198, 208, *cert denied* ___ US ___, 131 S Ct 125). "A court resentencing a defendant pursuant to Correction Law § 601-d is not 'supposed to do anything at resentencing other than correct the discrete error prompting the resentencing in the first place' " (*People v Savery*, 90 AD3d 1505, 1506, *lv denied* 18 NY3d 928, quoting *People v Lingle*, 16 NY3d 621, 634). Here, although a five-year period of PRS with respect to the robbery conviction was mandatory pursuant to Penal Law § 70.45 (1), County Court (Sirkin, J.) did not impose any period of PRS. Judge Nesbitt simply corrected defendant's sentence by imposing the required five years of PRS in accordance with Correction Law § 601-d (*see Savery*, 90 AD3d at 1506).

Finally, because defendant was still serving his original sentence at the time he was resentenced, we reject his contention that the resentence violated his rights under the Double Jeopardy Clause of the Fifth Amendment (*see Lingle*, 16 NY3d at 630-631; *Williams*, 14 NY3d at 217; *see also Savery*, 90 AD3d at 1506).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

508

KA 07-01185

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN GAYDEN, JR., DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

JOHN GAYDEN, JR., DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered April 20, 2007. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We further reject defendant's contention that Supreme Court erred in allowing the People to present the testimony of an expert witness concerning child sexual abuse accommodation syndrome (CSAAS). "Expert testimony concerning CSAAS is admissible to assist the jury in understanding the unusual conduct of victims of child sexual abuse where, as here, the testimony is general in nature and does 'not attempt to impermissibly prove that the charged crimes occurred' " (*People v Filer*, 97 AD3d 1095, 1096, *lv denied* 19 NY3d 1025, quoting *People v Carroll*, 95 NY2d 375, 387; *see generally People v Diaz*, 20 NY3d 569, 575-576). In this case, the People properly offered the expert's testimony "for the purpose of instructing the jury about possible reasons why a child might not immediately report incidents of sexual abuse" (*Carroll*, 95 NY2d at 387), and the court properly prevented the prosecutor from "tailor[ing] hypothetical questions to include facts concerning the abuse that occurred in this particular case" (*People v Williams*, 20 NY3d 579, 584).

Contrary to defendant's contention, the court did not err in denying his challenge for cause to a prospective juror. "Although the prospective juror initially expressed 'a state of mind that [was] likely to preclude [him] from rendering an impartial verdict based upon the evidence adduced at the trial' (CPL 270.20 [1] [b]), [he] ultimately stated unequivocally that [he] could follow the law and be fair and impartial" (*People v Gladding*, 60 AD3d 1401, 1402, *lv denied* 12 NY3d 925; *see People v Johnson*, 94 NY2d 600, 614). Additionally, we conclude that the sentence is not unduly harsh or severe.

In his main and pro se supplemental briefs, defendant contends that he was denied his right to effective assistance of counsel. We reject that contention. 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).

In his pro se supplemental brief, defendant contends that the prosecutor's summation and the court's charge impermissibly changed the theory of the prosecution. Although defendant failed to preserve that contention for our review, we address it because "the right of an accused to be tried and convicted of only those crimes and upon only those theories charged in the indictment is fundamental and nonwaivable" (*People v McCallar*, 53 AD3d 1063, 1064, *lv denied* 11 NY3d 833 [internal quotation marks omitted]). We conclude that "defendant received the requisite ' "fair notice of the accusations against him" ' " (*id.* at 1065, quoting *People v Grega*, 72 NY2d 489, 495). The indictment included allegations that, between January 26 and August 31, 2006, defendant "engaged in two or more acts of sexual conduct, which included at least one act of oral sexual conduct and anal sexual conduct, with a child less than thirteen years old." The court, however, instructed the jury that the elements of the charged offense included the commission of "at least one act of *sexual intercourse*, oral sexual conduct, anal sexual conduct, or *aggravated sexual conduct or contact*" (emphasis added), and the charge included the statutory definitions of the terms "sexual intercourse" and "aggravated sexual contact." Nevertheless, at trial there was no evidence of sexual intercourse or aggravated sexual contact. Thus, "[w]hile the trial court should not have charged [the] statutory definitions of [sexual intercourse and aggravated sexual contact], but instead should have tailored its instructions to the case before it, on this record . . . the additional portion of the charge had no potential for prejudicing defendant, and thus was harmless error" (*Grega*, 72 NY2d at 497).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

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KA 11-02365

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EFFRIN MCNEILL, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered November 7, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]). Contrary to defendant's contention, County Court properly denied his request to charge robbery in the third degree (§ 160.05) as a lesser included offense of robbery in the first degree. We conclude that there was no reasonable view of the evidence that defendant committed robbery in the third degree and not robbery in the first degree inasmuch as there was no evidence that defendant used physical force other than the threatened use of a knife, i.e., a dangerous instrument (*see* Penal Law §§ 10.00 [13]; 160.15 [3]), to steal the property (*see People v James*, 11 NY3d 886, 888). Indeed, the store clerk testified that defendant displayed and threatened the use of a knife and identified a knife that was recovered from defendant as being the knife that was used during the robbery. Furthermore, although the surveillance recording of the robbery does not clearly show the knife in defendant's hand, the recording confirms the clerk's testimony that he stepped back when he saw the knife.

Defendant further contends that he was denied a fair trial by the admission of a witness's prior consistent statement, to wit, the store clerk was permitted to testify that he told his store manager and a police officer that the perpetrator displayed a knife during the robbery. Although "[a]n out-of-court statement made by a witness [that] is consistent with that witness's trial testimony is generally inadmissible as hearsay" (*People v Mack*, 89 AD3d 864, 866, *lv denied* 18 NY3d 959), any error in admitting that testimony was harmless.

There is overwhelming evidence of defendant's guilt and there is no significant probability that he would have been acquitted but for the error (*see People v Corchado*, 299 AD2d 843, 844, *lv denied* 99 NY2d 581; *People v Alshoaibi*, 273 AD2d 871, 872, *lv denied* 95 NY2d 960; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

We agree with defendant that the court, in denying his motion to suppress, failed to place its findings of fact and conclusions of law upon the record as required by CPL 710.60 (6). "The failure to do so is not fatal, however, where, as here, there has been a full and fair hearing. In such instances, this [C]ourt may make its own findings of fact and conclusions of law" (*People v Lewis*, 172 AD2d 1020, 1021; *see People v Clark*, 262 AD2d 1051, 1051, *lv denied* 93 NY2d 1016). Defendant moved to suppress certain tangible evidence, contending that it was seized as the result of an arrest that was made without probable cause. We reject that contention. The evidence from the suppression hearing establishes that a store clerk provided the police with a description of the clothing worn by the perpetrator and the unique vehicle he used to leave the scene—a bicycle that was towing a trailer. Based on a radio dispatch containing that information, an officer detained a person riding a bicycle that was towing a trailer near the scene of the robbery. The person riding the bicycle informed the officer that he had just been given the bicycle by another man. That person pointed out another person who was walking nearby, and whose age and clothing fit the description of the perpetrator. Additionally, police officers found items matching the description of the stolen property in the trailer that was attached to the bicycle in question, and defendant was found in possession of a blue pocket knife that was consistent with the knife displayed during the robbery. We thus conclude that the police had probable cause to arrest defendant, i.e., they had "knowledge of facts and circumstances 'sufficient to support a reasonable belief that an offense has been or is being committed' " (*People v Maldonado*, 86 NY2d 631, 635). Finally, we also conclude that the sentence is not unduly harsh or severe.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

511

KA 10-01206

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDUARDO TRINIDAD, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered May 4, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted robbery in the first degree, and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3] [felony murder]), attempted robbery in the first degree (§§ 110.00, 160.15 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant's contention that County Court abused its discretion in admitting in evidence photographs of the victim's fatal injuries is unpreserved for our review because he made only a general objection to the admission of the photographs at trial (*see People v Dickerson*, 42 AD3d 228, 236-237, *lv denied* 9 NY3d 960; *see generally People v Shire*, 77 AD3d 1358, 1359, *lv denied* 15 NY3d 955). In any event, the court did not abuse its discretion in admitting the photographs in evidence (*see People v Williams*, 28 AD3d 1059, 1060, *affd* 8 NY3d 854; *People v Hayes*, 71 AD3d 1477, 1477-1478, *lv denied* 15 NY3d 751). "Photographic evidence should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant" (*People v Pobliner*, 32 NY2d 356, 370, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905), and that is not the case here. The photographs were properly admitted for a number of purposes, including to assist the jury in understanding the Medical Examiner's testimony concerning the victim's gunshot wound (*see Hayes*, 71 AD3d at 1477-1478).

Defendant failed to preserve for our review his further contention that, in sentencing him, the court penalized him for

exercising the right to a jury trial, inasmuch as defendant failed to raise that contention at sentencing (*see People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862). In any event, that contention lacks merit because "there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial" (*id.* [internal quotation marks omitted]; *cf. People v Barone*, 101 AD3d 585, 587; *People v Cox*, 122 AD2d 487, 489; *People v Slobodan*, 67 AD2d 630, 630). We do not find defendant's sentence to be otherwise harsh or severe, and we decline to reduce it on that ground (*see* CPL 470.15 [6] [b]).

Additionally, viewing the evidence in the light most favorable to the prosecution (*see People v Danielson*, 9 NY3d 342, 349), we conclude that it is legally sufficient to establish beyond a reasonable doubt that the defendant acted in concert with and intentionally aided his companions in committing the crime of attempted robbery in the first degree (*see People v Roberts*, 64 AD3d 796, 797; *People v Mathis*, 60 AD3d 697, 698, *lv denied* 12 NY3d 856; *People v Witherspoon*, 300 AD2d 605, 605, *lv denied* 99 NY2d 634), and to support the conviction of felony murder "based on the commission of that predicate crime" (*Roberts*, 64 AD3d at 797). "Accessorial liability requires only that defendant, acting with the mental culpability required for the commission of the crime, intentionally aid another in the conduct constituting the offense" (*People v Molson*, 89 AD3d 1539, 1539, *lv denied* 18 NY3d 960 [internal quotation marks omitted]; *see* Penal Law § 20.00). Here, we conclude that there was evidence from which the jury could have reasonably inferred that defendant and his accomplices shared "a common purpose and a collective objective" (*People v Cabey*, 85 NY2d 417, 422). Viewing the evidence in light of the elements of the crimes of murder in the second degree and attempted robbery in the first degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we further conclude that the verdict with respect to those crimes is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

512

CA 12-01902

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND WHALEN, JJ.

DOMINIQUE D., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT KOERNTGEN, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

ATHARI & ASSOCIATES, LLC, UTICA (NICOLE C. PELLETIER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WILLIAMSON, CLUNE & STEVENS, ITHACA (PAUL D. SWEENEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered July 11, 2012. The order, inter alia, granted the motion of defendant Robert Koerntgen to compel plaintiff to provide authorizations permitting disclosure of certain records.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendant Robert Koerntgen to the extent that it seeks authorizations for the full disclosure of the records sought in connection with a sexual assault in Ohio and by granting the cross motion to the extent that it seeks an in camera review of those records and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained as the result of her childhood exposure to lead-based paint when she resided at premises owned by Robert Koerntgen (defendant). In her bill of particulars plaintiff alleges, inter alia, emotional and psychological harm, cognitive and developmental disabilities, abnormal social and behavioral development and an ongoing need for psychological and psychiatric services. After plaintiff refused to comply fully with his discovery requests, defendant moved for, inter alia, an order compelling plaintiff to provide authorizations permitting disclosure of records relating to any psychological, psychiatric and/or medical treatment plaintiff received in connection with a sexual assault in Ohio. Plaintiff cross-moved for a protective order with respect to those records or, alternatively, an in camera review of the records by Supreme Court. The court granted defendant's motion with respect to, inter alia, the authorizations and denied plaintiff's cross motion.

In view of the injuries alleged by plaintiff, we agree with

defendant that plaintiff waived her physician-patient privilege with respect to the records sought, and that those records may be material and necessary to the defense of the action (*see Donald v Ahern*, 96 AD3d 1608, 1610; *Rothstein v Huh*, 60 AD3d 839, 839-840). We further conclude, however, that there may be information in plaintiff's records that is irrelevant to this action, and there are legitimate concerns with respect to "the unfettered disclosure of sensitive and confidential information" contained in those records (*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 460; *see Donald*, 96 AD3d at 1610-1611). We therefore modify the order by denying defendant's motion to the extent that it seeks authorizations for the full disclosure of the records sought and by granting plaintiff's cross motion to the extent that it seeks the alternative relief of an in camera review of the records, and we remit the matter to Supreme Court for an in camera review of those records and the redaction of any irrelevant information therefrom (*see Donald*, 96 AD3d at 1611; *Nichter v Erie County Med. Ctr. Corp.*, 93 AD3d 1337, 1339; *Tirado v Koritz*, 77 AD3d 1368, 1369).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

513

CA 12-01777

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND WHALEN, JJ.

ORLEANS COMMUNITY HEALTH, FORMERLY KNOWN AS MEDINA MEMORIAL HEALTH CARE SYSTEM, INC., PLAINTIFF-RESPONDENT,

MEMORANDUM AND ORDER

V

LESLY GERMAIN, M.D., DEFENDANT-APPELLANT.

NIXON PEABODY LLP, ALBANY (DANIEL J. HURTEAU OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (JAMES P. NONKES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered August 27, 2012. The order denied the motion of defendant to compel alternative dispute resolution.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and defendant's motion is granted.

Memorandum: Plaintiff commenced this action to recover on a promissory note and, in the context of that action, defendant moved pursuant to CPLR 7503 (a) to compel "alternative dispute resolution" in accordance with a provision in an underlying agreement between the parties. Defendant appeals from an order denying his motion on the ground that he failed to establish that plaintiff intended to mediate or arbitrate a dispute arising under the promissory note. Plaintiff, a hospital located in Medina, New York, recruited defendant to establish a medical practice in the specialty of orthopedics and orthopedic surgery within plaintiff's service area. Plaintiff and defendant executed an agreement that, inter alia, provided an income guarantee to defendant, and provided that all payments made pursuant to that income guarantee "shall be considered as a loan" subject to repayment terms contained in the agreement. In order to document that loan, defendant executed a promissory note containing repayment terms identical with those contained in the agreement. The agreement also contains a dispute resolution provision stating: "Except as otherwise provided in this Agreement, the parties shall endeavor to resolve any disputes between them on a voluntary, cooperative basis. If a resolution of any dispute cannot be accomplished within 15-days of notice of the dispute by one party to the other, then the parties agree to submit the dispute to non-binding mediation in front of the

joint Executive Committees of the Hospital Board of Directors and the Medical Staff. If the mediation does not resolve the dispute, it shall be resolved by binding arbitration following the rules of the American Arbitration Association for commercial disputes before a single arbitrator to be selected by the mutual agreement of the parties. This paragraph does not, however, require the parties to use the services of the American Arbitration Association."

We agree with defendant that Supreme Court erred in denying the motion to compel, and that plaintiff is required to follow the dispute resolution procedure set forth in the agreement. The Court of Appeals, referencing the "very broad limits of arbitrability" envisioned by CPLR 7501, has held that judicial interference is forbidden with respect to disputes that are "logically connected with" an arbitration agreement (*Matter of Blum Folding Paper Box Co. [RaftenpFriedlander]*, 27 NY2d 35, 38). In determining whether a particular dispute falls within the scope of an agreement to arbitrate, "the role of the court is limited to determining 'whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the [agreement]' " (*City of Watertown v Watertown Firefighters, Local 191*, 6 AD3d 1095, 1096). Here, the dispute resolution provision in the agreement encompasses "any dispute," and thus we conclude that there is a reasonable relationship between the subject matter of the dispute on the promissory note and the general subject matter of the underlying agreement (*see City of Watertown*, 6 AD3d at 1095-1096). Resolution of the parties' dispute must therefore follow the dispute resolution procedure set forth in the agreement (*see Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95-96*; see also General Mills v Steuben Foods*, 244 AD2d 868, 868).

Finally, based on the reasoning of the Second Department in *Grossman v Laurence Handprints-N.J.* (90 AD2d 95, 100-102), we reject plaintiff's contention that the absence of a dispute resolution provision in the promissory note, and the inclusion therein of a provision allowing for recovery of attorneys' fees in a collection action on the promissory note, precludes application of the dispute resolution provision in the agreement.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

514

CA 12-01375

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND WHALEN, JJ.

OROSMAN DELSOL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FAMILY DOLLAR STORES OF NEW YORK, INC.,
DEFENDANT-RESPONDENT.

STEVEN A. LUCIA, ROCHESTER, FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (SANDRA J. SABOURIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered April 17, 2012. The order granted the motion of defendant for summary judgment and dismissed the amended complaint.

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

Memorandum: In this slip and fall action, plaintiff appeals from an order that granted defendant's motion for summary judgment dismissing the amended complaint. "In slip and fall cases involving the presence of slippery or wet substances, absent evidence that the owner of the premises created a dangerous condition, 'liability [can] be predicated only on failure of [defendant] to remedy the danger presented by the liquid after actual or constructive notice of the condition' " (*Winecki v West Seneca Post 8113*, 227 AD2d 978, 978, quoting *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969). Here, plaintiff relies upon constructive notice, and it is well settled that, "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). "By submitting evidence that demonstrated that the defect was not visible and apparent, defendant established that it did not have constructive notice of the defect. Defendant thus met its initial burden" on its motion for summary judgment (*Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 858; *see Dragotta v Walmart, Inc.*, 39 AD3d 800, 800-801), and plaintiff failed to raise a triable issue of fact in opposition (*see Breuer v Wal-Mart Stores*, 289 AD2d 276, 277, *lv denied* 97 NY2d 610).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

515

CA 12-02092

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND WHALEN, JJ.

BUFFALO UNITED CHARTER SCHOOL, BROOKLYN EXCELSIOR CHARTER SCHOOL AND NATIONAL HERITAGE ACADEMIES, INC., PETITIONERS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD, COUNCIL OF SCHOOL SUPERVISORS AND ADMINISTRATORS, LOCAL 1, AFSA, RESPONDENTS-RESPONDENTS-APPELLANTS, AND BUFFALO UNITED CHARTER SCHOOL EDUCATION ASSOCIATION, NYSUT/AFT, AFL-CIO NEW YORK, RESPONDENT-RESPONDENT.

HISCOCK & BARCLAY, LLP, BUFFALO (LAURENCE B. OPPENHEIMER OF COUNSEL), AND WHITEMAN OSTERMAN & HANNA LLP, ALBANY, FOR PETITIONERS-APPELLANTS-RESPONDENTS.

DAVID P. QUINN, ALBANY, FOR RESPONDENT-RESPONDENT-APPELLANT NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD.

DAVID N. GRANDWETTER, NEW YORK CITY, FOR RESPONDENT-RESPONDENT-APPELLANT COUNCIL OF SCHOOL SUPERVISORS AND ADMINISTRATORS, LOCAL 1, AFSA.

RICHARD E. CASAGRANDE, LATHAM (JENNIFER N. COFFEY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

DAVID J. STROM, GENERAL COUNSEL, WASHINGTON, D.C., OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, FOR AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND PHILIP A. HOSTAK, FOR NATIONAL EDUCATION ASSOCIATION, AMICI CURIAE.

Appeal and cross appeals from a judgment (denominated order and judgment) of the Supreme Court, Erie County (John M. Curran, J.), entered July 11, 2012 in a proceeding pursuant to CPLR article 78. The judgment denied the petition in part.

It is hereby ORDERED that the case is held and the decision is reserved in accordance with the following Memorandum: In this proceeding pursuant to CPLR article 78, petitioners appeal, and respondents New York State Public Employment Relations Board (PERB) and Council of School Supervisors and Administrators, Local 1, AFSA,

cross-appeal from a judgment determining, inter alia, that PERB properly exercised jurisdiction over two collective bargaining matters. We agree with petitioners, however, that Supreme Court erred in determining that PERB properly exercised jurisdiction over those matters. Inasmuch as the two collective bargaining matters "arguably" fall within the scope of the National Labor Relations Act (NLRA) (*San Diego Bldg. Trades Council, Millmen's Local 2020 v Garmon*, 359 US 236, 245; *see e.g. Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB 41; *Charter School Admin. Servs.*, 353 NLRB 394), the National Labor Relations Board (NLRB) has primary jurisdiction "to determine in the first instance" whether its jurisdiction preempts PERB's jurisdiction (*Metropolitan Life Ins. Co. v Massachusetts*, 471 US 724, 748). Under the circumstances of this case, and in the interest of judicial economy, we hold the case pending a determination of the NLRB whether the NLRA applies to the collective bargaining matters herein at issue and thus preempts PERB's jurisdiction (*see generally New York Inst. for Educ. of Blind v United Fedn. of Teachers' Comm. for N.Y. Inst. for Educ. of Blind*, 83 AD2d 390, 397-398, *affd* 57 NY2d 982).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

516

CA 12-01970

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND WHALEN, JJ.

VINCENT D. IOCOVOZZI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BONNETTE IOCOVOZZI, DEFENDANT-RESPONDENT.

AUDREY BARON DUNNING, ILION, FOR PLAINTIFF-APPELLANT.

LEVITT & GORDON, ESQS., NEW HARTFORD (DEAN L. GORDON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Herkimer County (Erin P. Gall, J.), dated August 10, 2012. The order and judgment granted the motion of defendant for a judgment determining that the parties' prenuptial agreement was void.

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

Memorandum: Plaintiff appeals from an order and judgment granting defendant's motion for summary judgment determining that the parties' prenuptial agreement (agreement) was void, based on the allegation in defendant's first affirmative defense that the agreement was unenforceable due to plaintiff's failure to provide her with relocation expenses pursuant to the terms of the agreement. Contrary to plaintiff's contentions, the demand by defendant for relocation expenses was not defective, notwithstanding a typographical error in the demand letter, nor did the demand fail to comply with the procedures outlined in the agreement. The demand letter was sent to plaintiff's attorney, and it contained sufficient information to put plaintiff on notice of defendant's demand. Plaintiff's further contention that defendant's demand was untimely is raised for the first time on appeal and is thus not properly before this Court (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Finally, we reject plaintiff's contention that the court erred in voiding the agreement in its entirety based on his breach of one provision, i.e., the provision concerning relocation expenses. Inasmuch as plaintiff willfully refused to pay for defendant's relocation expenses pursuant to the agreement, he cannot now seek to enforce the remainder of the agreement (*see generally Duryea v Bliven*, 122 NY 567, 570-571; *Blumberg v Blumberg*, 117 NYS2d 906, 909, *affd* 280 App Div 986; *Birnbaum v Birnbaum*, 70 Misc 2d 462, 464).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

517

CA 12-02006

PRESENT: FAHEY, J.P., CARNI, SCONIERS, AND WHALEN, JJ.

VINCENT AUTOMOTIVE, INC., MICHAEL MANCUSO AND DOMINIC MANCUSO, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CHEVRON U.S.A. INC., DEFENDANT-RESPONDENT.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (GRETA K. KOLCON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered December 21, 2011. The order granted the motion of defendant for summary judgment and denied the cross motion of plaintiffs to compel defendant to respond to a notice of deposition.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part, reinstating the first and second causes of action, and granting the cross motion and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking to recover investigation, remediation, cleanup and removal costs arising from oil and gasoline contamination that was discovered during the time they owned the subject property. Defendant moved for summary judgment dismissing the complaint on the ground that its predecessor, Gulf Oil Corporation (Gulf), was not responsible for any contamination of the property, and thus it was not liable for that contamination as a successor in interest to Gulf. Plaintiffs cross-moved, inter alia, to compel defendant to respond to their notice of deposition. Supreme Court granted the motion and denied the cross motion.

We note at the outset that plaintiffs have addressed only the first two causes of action that are based upon the Navigation Law and are thus deemed to have abandoned their other causes of action (*see Route 104 & Rte. 21 Dev., Inc. v Chevron U.S.A., Inc.*, 96 AD3d 1491, 1492). We agree with plaintiffs that the court erred in granting defendant's motion with respect to the Navigation Law causes of action. Contrary to the court's determination, we conclude that defendant did not meet its initial burden on the motion by submitting the affidavit of the attorney who is employed by defendant to

supervise environmental litigation in New York involving Gulf. That affidavit is without evidentiary value inasmuch as the attorney had no personal knowledge of the relevant facts (*see Cleary v Wallace Oil Co.*, 55 AD3d 773, 777; *Wright v Rite-Aid of NY*, 249 AD2d 931, 931). His assertions concerning Gulf's purported lack of involvement with the subject property or the petroleum discharge thereon consist of double hearsay (*see generally Bielak v Plainville Farms*, 299 AD2d 900), and thus fail to satisfy the "strict requirement" imposed upon the movant to "tender . . . evidentiary proof in admissible form" (*Friends of Animals v Association Fur Mfrs.*, 46 NY2d 1065, 1067-1068). Nor did defendant meet its burden of establishing that it did not cause or contribute to the contamination by asserting that plaintiffs have "no evidence" with respect thereto (*Route 104 & Rte. 21 Dev., Inc.*, 96 AD3d at 1492). "[D]efendant cannot establish its entitlement to judgment as a matter of law simply by pointing to gaps in plaintiff[s'] proof" (*id.*; *see Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980).

Finally, we conclude that plaintiffs' cross motion to compel defendant's deposition should have been granted (*see* CPLR 3101 [a]; *see generally Garrett v Community Gen. Hosp of Greater Syracuse*, 288 AD2d 928, 929).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

526

KA 09-02147

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SANDRA M. ARENA, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered April 22, 2009. The judgment convicted defendant, upon a nonjury verdict, of manslaughter in the second degree and assault in the third degree (four counts).

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

Memorandum: On appeal from a judgment convicting her following a nonjury trial of manslaughter in the second degree (Penal Law § 125.15 [1]) and four counts of assault in the third degree (§ 120.00 [2]), defendant contends that her constitutional right to confrontation was violated when a prosecution witness testified in disguise. Contrary to defendant's contention, the witness was not "in disguise." In fact, the witness was sworn as a male and acknowledged that his legal name was male in nature, but that he wished to testify as a female, and the prosecutor repeatedly referred to the witness as "Karen." In any event, County Court was not prevented from seeing the face or eyes of the witness or from observing the demeanor of the witness (*see People v Wrotten*, 14 NY3d 33, 38-40). We reject defendant's further contention that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), we conclude that the People established by legally sufficient evidence that defendant recklessly caused the death of another person (§ 125.15 [1]), and that she recklessly caused physical injury to several other people (§ 120.00 [2]). Defendant contends that she lacked the intent to harm or kill; however, intent is irrelevant to the issue whether her behavior was reckless, and we conclude that there is a valid line of reasoning and permissible inferences supporting the court's finding of recklessness for both crimes (*see People v Heinsohn*, 61 NY2d 855, 856; *see generally*

Bleakley, 69 NY2d at 495). Likewise, viewing the evidence in light of the elements of the crimes in this nonjury trial, we conclude that the verdict is not against the weight of the evidence (*see generally People v Danielson*, 9 NY3d 342, 348-349). Finally, we conclude that the sentence is not unduly harsh or severe, but we note that the certificate of conviction erroneously recites that defendant is a violent felony offender. The certificate of conviction therefore must be amended to correct that error (*see People v Dombrowski*, 94 AD3d 1416, 1417, *lv denied* 19 NY3d 959).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

528

KA 11-01080

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER ROMAN, DEFENDANT-APPELLANT.

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

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (MATTHEW P. WORTH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 22, 2010. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, rape in the second degree, criminal sexual act in the second degree 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 upon a jury verdict of, inter alia, course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), rape in the second degree (§ 130.30 [1]), and criminal sexual act in the second degree (§ 130.45 [1]), defendant contends that the verdict with respect to those counts is against the weight of the evidence. We reject that contention. We note that a different verdict would not have been unreasonable inasmuch as this case rests largely on the jury's credibility findings with respect to the testimony of the victim (*see People v Hutzler*, 270 AD2d 934, 934, *lv denied* 94 NY2d 948; *see generally People v Bleakley*, 69 NY2d 490, 495). Nevertheless, viewing the evidence in light of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and affording the requisite "great deference to the jury given its opportunity to view the witnesses" (*Hutzler*, 270 AD2d at 934; *see People v Barreto*, 64 AD3d 1046, 1048-1049, *lv denied* 13 NY3d 834), we conclude that the jury did not fail to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495). Contrary to the contention of defendant, the jury did not err in crediting the testimony of the People's medical expert with respect to physical evidence of sexual contact with the victim, a child, over the testimony of the defense expert on that subject. The People's medical expert, a pediatrician, focused her practice on the examination of alleged child victims of sexual abuse and was certified by the Child Abuse Medical Provider Program (CHAMP). The defense expert, an obstetrician/

gynecologist, focused his practice on adults and was not certified by CHAMP. Further, the People's medical expert physically examined the victim in this case, while the defense expert based his opinions on a single photograph taken during that examination. With respect to the experts' differing interpretations of the medical evidence, "[t]he jury was free to adopt whichever version it found more credible" (*People v Miller*, 91 NY2d 372, 380).

Contrary to the further contention of defendant, the victim's testimony was not incredible as a matter of law. Most of the alleged inconsistencies that defendant points to are of minimal, if any, significance. Moreover, with respect to the details of the first sexual encounter between the victim and defendant, we conclude that defendant mischaracterizes or exaggerates the inconsistencies in the victim's statements. In any event, "[a]ny inconsistencies in the victim's testimony were highlighted by defense counsel, and the jury's resolution of credibility issues with respect to the testimony of the victim is entitled to great deference" (*People v DiTucci* [appeal No. 1], 81 AD3d 1249, 1250, *lv denied* 17 NY3d 794; *see People v Hernandez*, 291 AD2d 263, 263, *lv denied* 98 NY2d 697). We further note that several aspects of the victim's testimony were corroborated by other witnesses.

Defendant's contention that he was deprived of effective assistance of counsel by defense counsel's failure to call unspecified exculpatory witnesses on his behalf or to introduce alleged documentary evidence that would have established his innocence is based on matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL 440.10 (*see People v Wittman*, 103 AD3d 1206, 1206-1207; *People v King,* 90 AD3d 1533, 1534, *lv denied* 18 NY3d 959). To the extent that defendant's contention is reviewable on this appeal, we conclude that, viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, defendant received meaningful representation (*see Wittman*, 103 AD3d at 1207; *see generally People v Baldi*, 54 NY2d 137, 147). Notably, prior to trial, defense counsel served discovery demands; filed an omnibus motion seeking, inter alia, dismissal or reduction of the charges in the indictment and suppression of defendant's oral statements; and requested a bill of particulars. Defense counsel also successfully moved to preclude potentially damaging testimony from a child witness. At trial, defense counsel extensively cross-examined the People's witnesses, particularly the victim and the People's medical expert, and vigorously advocated for defendant in his opening and closing statements, arguing that the victim was lying and that the People's witnesses were unworthy of belief.

We reject the further contention of defendant that the court punished him for exercising his right to a trial. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial . . . , and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial" (*People v Brink*, 78 AD3d 1483, 1485, *lv denied* 16 NY3d 742 [internal quotation marks omitted]; *see People v Lewis*, 93 AD3d 1264, 1267, *lv denied* 19 NY3d 963; *People v Russell*, 83 AD3d 1463, 1465, *lv denied* 17 NY3d 800). Finally,

the sentence is not unduly harsh or severe, particularly in light of the severity of the crimes and defendant's failure to take any responsibility for his actions or to express remorse.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

530

CA 12-00257

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

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

V MEMORANDUM AND ORDER

DANIEL FARNSWORTH, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (AILEEN M. MCNAMARA OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered December 1, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10. The jury found that respondent was sexually motivated in committing his crimes and that he suffers from a mental abnormality (*see* § 10.03 [i]). Respondent contends that Supreme Court abused its discretion and violated his right to due process by denying his motion to bifurcate the jury trial on the issues whether he was sexually motivated in his commission of the underlying crimes and whether he suffered from a mental abnormality. According to respondent, the jury may have been confused by the different legal standards applicable to the issues, i.e., whether petitioner established the first issue by proof beyond a reasonable doubt and whether petitioner established the second issue by clear and convincing evidence (*see Matter of State of New York v Farnsworth*, 75 AD3d 14, 28, *appeal dismissed* 15 NY3d 848). We note at the outset that respondent failed to preserve for our review his contention that due process required a bifurcation of the jury trial. In any event, we reject respondent's contentions that the court abused its discretion in denying his motion for bifurcation and that he was thereby denied his due process rights. Mental Hygiene Law article 10 does not authorize respondent's proposed bifurcation, and "a court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact" (*Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394,

rearg denied 85 NY2d 1033 [internal quotation marks omitted]). Moreover, in a previous appeal by respondent, we concluded that "the application of the two different [legal] standards would not confuse a jury" such that bifurcation would be required (*Farnsworth*, 75 AD3d at 28). Indeed, "the trial record is devoid of evidence indicating the existence of juror confusion" with respect to the different legal standards such that bifurcation would have assisted in clarification or simplification of issues (*Wylder v Viccari*, 138 AD2d 482, 484; *see generally* 22 NYCRR 202.42 [a]).

Contrary to respondent's contention, we conclude that the court properly denied his motion for a directed verdict at the close of proof in the jury trial on the ground that the evidence of sexual motivation in committing the underlying crimes was legally insufficient. "A court may set aside a jury verdict as legally [insufficient] and enter judgment as a matter of law only where 'there is simply no valid line of reasoning and permissible inferences [that] could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial' " (*Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1473, *lv denied* 17 NY3d 702 [internal quotation marks omitted]). Here, in his statement to the police, respondent admitted that he entered a residence for a sexual purpose. The evidence further established that respondent unlawfully entered the bedroom of another minor around the same time period, and we conclude that the jury could reasonably infer that his intent in entering that bedroom was the same as his admitted intent in the aforementioned incident (*see People v Judware*, 75 AD3d 841, 844-845, *lv denied* 15 NY3d 853). In addition, based upon a review of respondent's criminal and mental health history, petitioner's expert opined that respondent was sexually motivated in his commission of those two crimes. Thus, we conclude that the evidence is legally sufficient to establish that respondent had a sexual motivation in committing the underlying crimes.

Finally, we reject respondent's further contention that the court erred in failing to consider the least restrictive alternative, i.e., placement in a group home or confinement in a secure treatment facility staffed with personnel from the Office of Persons with Developmental Disabilities (OPWDD). Upon a judicial finding that a detained sex offender is "dangerous" and "requir[es] confinement" owing to the sex offender's "predisposition to commit sex offenses" and "inability to control behavior [such] that the respondent is likely to be a danger to others," a court must order that the sex offender "be committed to a secure treatment facility" (Mental Hygiene Law § 10.07 [f]). Alternatively, the court may find that a sex offender requires only "strict and intensive supervision" (*id.*). In this case, the uncontroverted testimony of petitioner's expert established that respondent was not a suitable candidate for strict and intensive supervision. Petitioner's expert also testified that, although respondent had a developmental disorder, he did not have a developmental disability that would qualify him for placement with OPWDD, and

respondent did not offer any evidence to the contrary.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

532

CA 12-01221

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

RICHARD HOTALING, PLAINTIFF-APPELLANT,

V ORDER

CHARLES M. SPROCK, ESQ., ROBERT F. BALDWIN, JR., ESQ., JAMIE L. SUTPHEN, ESQ. AND BALDWIN & SUTPHEN, LLP, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (LAURENCE F. SOVIK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered September 15, 2011. The order granted the motion of defendants for summary judgment and dismissed the third amended complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

533

CA 12-01222

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

RICHARD HOTALING, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHARLES M. SPROCK, ESQ., ROBERT F. BALDWIN, JR., ESQ., JAMIE L. SUTPHEN, ESQ. AND BALDWIN & SUTPHEN, LLP, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (LAURENCE F. SOVIK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (James P. Murphy, J.), entered September 26, 2011. The judgment awarded costs and disbursements to defendants.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part, and the third amended complaint, as amplified by plaintiff's response to defendants' interrogatories, is reinstated to the extent that it seeks damages for loss of rent based on legal malpractice and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this legal malpractice action seeking damages for the alleged negligence of defendants in failing to determine that a Town of Dewitt zoning ordinance prohibited him from operating an "adult use" business in the building he purchased for that purpose. Zonen, Ltd. (Zonen), the corporation formed by plaintiff to operate the business, has operated a retail establishment in the building, which includes "adult use" inventory, since 2001. Supreme Court granted defendants' motion for summary judgment dismissing the third amended complaint on the ground that plaintiff failed to raise an issue of fact whether he sustained actual and ascertainable damages, an " 'essential element[] of [a] legal malpractice cause of action' " (*Malachowski v Daly*, 87 AD3d 1321, 1321; *see generally Dombrowski v Bulson*, 19 NY3d 347, 350).

As a preliminary matter, we reject plaintiff's contention that he should be permitted to recover damages for personal funds that he alleged were expended through the corporate account on a theory of reverse-

piercing of the corporate veil. It is well established that "[t]he doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation" (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 140-141). " '[T]he courts are loathe to disregard the corporate form for the benefit of those who have chosen that form to conduct business' " (*Baccash v Sayegh*, 53 AD3d 636, 639), and we conclude that the court properly refused to disregard the corporate form here.

Nevertheless, viewing the submissions of the parties in the light most favorable to plaintiff, as we must (*see Victor Temporary Servs. v Slattery*, 105 AD2d 1115, 1117), we conclude that the court erred in determining that plaintiff failed to raise an issue of fact whether he has sustained damages for loss of rent (*cf. Malachowski*, 87 AD3d at 1323). We therefore modify the judgment accordingly. Plaintiff alleges in the third amended complaint, as amplified by his response to defendants' interrogatories, that he is unable to lease a portion of the property to Zonen or any other entity because defendants failed to advise him of zoning ordinances governing parking restrictions. Plaintiff also averred in his affidavit in opposition to the motion that his efforts to lease the warehouse were prohibited by the Town of Dewitt inasmuch as the property lacks the required number of parking spaces. Moreover, in response to defendants' interrogatories, plaintiff submitted documentary evidence establishing that he has been damaged by the loss of rent for 2,500 feet at a rate of $3.50 per square foot.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

537

CA 12-01545

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

SOPHIA MELSKI, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF PATRICK MELSKI, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FITZPATRICK & WELLER, INC., DEFENDANT-RESPONDENT.

FITZPATRICK & WELLER, INC., THIRD-PARTY PLAINTIFF,

V

NICHOLSON & HALL CORP., THIRD-PARTY DEFENDANT-RESPONDENT.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (CHARLES H. COBB OF COUNSEL), FOR PLAINTIFF-APPELLANT.

STOCKTON, BARKER & MEAD, LLP, TROY (ROBERT S. STOCKTON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

GOLDBERG SEGALLA LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered May 25, 2012. The order granted the motions of defendant and third-party defendant for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff's decedent fell from a ladder and was injured while performing work on a boiler at a hardwood lumber plant operated by defendant. Plaintiff commenced this action seeking damages for violations of Labor Law §§ 200, 240 (1) and 241 (6), as well as for common-law negligence, and Supreme Court granted the motions of defendant and third-party defendant for summary judgment dismissing the amended complaint. Plaintiff contends on appeal that the court erred in granting those parts of the motions with respect to the Labor Law §§ 240 (1) and 241 (6) claims inasmuch as decedent was engaged in a protected activity at the time he was injured. We reject that contention. With respect to

section 240 (1), defendant and third-party defendant met their initial burden of establishing that decedent was not performing one of the protected activities enumerated in the statute but, rather, was involved in routine maintenance in a non-construction, non-renovation context *(see Smith v Shell Oil Co.*, 85 NY2d 1000, 1002; *Noah v IBC Acquisition Corp*., 262 AD2d 1037, 1037, *lv denied* 93 NY2d 1042). Specifically, defendant and third-party defendant established that decedent's work involved replacing components that required replacement in the course of normal wear and tear, and thus that work did not involve repairing or any of the other activities enumerated in section 240 (1) (*see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528). With respect to section 241 (6), defendant and third-party defendant met their burden of establishing that decedent did not perform his work in the context of construction, demolition or excavation (*see Nagel v D & R Realty Corp*., 99 NY2d 98, 102-103). Plaintiff failed to raise a triable issue of fact with respect to either statute (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

538

CA 12-02075

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

ANN DUSZYNSKI, AS ADMINISTRATRIX OF THE ESTATE
OF RUBY LAMBERT, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY, PAUL E. RICHARDSON
AND THE LAW OFFICES OF MARY A. BJORK,
DEFENDANTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (R. SCOTT ATWATER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered August 22, 2012. The order granted the motion of plaintiff for leave to amend the complaint.

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

Memorandum: James Lambert (Lambert) struck a pedestrian while operating a vehicle owned by his mother, Ruby Lambert (decedent). The pedestrian commenced a personal injury action against decedent and Lambert, both of whom were insured by defendant Allstate Insurance Company (Allstate). Defendants Paul E. Richardson and The Law Offices of Mary A. Bjork (Bjork) were assigned by Allstate to defend decedent and Lambert in the personal injury action. As part of the settlement of that action, decedent agreed to pay approximately $200,000 from her personal assets. Before that payment could be made, however, decedent passed away. Pursuant to an order of Surrogate's Court, decedent's estate paid that amount to the personal injury plaintiff in full and final settlement of the action as against decedent.

Plaintiff, as administratrix of decedent's estate, thereafter commenced the instant action alleging, inter alia, that Richardson and Bjork were negligent and committed legal malpractice while handling the defense of the personal injury action. Sixteen months later, plaintiff moved for leave to amend the complaint to add a cause of action under Judiciary Law § 487. Supreme Court granted that motion, and we now affirm.

"It is well settled that [l]eave [to amend a pleading] shall be

freely given . . . , and [t]he decision to allow or disallow the amendment is committed to the court's discretion . . . A court should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face" (*Landers v CSX Transp., Inc.*, 70 AD3d 1326, 1327 [internal quotation marks omitted]; *see* CPLR 3025 [b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959). While defendants contend that plaintiff failed to make an evidentiary showing that the cause of action could be supported, we do not address that contention because it is improperly raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Contrary to defendants' further contention, we conclude that the proposed amendment is not patently lacking in merit.

"A violation of Judiciary Law § 487 may be established either by the defendant's alleged deceit *or* by an alleged chronic, extreme pattern of legal delinquency by the defendant" (*Scarborough v Napoli, Kaiser & Bern, LLP*, 63 AD3d 1531, 1533 [internal quotation marks omitted]; *cf. Donaldson v Bottar*, 275 AD2d 897, 898, *lv dismissed* 95 NY2d 959; *see generally Amalfitano v Rosenberg*, 12 NY3d 8, 12-14). With respect to the element of deceit, "[t]he operative language at issue—'guilty of any deceit'—focuses on the attorney's intent to deceive, not the deceit's success" (*Amalfitano*, 12 NY3d at 14). Here, in addition to alleging that Richardson "intentionally deceived . . . Lambert when Richardson falsely stated to . . . Lambert that [the personal injury plaintiff] was intent on settling the matter for the combined policy limits," plaintiff alleges that "Bjork/Richardson intentionally deceived [decedent] and . . . Lambert in representing to them that the [personal injury action] had been settled within policy limits and that neither [Lambert's] nor [decedent's] personal assets would be exposed." Inasmuch as plaintiff alleges that the attorneys "engaged in intentional deceit" (*Scarborough*, 63 AD3d at 1533), we conclude that plaintiff has alleged sufficient facts to state a cause of action under Judiciary Law § 487.

Defendants further contend that plaintiff's motion should have been denied inasmuch as no damages resulted from the alleged misconduct. In her proposed amended complaint, plaintiff alleges that, as a result of defendants' violation of section 487, decedent was damaged. On this record, we cannot conclude that plaintiff's allegation of damages is patently lacking in merit (*cf. Manna v Ades*, 237 AD2d 264, 265, *lv denied* 90 NY2d 806; *Michalic v Klat*, 128 AD2d 505, 506). In any event, " 'the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court' " (*Carro v Lyons Falls Pulp & Papers, Inc.*, 56 AD3d 1276, 1277), and we see no basis to disturb the court's decision here.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

546

KA 12-00838

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC J. MOTZER, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (GREGORY A. KILBURN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered April 5, 2012. The judgment convicted defendant, upon a jury verdict, of rape in the second degree, criminal sexual act in the second degree, criminal sale of marihuana in the second degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by directing that the sentences shall run concurrently with respect to each other and by amending the order of protection and as modified the judgment is affirmed and the matter is remitted to Wyoming County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him upon a jury verdict of rape in the second degree (Penal Law § 130.30 [1]), criminal sexual act in the second degree (§ 130.45 [1]), criminal sale of marihuana in the second degree (§ 221.50), and endangering the welfare of a child (§ 260.10 [1]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]).

Defendant's further contention that he was punished for exercising his right to a jury trial is not preserved for our review "inasmuch as defendant failed to raise [it] at sentencing" (*People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862), and in any event it lacks merit. " '[T]he mere fact that a sentence imposed

after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial . . . , and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial' " (*id.*). We agree with defendant, however, that the sentence is unduly harsh and severe. We therefore modify the sentence as a matter of discretion in the interest of justice by directing that all of the sentences shall run concurrently with respect to each other (*see* CPL 470.15 [6] [b]). In view of our modification of the judgment with respect to the sentence, we further modify the judgment by amending the order of protection, and we remit the matter to County Court for a recalculation of its expiration date (*see generally People v Wallace*, 53 AD3d 795, 798, *lv denied* 11 NY3d 795).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

548

KA 12-00277

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NOAH GREGG, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (GREGORY A. KILBURN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael F. Griffith, J.), rendered January 10, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [9]). To the extent that defendant's contention that he was denied effective assistance of counsel at sentencing survives his guilty plea (*see People v Shaffner*, 96 AD3d 1689, 1690), we conclude that it lacks merit. "Defendant was sentenced in accordance with the plea agreement, and any alleged deficiencies in defense counsel's representation at sentencing do not constitute ineffective assistance" (*People v Bolster*, 266 AD2d 928, 928-929, *lv denied* 94 NY2d 860; *see generally People v Baldi*, 54 NY2d 137, 147). At sentencing, just as at a trial or plea proceeding, "[a] contention of ineffective assistance . . . requires proof of less than meaningful representation, rather than simple disagreement with strategies and tactics" (*People v Rivera*, 71 NY2d 705, 708-709; *see People v Lane*, 60 NY2d 748, 749-751).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

549

KA 12-01438

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL P. DEWITT, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (DAVID DYS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered December 7, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (four counts), criminal sale of a controlled substance in or near school grounds, criminal possession of a controlled substance in the seventh degree (four counts), criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the fifth degree, criminally using drug paraphernalia in the second degree and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, the search warrant and the supporting affidavit identified the make, model, color and identification number of the vehicle to be searched and thus described with sufficient particularity the vehicle to be searched (*see generally People v Nieves*, 36 NY2d 396, 401; *People v Palmeri*, 272 AD2d 968, 969, *lv denied* 95 NY2d 967). Although the vehicle was mistakenly listed in the warrant under the heading "persons," "hypertechnical accuracy" of the description in the warrant is not required (*Nieves*, 36 NY2d at 401). Thus, we conclude that County Court properly denied that part of defendant's omnibus motion seeking suppression of the gun seized during the search of defendant's vehicle pursuant to the search warrant.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

550

KA 11-01642

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT E. BADDING, JR., DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered July 14, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and driving while ability impaired.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed for driving while ability impaired under the third count of the indictment and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for resentencing on that count.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and driving while ability impaired (Vehicle and Traffic Law § 1192 [1]). At the outset, we note that the certificate of conviction incorrectly reflects that defendant was convicted of driving while intoxicated, and it must therefore be amended to reflect that he was convicted of driving while ability impaired (*see People v Saxton*, 32 AD3d 1286, 1286-1287).

Contrary to defendant's contention, the record establishes that the waiver of the right to appeal was made knowingly, intelligently and voluntarily (*see People v Zimmerman*, 100 AD3d 1360, 1361, *lv denied* 20 NY3d 1015; *see generally People v Lopez*, 6 NY3d 248, 256). Additionally, defendant waived the right to raise his contention with respect to suppression on appeal inasmuch as he pleaded guilty before County Court issued its suppression ruling (*see People v Lewandowski*, 82 AD3d 1602, 1602; *People v Taylor*, 43 AD3d 1400, 1400-1401, *lv denied* 9 NY3d 1039). Defendant's further contention that he was denied his statutory right to a speedy trial is foreclosed by his guilty plea (*see People v Hansen*, 95 NY2d 227, 231 n 3; *People v Paduano*, 84 AD3d 1730, 1730; *People v Faro*, 83 AD3d 1569, 1569, *lv*

denied 17 NY3d 858) and, in any event, does not survive the valid waiver of the right to appeal (*see Paduano*, 84 AD3d at 1730).

As the People correctly concede, however, the sentence imposed for driving while ability impaired is illegal. The court indicated at sentencing that defendant was convicted of driving while intoxicated and sentenced him for that misdemeanor offense, but defendant actually pleaded guilty to driving while ability impaired, which is a traffic infraction (*see* Vehicle and Traffic Law § 1193 [1]). We therefore modify the judgment by vacating the sentence imposed for driving while ability impaired under the third count of the indictment, and we remit the matter to County Court for resentencing on that count.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

551

KA 10-01753

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES A. MCCOY, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Stephen T. Miller, A.J.), rendered July 1, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]), defendant correctly contends that his waiver of the right to appeal was invalid. Although defendant concedes that he signed a written waiver of his right to appeal, "there was no colloquy between County Court and defendant regarding the waiver of the right to appeal to ensure that it was knowingly, voluntarily and intelligently entered" (*People v Carno*, 101 AD3d 1663, 1664, *lv denied* 20 NY3d 1060; *see People v Callahan*, 80 NY2d 273, 283; *People v Grant*, 83 AD3d 862, 862-863, *lv denied* 17 NY3d 795).

Defendant further contends that the permanent order of protection is invalid because the court failed to articulate on the record its reasons for issuing the order pursuant to CPL 530.12 (5). Although that contention is properly before us in light of defendant's invalid waiver of the right to appeal, we conclude that it is not preserved for our review inasmuch as defendant failed to object to the order of protection at sentencing (*see People v Decker*, 77 AD3d 675, 675, *lv denied* 15 NY3d 952; *see also People v Nieves*, 2 NY3d 310, 316), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

553

CAF 11-02466

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF ROMAN E.A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANIELLE M., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL).

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 23, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that the subject child is the child of a mentally ill parent.

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

Same Memorandum as in *Matter of Roman E.A.* ([appeal No. 2] ___ AD3d ___ [June 7, 2013]).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

554

CAF 12-00301

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF ROMAN E.A.

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

DANIELLE M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL).

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered January 10, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred guardianship and custody of the subject child to petitioner.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order of fact-finding determining that the child who is the subject of this proceeding pursuant to Social Services Law § 384-b is the child of a mentally ill parent. That order is not appealable as of right (*see* Family Ct Act § 1112 [a]), and the mother has not sought permission to appeal therefrom. We therefore dismiss the appeal from the order in appeal No. 1 (*see Matter of Roy D.*, 207 AD2d 958, 958-959). We note, however, that the mother's appeal from the dispositional order in appeal No. 2 brings up for review the propriety of the fact-finding order in appeal No. 1 (*see Matter of Atreyu G. [Jana M.]*, 91 AD3d 1342, 1342, *lv denied* 19 NY3d 801).

In appeal No. 2, the mother appeals from an order transferring her guardianship and custody rights to petitioner. Contrary to the mother's contention, we conclude that "petitioner met its burden of proving by clear and convincing evidence that [the mother], by reason of mental illness, is presently and for the foreseeable future unable to provide proper and adequate care for her child[ ]" (*Matter of Jessica N.*, 265 AD2d 800, 800, *lv denied* 94 NY2d 758; *see* Social Services Law § 384-b [4] [c]; [6] [a]; *Matter of Charity A.*, 38 AD3d

1276, 1276). The psychologist appointed by Family Court testified that the mother has schizophrenia, paranoid type. He characterized her prognosis as "bleak" based upon her lack of insight into her illness (*see Matter of Victoria Lauren W.*, 15 AD3d 165, 165) or her need for treatment (*see Jessica N.*, 265 AD2d at 801), and her refusal to take prescribed medication (*see Matter of Vincent E.D.G. [Rozzie M.G.]*, 81 AD3d 1285, 1285, *lv denied* 17 NY3d 703). The psychologist further concluded that if the child were returned to the mother he would be at imminent risk of harm (*see Matter of Corey UU.*, 85 AD3d 1255, 1257, *lv denied* 17 NY3d 708; *Jessica N.*, 265 AD2d at 801). The court therefore properly granted the petition and terminated the mother's parental rights.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

555

CAF 11-01564

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF NANCY CHINEZE NWAWKA,
PETITIONER,

V MEMORANDUM AND ORDER

DÉSIRÉ BADIBADY YAMUTUALE,
RESPONDENT-RESPONDENT.

JENNIFER M. LORENZ, ATTORNEY FOR THE CHILD,
APPELLANT.

JENNIFER M. LORENZ, ATTORNEY FOR THE CHILD, LANCASTER, APPELLANT PRO SE.

DÉSIRÉ BADIBADY YAMUTUALE, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered July 11, 2011 in a proceeding pursuant to Domestic Relations Law article 5-A. The order, inter alia, denied the petition of petitioner to suspend visitation.

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

Memorandum: The Attorney for the Child (AFC) appeals from that part of an order denying the petition in which petitioner mother sought to suspend all unsupervised visitation between the parties' child and respondent father and sought an award of sole custody of the child. After a hearing, Family Court, inter alia, denied the petition, reinstated visitation between the father and the child according to the schedule set forth in the parties' divorce decree, and ordered that the father and the child engage in joint counseling.

Contrary to the contention of the AFC, the court properly denied the petition and reinstated visitation between the father and the child. "[V]isitation with the noncustodial parent is presumed to be in the child's best interests . . . , and . . . denial of visitation is justified only for a compelling reason" (*Matter of Carter v Work*, 100 AD3d 1557, 1557). Based upon our review of the record, including the child's statements at the *Lincoln* hearing (*see Matter of Lincoln v Lincoln*, 24 NY2d 270, 272-274), we conclude that the court's determination has a sound and substantial basis, and we decline to disturb it (*see generally Matter of Klee v Schill*, 95 AD3d 1599, 1601-1602). Specifically, we conclude that the record supports the court's

findings that the mother "has sought to alienate this child from her father" by blaming the father for an incident of alleged sexual abuse perpetrated against the child by a third party, and that the father was not in any way responsible for the occurrence of that alleged crime. The actions of the mother have damaged the father's relationship with the child, and thus we also conclude that the record supports the court's determination to order joint counseling sessions involving the child and the father for the purpose of restoring their relationship (*see Carter*, 100 AD3d at 1557). Moreover, "the record suggests that the child's opposition to visitation was the product, at least in part, of parental alienation by the mother" (*id.* at 1557-1558). Based on the foregoing, we conclude that the court properly determined that the child's best interests would be served by denying the petition (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

568

KA 09-01186

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAMIAN R. ALEXIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered January 15, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

569

KA 12-02354

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMISON SANBORN, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, 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 April 3, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and menacing 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, inter alia, robbery in the first degree (Penal Law § 160.15 [3]). We agree with defendant that his waiver of the right to appeal is not valid (*see People v Jackson*, 99 AD3d 1240, 1240-1241, *lv denied* 20 NY3d 987). During the plea colloquy, County Court "conflated the appeal waiver with the rights automatically waived by the guilty plea" (*People v Martin*, 88 AD3d 473, 474, *affd* 19 NY3d 914; *see People v Hawkins*, 94 AD3d 1439, 1439-1440, *lv denied* 19 NY3d 974; *People v Tate*, 83 AD3d 1467, 1467), and thus "the record fails to establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Jackson*, 99 AD3d at 1241 [internal quotation marks omitted]). Although defendant's contentions with respect to the severity of the sentence therefore are not encompassed by the invalid waiver, we nevertheless conclude that the sentence is not unduly harsh or severe. In light of our determination, we do not address defendant's remaining contentions with respect to his waiver of the right to appeal.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

570

KA 11-02324

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOEY D. BARR, ALSO KNOWN AS JOSEPHINE BARR,
DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered April 27, 2011. The judgment convicted defendant, upon her plea of guilty, of attempted criminal sale of a controlled substance in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted criminal sale of a controlled substance in the second degree (Penal Law §§ 110.00, 220.41 [5]). Defendant contends that the prosecutor's failure to instruct the grand jury as to a lesser offense of unlawful sale of an imitation controlled substance (Public Health Law § 3383 [2]) impaired the fundamental integrity of the grand jury proceeding, requiring dismissal of the indictment. By pleading guilty, defendant forfeited her right to seek our review of that contention (*see generally People v Hansen*, 95 NY2d 227, 231-232; *People v Palo*, 299 AD2d 871, 871, *lv denied* 99 NY2d 618). Defendant also failed to preserve that contention for our review (*see People v Davis*, 87 AD3d 1332, 1333, *lv denied* 18 NY3d 858, *reconsideration denied* 18 NY3d 956; *People v Estes*, 202 AD2d 516, 517, *lv denied* 84 NY2d 825). In any event, defendant's contention is without merit inasmuch as the People are "free to seek an indictment for the highest crime the evidence will support" (*People v Valles*, 62 NY2d 36, 39).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

573

KAH 12-00566

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
WILLIAM CRENSHAW, PETITIONER-APPELLANT,

V ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered February 8, 2012 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

574

KAH 12-00657

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
STEPHAN BRIECKE, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, RESPONDENT-RESPONDENT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered December 6, 2011 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner's appeal from the judgment dismissing his petition for a writ of habeas corpus has been rendered moot by his release to parole supervision (*see People ex rel. Baron v New York State Dept. of Corrections*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807; *People ex rel. Kendricks v Smith*, 52 AD2d 1090, 1090), and the exception to the mootness doctrine does not apply (*see Baron*, 94 AD3d at 1410; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

578

CAF 11-02546

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

IN THE MATTER OF DAMIEN W. AND ANGELA O.

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

KENNETH O., RESPONDENT-APPELLANT.

LEAH K. BOURNE, ROCHESTER, FOR RESPONDENT-APPELLANT.

JAMES D. BELL, BROCKPORT, FOR PETITIONER-RESPONDENT.

HARRIET L. ZUNNO, ATTORNEY FOR THE CHILDREN, HILTON.

Appeal from an order of the Family Court, Orleans County (James P. Punch, J.), entered December 7, 2011 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject children.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

579

CAF 12-01027

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

IN THE MATTER OF JANIE JASCO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID ALVIRA, RESPONDENT-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (JOHN KEENAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered April 23, 2012. The order, among other things, confirmed the finding of the Support Magistrate that respondent willfully violated a prior order of support.

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

Memorandum: Respondent father appeals from an order confirming the finding of the Support Magistrate that he was in contempt of court based on his willful violation of a prior order of support, and incarcerating him. Initially, we agree with the father that, although he has completed serving the sentence of incarceration, the appeal is not moot because of the "enduring consequences [that] potentially flow from an order adjudicating a party in civil contempt" (*Matter of Bickwid v Deutsch*, 87 NY2d 862, 863; *see Matter of Storelli v Storelli*, 101 AD3d 1787, 1788).

The father's further contention that Family Court lacked subject matter jurisdiction is in actuality a contention that the petition was not legally sufficient because it failed to allege that he willfully failed to comply with a prior order requiring him to pay child support. The father failed to preserve that contention for our review (*see generally Matter of Irene C. [Reina M.]*, 68 AD3d 416, 416; *Matter of Toshea C.J.*, 62 AD3d 587, 587; *Matter of Kimberly Vanessa J.*, 37 AD3d 185, 185), and in any event it is without merit (*see generally Matter of Child Support Enforcement Unit v John M.*, 283 AD2d 40, 43). The petition included, in capital letters and large bold type on the front page, the "warning" that a hearing was being requested, the purpose of which was to punish the father for contempt of court. The "warning" further advised the father that the sanction of imprisonment could be imposed. Furthermore, the father admitted that he was in willful violation of the prior order, and the Support Magistrate, "on more than one occasion prior to the [admission by the father that he

violated the prior order,] confirmed that the petition was for a willful violation of the prior order[]" (*Matter of Santana v Gonzalez*, 90 AD3d 1198, 1199).

We reject the further contention of the father that he was not afforded effective assistance of counsel (*see Matter of Rothfuss v Thomas*, 6 AD3d 1145, 1146, *lv denied* 3 NY3d 603; *Matter of Amanda L.*, 302 AD2d 1004, 1004). We have considered the father's remaining contention and conclude that it is without merit.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

585

CA 13-00013

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

ROBERT M. PAYTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

5391 TRANSIT ROAD, LLC, AND CARROLS CORPORATION, DEFENDANTS-APPELLANTS.

CARROLS, LLC, A WHOLLY OWNED SUBSIDIARY OF CARROLS CORPORATION, THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT,

V

JOSEPH H. TUDOR, DOING BUSINESS AS JM ENTERPRISES, THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN KROGMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 9, 2012. The order denied the motion of third-party defendant for summary judgment and the motion of defendants and third-party plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he slipped and fell in a parking lot of a Burger King restaurant operated by defendant Carrols Corporation. The parking lot was on property owned by defendant 5391 Transit Road, LLC. Third-party defendant, who was hired to perform snowplowing services for the parking lot, moved for summary judgment dismissing the third-party complaint seeking contractual indemnification, and defendants and third-party plaintiff moved for summary judgment dismissing the complaint and for a conditional order of indemnification against third-party defendant. Supreme Court properly denied the motions.

Addressing first the motion of defendants and third-party plaintiff, we note that it is well settled that a property owner has "a duty to keep the property in a 'reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk' " (*Sweeney v Lopez*, 16 AD3d 1174, 1175, quoting *Basso v Miller*, 40 NY2d 233, 241). In addition, " '[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' " (*id.*). We conclude that defendants and third-party plaintiff failed to meet their initial burden of establishing that defendants either did not create the dangerous condition or did not have actual or constructive notice of it and thus failed to establish their entitlement to summary judgment dismissing the complaint. Plaintiff alleged that the dangerous condition consisted of a mound of snow in the first parking space next to the front entrance, which plaintiff climbed over to reach his vehicle parked in the second parking space. The deposition testimony of plaintiff, the restaurant manager, and third-party defendant raised a triable issue of fact whether the snow mound was created by third-party defendant's removal of snow from the parking lot, by defendants' removal of snow from the sidewalk, or both, and whether defendants were aware of the dangerous condition (*see generally Frank v CPG Partners, L.P.*, 96 AD3d 900, 901; *Rotella v Wegmans Food Mkts.*, 289 AD2d 1014, 1014; *Giamboi v Manor House Owners Corp.*, 277 AD2d 201, 202).

We further conclude that the court properly denied both motions with respect to contractual indemnification inasmuch as there is a triable issue of fact whether third-party defendant was negligent in the performance of the snow removal contract (*see Mesler v PODD LLC*, 89 AD3d 1533, 1535; *Trzaska v Allied Frozen Stor., Inc.*, 77 AD3d 1291, 1292-1293; *Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188).

Finally, we reject third-party defendant's contention that the indemnification agreement is ambiguous and therefore unenforceable (*see generally Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

586

CA 13-00027

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

PATRICK GEORGE AND LINDA GEORGE,
PLAINTIFFS-APPELLANTS,

V ORDER

REISDORF BROS., INC., DEFENDANT-RESPONDENT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (JAMES L. MAGAVERN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Wyoming County (Michael F. Griffith, A.J.), entered August 27, 2012. The order denied the motion of plaintiffs for partial summary judgment.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

589

TP 12-02389

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF OMAN GUTIERREZ, PETITIONER,

V MEMORANDUM AND ORDER

BRIAN FISCHER, 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.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU 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 [Mark H. Dadd, A.J.], entered December 19, 2012) to review a determination of respondent. The determination segregated petitioner from the general population.

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

Memorandum: In this CPLR article 78 proceeding, which was transferred to this Court pursuant to CPLR 7804 (g), petitioner seeks review of respondent's determination directing that he be placed in administrative segregation. Contrary to petitioner's contention, substantial evidence supports the determination that petitioner's presence in the general population would pose a threat to the safety and security of the facility where he is incarcerated (*see generally* 7 NYCRR 301.4 [b]; *Matter of Blake v Selsky*, 10 AD3d 774, 775; *Matter of O'Keefe v Coombe*, 233 AD2d 640, 640). Petitioner's further contention that he was impermissibly denied the right to observe the search of his cell is without merit (*cf. Matter of Morales v Fischer*, 89 AD3d 1346, 1347; *Matter of Johnson v Goord*, 288 AD2d 525, 526).

Petitioner's contention that he was denied due process as a result of the hearing officer's denial of his request to call several witnesses and provide certain documents is without merit. A petitioner's due process rights with respect to matters of involuntary administrative segregation are "satisfied by notice to petitioner and an opportunity to present his [or her] views" (*Matter of Blake v Coughlin*, 189 AD2d 1016, 1017; *see Matter of Burr v Goord*, 17 AD3d

751, 752), which petitioner was afforded here.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

590

TP 12-02305

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF JAMES M. WEST, ALSO KNOWN AS WESS, PETITIONER,

V ORDER

MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

JAMES M. WEST, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered December 12, 2012) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

591

KA 12-00357

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROBERT C. STROLLO, ALSO KNOWN AS ROBERT STROLLO,
DEFENDANT-APPELLANT.

E. ROBERT FUSSELL, P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 11, 2012. The judgment convicted defendant, upon his plea of guilty, of failure to register a change of address.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

593

KA 12-00215

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS LANE, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 24, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that the waiver of the right to appeal is not valid, and he challenges the severity of the sentence. Although the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that the valid waiver of the right to appeal does not encompass the challenge to the severity of the sentence because Supreme Court failed to advise defendant of the potential maximum term of incarceration (*see People v Newman*, 21 AD3d 1343, 1343; *see generally People v Lococo*, 92 NY2d 825, 827), and there was no specific sentence promise at the time of the waiver (*cf. People v Semple*, 23 AD3d 1058, 1059, *lv denied* 6 NY3d 852). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

594

KA 11-01155

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TERRY L. DANDRIDGE, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 16, 2011. Defendant was resentenced upon his conviction of robbery in the first degree and robbery in the second degree.

It is hereby ORDERED that the resentence so appealed from is unanimously affirmed (*see People v Howard*, 96 AD3d 1691, 1692, *lv denied* 19 NY3d 1103).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

595

KA 09-01138

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

UKIAH R. ATKINS, ALSO KNOWN AS "K,"
DEFENDANT-APPELLANT.

FRANK A. ALOI, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN 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 (Frank P. Geraci, Jr., J.), entered April 30, 2009. The order denied the motion of defendant to vacate the judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant was convicted following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), and the judgment of conviction was affirmed on appeal (*People v Atkins*, 39 AD3d 1230, *lv denied* 9 NY3d 872). Defendant thereafter moved pursuant to CPL 440.10 to vacate the judgment. After that motion was summarily denied, we granted his CPL 460.15 application for a certificate granting leave to appeal.

We reject defendant's contention that he was denied effective assistance of counsel at trial. "To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709; *see People v Benevento*, 91 NY2d 708, 712). "A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152). Here, "[trial counsel's] decision not to use an alibi defense, which the District Attorney was prepared to rebut, was a matter of trial strategy and cannot be characterized as ineffective assistance of counsel" (*People v Villone*, 138 AD2d 971, 971, *lv denied* 72 NY2d 913). Additionally, defendant failed to demonstrate that the decision of his trial counsel not to use an alibi defense was "prejudicial to him"

(*People v Barber*, 202 AD2d 978, 979, *lv denied* 83 NY2d 908, citing *People v Ford*, 46 NY2d 1021, 1023). Contrary to defendant's further contention, he was not entitled to a hearing pursuant to CPL 440.30 (5) inasmuch as his factual contentions concerning trial counsel's alleged deficiencies are unsupported by "any other affidavit or evidence" and, under the circumstances of this case, there is "no reasonable possibility that [defendant's] allegation[s are] true" (CPL 440.30 [4] [d]).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

597

KA 10-02122

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAUN K. ELLIOTT, DEFENDANT-APPELLANT.

LEONARD, CURLEY & WALSH, PLLC, ROME (MICHAEL W. ARTHUR OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Charles C. Merrell, J.), rendered July 9, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that County Court erred in accepting his *Alford* plea because the record lacked the requisite "strong evidence of actual guilt" to support his plea. That contention survives his waiver of the right to appeal to the extent that it implicates the voluntariness of the plea (*see People v Dash*, 74 AD3d 1859, 1860, *lv denied* 15 NY3d 892; *People v Dille*, 21 AD3d 1298, 1298, *lv denied* 5 NY3d 882). By failing to move to withdraw the plea or vacate the judgment of conviction on the ground that the record lacked the requisite "strong evidence of actual guilt," however, defendant failed to preserve his contention for our review (*see Dille*, 21 AD3d at 1298; *People v Ebert*, 15 AD3d 781, 782), and this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666; *Dille*, 21 AD3d at 1298). In any event, we conclude that "the record establishes that defendant's *Alford* plea was the product of a voluntary and rational choice, and the record . . . contains strong evidence of actual guilt" (*Dash*, 74 AD3d at 1860 [internal quotation marks omitted]).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

601

CA 12-02380

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF NORSE PIPELINE, LLC,
PETITIONER-APPELLANT,

V ORDER

TOWN OF BUSTI, TOWN OF FRENCH CREEK, TOWN OF NORTH HARMONY AND TOWN OF SHERMAN, ET AL.,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

AMIGONE, SANCHEZ & MATTREY, LLP, BUFFALO (B.P. OLIVERIO OF COUNSEL), FOR PETITIONER-APPELLANT.

THE VINCELETTE LAW FIRM, ALBANY (DANIEL G. VINCELETTE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Chautauqua County (Joseph Gerace, J.H.O.), entered February 27, 2012 in proceedings pursuant to RPTL article 7. The amended order, among other things, dismissed the petitions for the years 2009 and 2010.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

606

CA 12-02381

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF NORSE PIPELINE, LLC,
PETITIONER-APPELLANT,

V ORDER

TOWN OF BUSTI, TOWN OF FRENCH CREEK, TOWN OF NORTH HARMONY AND TOWN OF SHERMAN, ET AL.,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

AMIGONE, SANCHEZ & MATTREY, LLP, BUFFALO (B.P. OLIVERIO OF COUNSEL), FOR PETITIONER-APPELLANT.

THE VINCELETTE LAW FIRM, ALBANY (DANIEL G. VINCELETTE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered September 11, 2012 in proceedings pursuant to RPTL article 7. The order settled the record on appeal.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

610.1

CA 12-01944

PRESENT: SMITH, J.P., FAHEY, VALENTINO, AND WHALEN, JJ.

JANE DOE AND JOHN DOE, PLAINTIFFS-RESPONDENTS,

V ORDER

ESTATE OF STEPHEN B GANDERSON, M.D.,
DECEASED, DEFENDANT,
AND NORTH MEDICAL, P.C., DOING BUSINESS AS THE
WOMEN'S PLACE, DEFENDANT-APPELLANT.

VENTRE LAW OFFICE, LIVERPOOL (FRANK VENTRE, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

COTE & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered July 26, 2012. The order granted the motion of plaintiffs for leave to file and serve an amended complaint.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

613

KA 10-01097

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARQUES BATTLE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered December 18, 2009. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

614

KA 11-01629

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRUMAINE SUTTLES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered July 26, 2011. The judgment convicted defendant, upon his plea of guilty, of murder 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.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). We reject defendant's contention that his waiver of the right to appeal is invalid. "[T]he record demonstrates that County Court engaged the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Burt*, 101 AD3d 1729, 1730, *lv denied* 20 NY3d 1060 [internal quotation marks omitted]). Defendant's valid waiver of the right to appeal encompasses his contention that the sentence is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 256).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

615

KA 12-00820

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

AUSTIN J. TARO, DEFENDANT-APPELLANT.

CURRIER LAW FIRM, P.C., AUBURN (REBECCA CURRIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (KRISTIN L. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered January 24, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree, petit larceny and criminal possession of stolen property in the fifth degree.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

620

CAF 12-01136

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF DESTINY V.

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

MARK V., RESPONDENT-APPELLANT.

BERNADETTE M. HOPPE, BUFFALO, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL).

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 21, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to the subject child in this proceeding pursuant to Social Services Law § 384-b. We reject the father's contention that Family Court erred in denying his request for new assigned counsel. The right of an indigent party to assigned counsel under the Family Court Act is not absolute (*see Matter of Petkovsek v Snyder*, 251 AD2d 1088, 1089). " 'In order to have substitute counsel appointed, a party must establish that good cause for release existed necessitating dismissal of assigned counsel' " (*id.*), and here the father failed to establish good cause.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

621

CAF 12-00092

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF JULIE K.

SHERIE L.D., PETITIONER-APPELLANT;

ORDER

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT-RESPONDENT.

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO (P. ADAM MILITELLO OF COUNSEL), FOR PETITIONER-APPELLANT.

JOHN T. SYLVESTER, GENESEO, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered December 5, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of a prior order of disposition.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

622

CA 12-01611

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

ARIA CONTRACTING CORPORATION AND JAMES F. JERGE, JR., PLAINTIFFS-RESPONDENTS,

V ORDER

HISCOCK & BARCLAY, LLP, HISCOCK BARCLAY SAPERSTON & DAY AND MICHAEL E. FERDMAN, ESQ., DEFENDANTS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (TERRENCE M. CONNORS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (THOMAS S. LANE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered August 21, 2012. The order, among other things, granted the motion of plaintiffs for summary judgment.

Now, upon the stipulation discontinuing action signed by the attorneys for the parties on February 25, 2013, and filed in the Erie County Clerk’s Office on March 22, 2013,

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

624

CA 13-00018

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

CHASTITY N. PRESNELL, PLAINTIFF-RESPONDENT,

V ORDER

NEW YORK CENTRAL MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (LOUIS B. DINGELDEY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered April 4, 2012. The order denied the motion of defendant to dismiss plaintiff's breach of contract claim.

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

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

637

KA 12-01107

PRESENT: CENTRA, J.P., FAHEY, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT GWYNN, JR., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Drury, J.), rendered July 25, 2007. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

641

KA 12-02247

PRESENT: CENTRA, J.P., FAHEY, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER B. PREEDOM, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered February 27, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]). We conclude that County Court did not abuse its discretion in denying defendant's request for youthful offender status in light of defendant's admitted participation in the attempted burglary, during which defendant stabbed the victim in the left eye with a pair of scissors, defendant's prior assaultive behavior, and concerns with respect to defendant's ability to manage his anger (*see People v Session*, 38 AD3d 1300, 1301, *lv denied* 8 NY3d 990; *People v Fisher*, 35 AD3d 1276, 1277, *lv denied* 13 NY3d 907). We decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see generally People v Shrubsall*, 167 AD2d 929, 930). Contrary to defendant's further contention, the bargained-for sentence is not unduly harsh or severe.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

649

CAF 12-00439

PRESENT: CENTRA, J.P., FAHEY, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF CHARLES J. VENNARD, JR.,
PETITIONER-APPELLANT,

V ORDER

SANDRA L. HAUN AND DOUGLAS P. HAUN,
RESPONDENTS-RESPONDENTS.

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

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

PETER J. DEGNAN, ATTORNEY FOR THE CHILDREN, ALFRED.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered February 3, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for custody.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

658

CA 11-02472

PRESENT: CENTRA, J.P., FAHEY, CARNI, AND SCONIERS, JJ.

ARMANDO TORRES, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 118610.)

ARMANDO TORRES, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Philip J. Patti, J.), entered May 31, 2011. The order, inter alia, granted the cross motion of defendant to dismiss the claim.

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

Memorandum: Claimant appeals from an order that, inter alia, granted defendant's cross motion to dismiss the claim on the ground that claimant failed to comply with the requirements of Court of Claims Act § 10 (3). We conclude that the Court of Claims properly granted the cross motion inasmuch as the claim was not filed and served nor was a notice of intention to file a claim served upon the Attorney General within 90 days after the accrual of the claim (*see* § 10 [3]; *Ivy v State of New York*, 27 AD3d 1190, 1191). It is well settled that " '[f]ailure to comply with either the filing or service provisions of the Court of Claims Act results in a lack of subject matter jurisdiction requiring dismissal of the claim' " (*Hatzfeld v State of New York*, 104 AD3d 1165, 1166). We reject claimant's contention that his claim did not accrue until after he had completed the grievance process (*see generally Prisco v State of New York*, 62 AD3d 978, 978, *lv denied* 13 NY3d 706; *McClurg v State of New York*, 204 AD2d 999, 1000-1001, *lv denied* 84 NY2d 806). Claimant's further contention that the continuous treatment doctrine applied to toll the time period within which the notice of intention or claim may be served (*see Ogle v State of New York*, 142 AD2d 37, 39) is not properly before us because it is raised for the first time on appeal (*see Hatzfeld*, 104 AD3d at 1167; *Williams v State of New York*, 56 AD3d 1208, 1208). In light of our determination, we need not consider

claimant’s remaining contentions.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

661

TP 12-02249

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

IN THE MATTER OF BENJAMIN BROWNLEE, PETITIONER,

V ORDER

BRIAN FISCHER, 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.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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 amended order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered December 12, 2012) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

662

TP 12-02388

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

IN THE MATTER OF DAVID REDMOND, PETITIONER,

V ORDER

BRIAN FISCHER, 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.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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 [Mark H. Dadd, A.J.], entered December 19, 2012) to review two determinations of respondent. The determinations found after separate Tier II hearings that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination rendered March 3, 2012 is unanimously annulled on the law and facts without costs, the petition is granted in part and respondent is directed to expunge from petitioner's institutional record all references to the violation of inmate rules 113.14 (7 NYCRR 270.2 [B] [14] [iv]), 113.15 (7 NYCRR 270.2 [B] [14] [v]), 116.12 (7 NYCRR 270.2 [B] [17] [iii]), and 116.13 (7 NYCRR 270.2 [B] [17] [iv]), and the determination rendered January 13, 2012 is confirmed.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

664

TP 12-02210

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

IN THE MATTER OF GENARO DELACRUZ, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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 [Mark H. Dadd, A.J.], entered November 20, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

666

KA 10-00398

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT SAFFOLD, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered January 25, 2010 pursuant to the 2009 Drug Law Reform Act. The order denied the application of defendant to be resentenced upon defendant's 2003 conviction of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order denying his application for resentencing pursuant to the 2009 Drug Law Reform Act (*see* CPL 440.46). As the People correctly concede, County Court erred in denying the application on the ground that defendant was a reincarcerated parole violator (*see People v Paulin*, 17 NY3d 238, 241-242; *People v Wallace*, 87 AD3d 824, 824). In addition, it is of no moment that defendant was released to parole supervision subsequent to his application inasmuch as "a prisoner who applied before being paroled is not barred from obtaining resentencing after [his or] her release" (*People v Santiago*, 17 NY3d 246, 247). We therefore reverse the order and remit the matter to County Court for further proceedings on defendant's application for resentencing pursuant to CPL 440.46.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

669

KA 11-02491

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DUSTIN L. BUTCHINO, DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (MATTHEW J. BELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered August 31, 2011. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of grand larceny in the third degree (Penal Law § 155.35 [1]), defendant contends that the evidence is legally insufficient to support the conviction. Defendant failed to preserve that contention for our review inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Further, viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that defense counsel was ineffective on the ground that he failed to make a timely request for a missing witness charge with respect to defendant's former girlfriend. Defense counsel in fact made a request for such a charge in a timely manner, i.e., " 'as soon as practicable' " (*People v Carr*, 14 NY3d 808, 809), and we note that the charge was not warranted in any event. The girlfriend refused to testify and she " 'was not under the control of the People such that she could be expected to give testimony favorable to the prosecution' " (*People v Hernandez*, 256 AD2d 18, 19, *lv denied* 93 NY2d 874). Contrary to defendant's further contention, the fact that the jury acquitted him of burglary in the second degree but found him guilty of grand larceny in the third degree does not render the verdict repugnant (*see People v Jock*, 111 AD2d 941, 942, *lv denied* 66 NY2d 615; *People v McGee*, 110 AD2d 719,

719-720), and thus it cannot be said that defense counsel was ineffective in failing to preserve such a contention for our review (*see generally People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

677

CA 12-02039

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

LINDSEY STEPHENSON, PLAINTIFF-RESPONDENT,

V ORDER

ANDREW P. FLEMING AND CHIACCHIA & FLEMING, LLP,
DEFENDANTS-APPELLANTS.

MARTHA KAVANAUGH, PLAINTIFF-RESPONDENT,

V

ANDREW P. FLEMING AND CHIACCHIA & FLEMING, LLP,
DEFENDANTS-APPELLANTS.

CHIACCHIA & FLEMING, LLP, HAMBURG (CHRISTEN ARCHER PIERROT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered February 1, 2012. The order denied the motions of defendants to dismiss the actions.

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: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

680

CA 12-02001

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

FREDERICK D. TAYLOR, PLAINTIFF-RESPONDENT,

V ORDER

DANRICH HOMES, INC., DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK, LLP, ROCHESTER (RICHARD C. BRISTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

FARACI LANGE LLP, ROCHESTER (RAUL MARTINEZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered August 3, 2012. The order granted the motion of plaintiff for summary judgment on the issue of Labor Law § 240 (1) liability.

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: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

684

KA 12-00405

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RICKY L. MILLER, II, ALSO KNOWN AS RICKY MILLER, II, ALSO KNOWN AS RICKY LEE MILLER, II, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 6, 2011. 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.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

689

KA 12-00407

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RICKY L. MILLER, ALSO KNOWN AS RICKY L. MILLER, II, ALSO KNOWN AS RICKY LEE MILLER, II, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 6, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

697

CA 12-02221

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF DARRYL R. VAUGHN,
PETITIONER-APPELLANT,

V ORDER

STEPHANIE M. MAHON, RESPONDENT-RESPONDENT.

THE CHARLAP LAW FIRM, ELMIRA (ALLAN G. CHARLAP OF COUNSEL), FOR PETITIONER-APPELLANT.

SAYLES & EVANS, ELMIRA (L. CRARY MYERS, III, OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered August 28, 2012. The order denied the application of petitioner for an order committing respondent to prison.

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: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

700

CA 12-02005

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

LI HSIEN EASLING, PLAINTIFF-RESPONDENT,

V ORDER

STEPHEN R. HENDERSON, BRIAN J. CRANS, VICKY A. VANHORN AND CINDY L. DURFEY, AS ADMINISTRATOR FOR THE ESTATE OF DAVID A. CAMPBELL, DECEASED, DEFENDANTS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (L. DAMIEN COSTANZA OF COUNSEL), FOR DEFENDANT-APPELLANT STEPHEN R. HENDERSON.

LEVENE GOULDIN & THOMPSON LLP, BINGHAMTON (SARAH E. NUFFER OF COUNSEL), FOR DEFENDANT-APPELLANT BRIAN J. CRANS.

GORIS & O'SULLIVAN, LLC, CAZENOVIA (MARK D. GORIS OF COUNSEL), FOR DEFENDANT-APPELLANT VICKY A. VANHORN.

O'NEILL, GROSSO & BROWNELL, WILLIAMSVILLE (JAMES C. GROSSO OF COUNSEL), FOR DEFENDANT-APPELLANT CINDY L. DURFEY, AS ADMINISTRATOR FOR THE ESTATE OF DAVID A. CAMPBELL, DECEASED.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Yates County (W. Patrick Falvey, A.J.), entered July 12, 2012. The order, insofar as appealed from, denied in part the motions of defendants for summary judgment dismissing the amended complaint.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

707

TP 12-02375

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF CARL DRUMM, PETITIONER,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH AND DIANE DEANE, COMMISSIONER, LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

LEVENE GOULDIN & THOMPSON, LLP, BINGHAMTON (GREG S. CATARELLA OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENT NIRAV R. SHAH, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH.

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, Livingston County [Robert B. Wiggins, A.J.], entered December 18, 2012) to review a determination of respondent Nirav R. Shah, Commissioner, New York State Department of Health. The determination adjudged that petitioner was not eligible for Medical Assistance for nursing facility services for a period of 11.31 months.

It is hereby ORDERED that the order so appealed from is unanimously vacated without costs and the matter is remitted to Supreme Court, Livingston County, for further proceedings.

Memorandum: Petitioner's attorney has advised us that petitioner died before Supreme Court transferred this CPLR article 78 proceeding to this Court, and that to date a legal representative for petitioner has not been designated (*see* CPLR 1015 [a]; 1021). " '[I]t is well settled that the death of a party divests a court of jurisdiction to conduct proceedings in [a proceeding] until a proper substitution has been made pursuant to CPLR 1015 (a) . . . , and any order rendered after the death of a party and before the substitution of a legal representative is void' " (*Matter of Sills v Fleet Natl. Bank*, 81 AD3d 1422, 1423; *cf. Matter of Giaquinto v Commissioner of the N.Y. State Dept. of Health*, 91 AD3d 1224, 1225 n 1, *lv denied* 20 NY3d 861; *Grant v Blum*, 76 AD2d 823, 823). Here, because petitioner died before the court transferred this proceeding to us, the transfer order is void, and we thus conclude that under these circumstances the proceeding is not properly before us (*see generally Matter of Cappon v Carballada*,

93 AD3d 1179, 1180).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

709

KA 12-00383

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN WHALEN, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 23, 2011. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for resentencing in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]). As the People correctly concede, Supreme Court erred in failing to set forth on the record its determination denying defendant's request for youthful offender treatment (*see* CPL 720.20 [1]; *People v Beasley*, 86 AD3d 932, 932; *People v Lee*, 79 AD3d 1641, 1641). We thus modify the judgment by vacating the sentence, and we remit the matter to Supreme Court for resentencing following a determination whether defendant should be sentenced as a youthful offender (*see Beasley*, 86 AD3d at 932). In view of our determination, we do not address defendant's remaining contentions, which concern the waiver of the right to appeal and the severity of the sentence.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

710

KA 12-01483

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TIMOTHY WELCH, DEFENDANT-APPELLANT.

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

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wyoming County Court (Mark H. Dadd, J.), dated March 20, 2012. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

714

KA 09-01085

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRAIG D. BROWN, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered March 5, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and unauthorized use of a vehicle in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Viewing the evidence in light of the elements of the crimes of criminal possession of a weapon in the second and third degrees as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, the jury was entitled to find defendant guilty of both crimes beyond a reasonable doubt based upon the credible evidence concerning the operability of the .32 caliber pistol at the time of his possession (*see People v Cavines*, 70 NY2d 882, 883; *People v Velez*, 278 AD2d 53, 53, *lv denied* 96 NY2d 808; *People v Francis*, 126 AD2d 740, 740). The testimony of the police officer that, immediately after recovering the pistol, he released the slide to empty the round of ammunition from the pistol's chamber, combined with the expert testimony of the firearms examiner, established that, although the slide mechanism was sticking at the time of the examination, at the time the firearm was recovered it was loaded and it would have discharged during test firing had it not been unloaded based on the ease with which the trigger and hammer moved. Furthermore, the firearms examiner successfully discharged the pistol with ammunition recovered with the pistol after releasing the slide.

Defendant further contends that the verdict is against the weight of the evidence with respect to those crimes on the issue of his knowledge of the operability of the pistol. Contrary to defendant's contention, however, the People were not required to establish that he was aware of the operability of the pistol (*see People v Cooper*, 59 AD3d 1052, 1053, *lv denied* 12 NY3d 852; *People v Ansare*, 96 AD2d 96, 97-98, *lv denied* 61 NY2d 672).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

715

KA 11-01985

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES PORTERFIELD, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered August 25, 2011. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child 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 course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [a]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). That valid waiver encompasses defendant's contention that County Court erred in refusing to suppress his statements to the police (*see People v Mack*, 96 AD3d 1689, 1689, *lv denied* 19 NY3d 1027; *People v Aguayo*, 37 AD3d 1081, 1081, *lv denied* 8 NY3d 981), as well as his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255; *People v Lococo*, 92 NY2d 825, 827).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

718

CA 12-02400

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

ALICIA M. FLATTS, PLAINTIFF-APPELLANT,

V ORDER

VIRGINIA D. RODRIGUEZ, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK, LLP, BUFFALO (THOMAS A. DIGATI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered February 27, 2012. The order granted the motion of defendant Virginia D. Rodriguez for summary judgment and dismissed the complaint.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

722

CA 12-02376

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

MARIE T. BENKLEMAN AND ROBERT A. BENKLEMAN,
PLAINTIFFS-APPELLANTS,

V ORDER

MARCIA A. KOLB, DEFENDANT-RESPONDENT.

CONNORS & VILARDO, LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered July 26, 2012. The order, insofar as appealed from, denied the motion of plaintiffs for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on April 26, 2013, and filed in the Erie County Clerk’s Office on May 20, 2013,

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

724

CA 12-02207

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

PATRICIA J. CURTO, PLAINTIFF-APPELLANT,

V ORDER

NEW YORK STATE COLLEGE OF VETERINARY MEDICINE AT CORNELL, CORNELL UNIVERSITY, NELSON ROTH, VALERIE CROSS, HUNTER RAWLINGS, III, DONALD SMITH, KATHERINE EDMONDSON, LISA CLARK, SUSAN STEVENS SUAREZ, LINDA ALLEN MIZER, WENDY TARLOW, WALTER LYNN AND DANILEE POPPENSIEK, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

PATRICIA J. CURTO, PLAINTIFF-APPELLANT PRO SE.

VALERIE CROSS DORN, ITHACA, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 30, 2012. The order granted the motion of defendants-respondents to dismiss the complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Laborers Intl. Union of N. Am., Local 210, AFL-CIO v Shevlin-Manning, Inc.*, 147 AD2d 977).

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

725

CA 12-02209

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

PATRICIA J. CURTO, PLAINTIFF-APPELLANT,

V ORDER

NEW YORK STATE COLLEGE OF VETERINARY MEDICINE AT CORNELL, CORNELL UNIVERSITY, NELSON ROTH, VALERIE CROSS, HUNTER RAWLINGS, III, DONALD SMITH, KATHERINE EDMONDSON, LISA CLARK, SUSAN STEVENS SUAREZ, LINDA ALLEN MIZER, WENDY TARLOW, WALTER LYNN AND DANILEE POPPENSIEK, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

PATRICIA J. CURTO, PLAINTIFF-APPELLANT PRO SE.

VALERIE CROSS DORN, ITHACA, FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 30, 2012. The judgment dismissed the complaint against defendants-respondents.

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

728.1

TP 12-01781

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF JENNIFER BIANCHINE, PETITIONER,

V ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT AND ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

TIMOTHY M. O'MARA, WILLIAMSVILLE, AND MICHAEL J. FLAHERTY, BUFFALO, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENTS NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, AND NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT.

EMIL J. CAPPELLI, BUFFALO, FOR RESPONDENT ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Shirley Troutman, J.], entered September 14, 2012) to review a determination of respondent New York State Office of Children and Family Services. The determination denied petitioner's application to amend the indicated report of maltreatment to an unfounded report.

Now, upon reading and filing the stipulation of discontinuance signed by petitioner on March 28, 2013, and by the attorneys for the parties on March 20, 28 and 29, and April 3, 2013,

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

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court

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

774

CA 12-00674

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

TODD M. HOBIN, PLAINTIFF-RESPONDENT,

V ORDER

CANDICE L. HOBIN, DEFENDANT-APPELLANT.

CANDICE L. HOBIN, DEFENDANT-APPELLANT PRO SE.

GETNICK, LIVINGSTON, ATKINSON & PRIORE, LLP, UTICA (THOMAS L. ATKINSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

JOHN G. KOSLOSKY, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered December 15, 2011. The order, inter alia, granted plaintiff sole legal and physical custody of the parties' youngest child.

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: June 7, 2013

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1102/98) KA 05-00507. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROY B. HIGHSMITH, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ. (Filed June 7, 2013.)

MOTION NO. (601/02) KA 00-01465. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVID MOSCA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, LINDLEY, AND SCONIERS, JJ. (Filed June 7, 2013.)

MOTION NO. (44/08) KA 03-00150. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RAYMOND CLAIR CIMINO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND FAHEY, JJ. (Filed June 7, 2013.)

MOTION NO. (1209/08) KA 06-03133. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DION MAXWELL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI,

LINDLEY, AND VALENTINO, JJ. (Filed June 7, 2013.)

MOTION NO. (1143/09) KA 07-02575. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIE J. SINGLETON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND SCONIERS, JJ. (Filed June 7, 2013.)

MOTION NO. (1382/09) KA 05-01911. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JERMAINE BROWN, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND CARNI, JJ. (Filed June 7, 2013.)

MOTION NO. (1383/09) KA 06-00458. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JERMAINE M. BROWN, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND CARNI, JJ. (Filed June 7, 2013.)

MOTION NO. (368/11) KA 10-00061. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER MONROE, ALSO KNOWN AS LUV, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (1066/11) KA 06-01663. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDWIN PEREZ, DEFENDANT-APPELLANT. -- Motion for writ of error

coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, SCONIERS, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (252/12) KA 10-02161. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANDRE L. SCOTT, ALSO KNOWN AS ANDRE SCOTT, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND LINDLEY, JJ. (Filed June 7, 2013.)

MOTION NO. (971/12) TP 12-00005. -- IN THE MATTER OF WILLIAM B. JOHNSTON, PETITIONER-RESPONDENT, V GALEN D. KIRKLAND, COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS, RESPONDENT-PETITIONER, SCOTT GEHL, HOUSING OPPORTUNITIES MADE EQUAL, INC., STEPHANIE M. GILLIAM, ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, MAYOR BYRON W. BROWN AND ERIE COUNTY EXECUTIVE CHRISTOPHER C. COLLINS, RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND SCONIERS, JJ. (Filed June 7, 2013.)

MOTION NO. (1184/12) CA 12-00075. -- COUNTY OF ERIE, PLAINTIFF-RESPONDENT, V M/A-COM, INC., ET AL., DEFENDANTS, AND KEVIN J. COMERFORD, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., CARNI, SCONIERS, VALENTINO, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (1190/12) CA 12-00076. -- COUNTY OF ERIE, PLAINTIFF-RESPONDENT,

V M/A-COM, INC., ET AL., DEFENDANTS, AND KEVIN J. COMERFORD, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CARNI, SCONIERS, VALENTINO, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (1388/12) CA 11-02090. -- STEPHEN APPLEBEE, PLAINTIFF-APPELLANT, V COUNTY OF CAYUGA, DEFENDANT-RESPONDENT. COUNTY OF CAYUGA, THIRD-PARTY PLAINTIFF, V VILLAGE OF PORT BYRON, THIRD-PARTY DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motions for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (1389/12) CA 11-02091. -- STEPHEN APPLEBEE, PLAINTIFF-APPELLANT, V COUNTY OF CAYUGA, DEFENDANT-RESPONDENT. COUNTY OF CAYUGA, THIRD-PARTY PLAINTIFF, V VILLAGE OF PORT BYRON, THIRD-PARTY DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motions for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (1466/12) CA 12-00809. -- RENEE SCIARA AND MATTHEW SCIARA, PLAINTIFFS-APPELLANTS-RESPONDENTS, V SURGICAL ASSOCIATES OF WESTERN NEW YORK, P.C. AND GEORGE BLESSIOS, M.D., DEFENDANTS-RESPONDENTS. USHA CHOPRA, M.D. AND FAGER & AMSLER, LLP, RESPONDENTS-APPELLANTS. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND CARNI, JJ. (Filed June 7, 2013.)

MOTION NO. (14/13) CA 12-01422. -- THOMAS M. SULLIVAN, PLAINTIFF-RESPONDENT, V TROSER MANAGEMENT, INC., DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed June 7, 2013.)

MOTION NO. (19/13) CA 12-00861. -- RHONDA WILLIAMS, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF ALEXANDRA WILLIAMS, AN INFANT, PLAINTIFF-RESPONDENT, V SHARON T. WEATHERSTONE, DEFENDANT, AND JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT, DEFENDANT-APPELLANT. -- Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed June 7, 2013.)

MOTION NO. (38/13) CA 12-00803. -- TOWN OF AMHERST AND GRANITE STATE INSURANCE COMPANY, PLAINTIFFS-RESPONDENTS, V ARTHUR HILGER, SALLY BISHER, DEFENDANTS-APPELLANTS, AND AARON HILGER, DEFENDANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: SMITH, J.P., FAHEY, VALENTINO, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (82/13) CA 12-01337. -- GEORGETOWN CAPITAL GROUP, INC. AND JOSEPH CURATOLO, PLAINTIFFS-RESPONDENTS, V EVEREST NATIONAL INSURANCE COMPANY, DEFENDANT-APPELLANT, AND ROYAL ALLIANCE ASSOCIATES, INC., DEFENDANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

(Filed June 7, 2013.)

MOTION NO. (119/13) CA 12-01326. -- MARIA L. JAOUDE, PLAINTIFF-APPELLANT, V MATTHEW E. HANNAH, L.P. PARNASSOS AND RITA J. BIONDO, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (124/13) CA 11-02557. -- MARIA L. JAOUDE, PLAINTIFF-APPELLANT, V MATTHEW E. HANNAH, L.P. PARNASSOS AND RITA J. BIONDO, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (181/13) CA 11-02507. -- NIESHA HAYNES, PLAINTIFF-APPELLANT, V KALEIDA HEALTH, CHILDREN'S HOSPITAL, KEVIN FITZPATRICK, M.D., AND MARGARET MULVIHILL, M.D., DEFENDANTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND SCONIERS, JJ. (Filed June 7, 2013.)

MOTION NO. (268/13) CA 12-01797. -- IN THE MATTER OF MERRY-GO-ROUND PLAYHOUSE, INC., PETITIONER-APPELLANT, V ASSESSOR OF CITY OF AUBURN, BOARD OF ASSESSMENT REVIEW OF CITY OF AUBURN, AND CITY OF AUBURN, RESPONDENTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND

WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (288/13) CA 12-01484. -- JOHNNY WATSON, PLAINTIFF-APPELLANT, V SALVATORE PRIORE, ET AL., DEFENDANTS, STEVEN A. ABDOO AND PETER M. BOLOS, DEFENDANTS-RESPONDENTS. (APPEAL NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (293/13) CA 12-00977. -- JOHNNY WATSON, PLAINTIFF-APPELLANT-RESPONDENT, V SALVATORE PRIORE, ET AL., DEFENDANTS, LIVINGSTON WESTON, DEFENDANT-RESPONDENT-APPELLANT, STEVEN A. ABDOO AND PETER M. BOLOS, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (294/13) CA 12-00984. -- JOHNNY WATSON, PLAINTIFF-APPELLANT, V SALVATORE PRIORE, ET AL., DEFENDANTS, STEVEN A. ABDOO AND PETER M. BOLOS, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (346/13) KA 11-02603. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER SHARP, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO,

AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (351/13) CA 12-01192. -- JOSEPH C. HALE, PLAINTIFF-APPELLANT, V MEADOWOOD FARMS OF CAZENOVIA, LLC, MARC P. SCHAPPELL AND THOMAS B. ANDERSON, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed June 7, 2013.)

MOTION NO. (442/13) KA 10-00532. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLIFFORD GRAHAM, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, AND WHALEN, JJ. (Filed June 7, 2013.)