SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 14, 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

210

CA 12-01733

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

NIKKI PAGAN, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

FRANK RAFTER, DEFENDANT-APPELLANT-RESPONDENT.

ECKERT SEAMANS CHERIN & MELLOTT, LLC, WHITE PLAINS (STEVEN R. KRAMER OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

ATHARI & ASSOCIATES, LLC, UTICA (MO ATHARI OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered June 11, 2012. The order, inter alia, denied the cross motion of defendant for summary judgment.

It is hereby ORDERED that said cross appeal from the order insofar as it denied that part of the motion seeking to preclude defendant from presenting evidence of factors other than lead poisoning that may have contributed to plaintiff's injuries is unanimously dismissed and the order is modified on the law by granting the cross motion in part and dismissing the first cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained as a result of his exposure to lead paint as a child. The exposure allegedly occurred when plaintiff resided in an apartment rented by his mother from defendant (premises). Plaintiff asserted as a first cause of action that defendant was negligent in his ownership and maintenance of the premises, and as a second cause of action that defendant was negligent in the abatement of the lead paint hazard. Following joinder of issue and discovery, plaintiff moved, inter alia, for partial summary judgment on the issue of liability and for an order taking judicial notice of certain legislative findings, including the congressional findings set forth in 42 USC § 4851, and statutes and regulations regarding lead based paint; precluding defendant from introducing evidence regarding alternative causes of plaintiff's injuries; and dismissing certain affirmative defenses. Defendant cross-moved for summary judgment dismissing the complaint. Supreme Court denied the cross motion and those parts of the motion relevant to this appeal. Defendant appeals, and plaintiff cross-appeals.

With respect to the appeal, we agree with defendant that the court erred in denying that part of his cross motion for summary judgment dismissing the first cause of action, which alleges negligence in his ownership and maintenance of the premises. We therefore modify the order accordingly. "To establish that a landlord is liable for a lead-paint condition, a plaintiff must demonstrate that the landlord had actual or constructive notice of, and a reasonable opportunity to remedy, the hazardous condition" (*Rodriguez v Trakansook*, 67 AD3d 768, 768-769). Defendant met his burden of establishing that he had no actual or constructive notice of the hazardous lead paint condition prior to an inspection conducted by the county department of health, and plaintiff failed to raise a triable issue of fact (*see Joyner v Durant*, 277 AD2d 1014, 1014-1015; *see also Sanders v Patrick*, 94 AD3d 1514, 1515, *lv denied* 19 NY3d 814; *see generally Chapman v Silber*, 97 NY2d 9, 15). Contrary to defendant's contention, however, the court properly denied that part of his cross motion seeking summary judgment dismissing the second cause of action, which alleges negligent abatement of the lead-based paint hazard. Defendant failed to establish his prima facie entitlement to judgment as a matter of law with respect to that cause of action. Although defendant cross-moved for summary judgment dismissing the entire complaint, he failed to address the second cause of action in support of his cross motion (*see Williams v City of New York*, 40 AD3d 847, 850; *see also Ronan v Northrup*, 245 AD2d 1119, 1119). Even assuming, arguendo, that defendant established his prima facie entitlement to judgment as a matter of law dismissing the second cause of action, under the circumstances of this case we conclude that the evidence submitted by plaintiff raised triable issues of fact whether defendant took reasonable measures to abate the lead paint hazard after he received actual notice thereof and whether plaintiff sustained additional injuries after defendant received such notice (*see Rivas v Danza*, 68 AD3d 743, 745; *Galicia v Ramos*, 303 AD2d 631, 632-633; *cf. Derr v Fleming*, 106 AD3d 1240, ___).

With respect to plaintiff's cross appeal, we note at the outset that the cross appeal from the order insofar as it denied that part of his motion seeking to preclude defendant from presenting evidence of factors other than lead poisoning that may have contributed to his injuries must be dismissed. "[A]n evidentiary ruling, even when made in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" (*Angelicola v Patrick Heating of Mohawk Val., Inc.*, 77 AD3d 1322, 1323 [internal quotation marks omitted]).

Plaintiff further contends that the court erred in denying that part of his motion seeking an order taking judicial notice of the aforementioned congressional findings, statutes, and regulations concerning lead paint because they establish that defendant had constructive notice of the hazards of lead paint to children. We reject that contention. "The factors set forth in *Chapman v Silber* (97 NY2d [at] 20-21) remain the bases for determining whether a landlord knew or should have known of the existence of a hazardous lead paint condition and thus may be held liable in a lead paint case" (*Watson v Priore*, 104 AD3d 1304, 1305). We also conclude that

plaintiff failed to establish defendant's liability as a matter of law, and thus the court properly denied plaintiff's motion for partial summary judgment on the issue of liability (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Finally, the court properly denied that part of plaintiff's motion to dismiss certain affirmative defenses inasmuch as plaintiff failed to show that those defenses lacked merit as a matter of law (*see Derr*, 106 AD3d at ___; *Van Wert v Randall*, 100 AD3d 1079, 1081; *Cunningham v Anderson*, 85 AD3d 1370, 1372-1373, *lv denied in part and dismissed in part* 17 NY3d 948).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

233

CAF 11-02192

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

IN THE MATTER OF VALENTINA RULINSKY,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE WEST, RESPONDENT-PETITIONER-APPELLANT.

PAUL M. DEEP, UTICA, FOR RESPONDENT-PETITIONER-APPELLANT.

MONICA R. BARILE, ATTORNEY FOR THE CHILD, NEW HARTFORD.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered October 7, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the petition of petitioner-respondent seeking to modify a prior order of custody and visitation, and denied the petition of respondent-petitioner for an order of contempt based on the alleged failure of petitioner-respondent to comply with the prior order.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, respondent-petitioner father appeals from an order that, following a hearing, granted the petition of petitioner-respondent mother seeking to modify a prior order of custody and visitation (prior order) by terminating visitation with the father, who was incarcerated. The order, inter alia, also denied the father's petition for an order of contempt based on the alleged failure of the mother to comply with the prior order. The prior order required the mother to bring the parties' biological child, who was 10 years old at the time of the commencement of this proceeding, to visit the father at the Auburn Correctional Facility twice a year.

We reject the father's contention that the mother failed to establish the requisite change in circumstances warranting a review of the prior order. "An order of visitation cannot be modified unless there has been a sufficient change in circumstances since the entry of the prior order [that], if not addressed, would have an adverse effect on the child['s] best interests" (*Matter of Anderson v Roncone*, 81 AD3d 1268, 1268, *lv denied* 16 NY3d 712 [internal quotation marks omitted]; *see also Matter of Ragin v Dorsey* [appeal No. 1], 101 AD3d 1758, 1758). "[W]hile not dispositive, the express wishes of older and more mature children can support the finding of a change in

circumstances" (*Matter of Dorsa v Dorsa*, 90 AD3d 1046, 1047; *see Matter of VanDusen v Riggs*, 77 AD3d 1355, 1356; *Matter of Burch v Willard*, 57 AD3d 1272, 1273). Here, the evidence establishes that, since the entry of the prior order and as the child has matured, she has developed a strong desire not to visit the father. Additionally, Family Court credited the mother's testimony that the father was using visitation time to attempt to reconcile with the mother rather than to interact with their child. Thus, we conclude that there has been a sufficient change of circumstances 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 Matter of Bowers v Bowers*, 266 AD2d 741, 742).

We further reject the father's contention that the record fails to support the court's determination that visitation with him was not in the child's best interests. We recognize that "[v]isitation with a noncustodial parent is presumed to be in a child's best interests even when the parent is incarcerated" (*Matter of Chambers v Renaud*, 72 AD3d 1433, 1434; *see Matter of Flood v Flood*, 63 AD3d 1197, 1198). In order to rebut the presumption, the party opposing visitation must establish by a preponderance of the evidence "that under all the circumstances visitation [with the incarcerated parent] would be harmful to the child's welfare" (*Matter of Granger v Misercola*, ___ NY3d ___, ___ [Apr. 30, 2013]). Here, the court did not make a determination with respect to whether the presumption in favor of visitation with the father had been rebutted. Nevertheless, we conclude that the record is adequate to enable us to determine that the mother established by a preponderance of the evidence that, under all the circumstances, "visitation would be harmful to the child's welfare" (*id.* at ___; *see generally Matter of Vincent A.B. v Karen T.*, 30 AD3d 1100, 1101, *lv denied* 7 NY3d 711).

With respect to the analysis of the best interests of the child in the absence of any presumption, we note that visitation "need not always include contact visitation at the prison" (*Matter of Ruple v Harkenreader*, 99 AD3d 1085, 1087; *see Matter of Cole v Comfort*, 63 AD3d 1234, 1235, *lv denied* 13 NY3d 706; *Matter of Conklin v Hernandez*, 41 AD3d 908, 910). Moreover, "a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record," i.e., is not "supported by a sound and substantial basis in the record" (*Matter of Krug v Krug*, 55 AD3d 1373, 1374). While the fact that the father " 'is incarcerated will not, by itself, render visitation [with him] inappropriate' " (*Matter of Thomas v Thomas*, 277 AD2d 935, 935), that fact, when considered in conjunction with the evidence establishing the father's lack of prior contact with the child, the father's failure to interact with the child during visitation and the child's express desire not to visit with the father, provides a sufficient basis for the court's determination that terminating visitation with the father was in the child's best interests (*see Matter of Bougor v Murray*, 283 AD2d 695, 695-696; *Bowers*, 266 AD2d at 742). We therefore find no basis to

disturb the court's determination, which was made after a *Lincoln* hearing and a full evidentiary hearing at which the father was present and testified (*cf. Thomas*, 277 AD2d at 935).

The father failed to preserve for our review his contention that the court should have dismissed the modification petition due to the mother's alleged lack of compliance with his discovery demand inasmuch as a "request for the imposition of a penalty pursuant to CPLR 3126 is improperly made for the first time on appeal" (*Rivera v City of New York*, 90 AD3d 735, 736). We further reject the father's contention that the court erred in dismissing his petition seeking an order of contempt for the mother's alleged failure to comply with the prior order. Where a party "seeks an adjudication of civil contempt based upon a violation of a court order, he or she must establish a willful and deliberate violation of a lawful court order expressing a clear and unequivocal mandate" (*Collins v Telcoa Intl. Corp.*, 86 AD3d 549, 549; *see Matter of Hicks v Russi*, 254 AD2d 801, 801), and that, "as a result of the violation, a right or remedy of a party to the litigation was prejudiced" (*Matter of Hughes v Kameneva*, 96 AD3d 845, 846; *see* Judiciary Law § 753; *McCain v Dinkins*, 84 NY2d 216, 226). Here, the mother's act of filing the modification petition was a proactive measure in the best interests of the child and is not the type of willful and deliberate violation punishable by contempt.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

302

CAF 12-00796

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

IN THE MATTER OF HEATHER A. COLE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL JAMES NOFRI, RESPONDENT-RESPONDENT.

KELLY M. CORBETT, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

KELLY M. CORBETT, ATTORNEY FOR THE CHILD, FAYETTEVILLE, APPELLANT PRO SE.

WILLIAM M. BORRILL, NEW HARTFORD, FOR PETITIONER-APPELLANT.

GETNICK, LIVINGSTON, ATKINSON & PRIORE, LLP, UTICA (THOMAS L. ATKINSON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered April 6, 2012 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, dismissed that part of the petition seeking a modification of custody.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the petition is granted in part by awarding primary physical custody of the child to petitioner and visitation to respondent, and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following Memorandum: Petitioner mother commenced this proceeding seeking, inter alia, to modify a prior order of joint custody granting respondent father physical custody of the parties' child (child) by awarding physical custody of the child to her. As limited by their briefs, the mother and the Attorney for the Child (AFC) appeal from the order insofar as it dismissed that part of the petition seeking a modification of the parties' custody arrangement on the ground that the mother failed to establish a change in circumstances.

A party seeking a change in an established custody arrangement has the "burden of establishing a change in circumstances sufficient to warrant an inquiry into whether the best interests of the child warranted a change in custody" (*Matter of York v Zullich*, 89 AD3d 1447, 1448). Although, as a general rule, the custody determination of the trial court is entitled to great deference (*see Eschbach v Eschbach,* 56 NY2d 167, 173-174), "[s]uch deference is not warranted .

. . where the custody determination lacks a sound and substantial basis in the record" (*Fox v Fox,* 177 AD2d 209, 211-212). Moreover, "[o]ur authority in determinations of custody is as broad as that of Family Court" (*Matter of Bryan K.B. v Destiny S.B.,* 43 AD3d 1448, 1450; *see Matter of Louise E.S. v W. Stephen S.,* 64 NY2d 946, 947).

We agree with the mother and the AFC that the mother met her burden of establishing a change of circumstances. Since the original custody trial, each party has remarried and has had two additional children who are younger than the subject child, and the father has two step-children who are older than the subject child. The evidence established that the child felt isolated in the father's home and indicated a strong desire to live with the mother. While a 10-year-old child's preference regarding the parent with which he or she would like to reside is not dispositive, it is a factor to consider in determining whether there has been a change in circumstances (*see Matter of Taylor v Rivera,* 261 AD2d 947, 948; *see generally Matter of Dorsa v Dorsa*, 90 AD3d 1046, 1047). The evidence further established that the child's anxiety with respect to living with the father has progressed to the point where he has expressed to others his thoughts of harming the father and the father's family, which led the parties to agree that the child needs counseling.

The father contends that, inasmuch as there was no showing that he was unfit or less fit than the mother, the current custodial arrangement should not be altered simply to accommodate the desires of the child (*see Fox*, 177 AD2d at 211). We reject the father's contention that the current custodial arrangement should not be changed. The Court of Appeals has cautioned that "[t]he only absolute in the law governing custody of children is that there are no absolutes" (*Friederwitzer v Friederwitzer,* 55 NY2d 89, 93), and that "no one factor, including the existence of the earlier decree or agreement, is determinative of whether there should, in the exercise of sound judicial discretion, be a change in custody" (*id.* at 93-94). We conclude that this case is unique because the record establishes that the child suffers from extreme anxiety as a result of the current custodial arrangement. Although the reason for his anxiety is not clear, it is clear that the child is not doing well under the current arrangement. Thus, on this record, we conclude that there has been a sufficient change in circumstances warranting an inquiry into whether the best interests of the child would be served by modifying the existing custody arrangement.

Inasmuch as the record is sufficient for this Court to make a best interests determination, we will do so "in the interests of judicial economy and the well-being of the child" (*Bryan K.B.,* 43 AD3d at 1450). After reviewing the relevant factors (*see Fox,* 177 AD2d at 210), we conclude that it is in the child's best interests to award the mother primary physical custody of the child. While the father has been the primary residential parent for the past five years, the mother is better able to provide for the child's emotional needs. The evidence established that the child confided in the mother and felt secure addressing his emotional issues with her, whereas he was afraid to discuss any issues or problems with the father. Given the child's

anxiety, the mother's ability to provide for the child's emotional needs is a factor that should be accorded greater weight. We therefore reverse the order insofar as appealed from and grant the petition in part by awarding the mother primary physical custody of the child and visitation to the father, and we remit the matter to Family Court to fashion an appropriate visitation schedule.

All concur except MARTOCHE, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent and would affirm the order that, inter alia, dismissed the petition. Preliminarily, I note that the parties were divorced in December 2005, and the child who is the subject of this proceeding (child) had just turned four years old at that time. Following a trial, the parties were granted joint custody of the child, and respondent father was granted primary physical custody. Although the transcript of that trial is not included in the record on appeal, I can only conclude that a determination was made that it was in the best interests of the child for the father to have primary physical custody. In November 2006, petitioner mother filed a petition seeking a modification of the parties' custody arrangement by awarding her sole legal and physical custody of the child (2006 modification petition). The mother alleged two changes in circumstances, namely that the child was "forced to endure excessive 'shuffling' between the parties, created by [the father's] change of hours at his job" and that the child was suffering from emotional difficulties, including separation anxiety stemming from his separation from the mother. The 2006 modification petition, according to the accompanying decision of Supreme Court, also alleged that the child displayed aggression toward his teacher and "created a huge disruption [in] his class." The child apparently underwent a psychological evaluation in January 2005 because of his temper tantrums and separation anxiety, and was diagnosed in March 2005 with an "Adjustment Disorder Unspecific." With respect to the 2006 modification petition, Supreme Court concluded that the mother failed to show the requisite change in circumstances. The court expressed its concern regarding the child's emotional problems, but the court noted that the mother was aware of the child's alleged difficulties with temper tantrums and separation anxiety as early as January 2005, i.e., well before the judgment of divorce and initial custody determination.

In January 2011, the mother commenced this proceeding and again sought a modification of the parties' custody arrangement. Family Court interviewed the child in camera in September 2011, and in November 2011 a lengthy trial was held on the petition. The court heard testimony from the parties, relatives of the parties, the new spouses of each party, parents of children who played with the subject child, and the child's teachers and coaches. The court also heard testimony from a clinical social worker, who had several counseling sessions with the child. The social worker testified that the child told her that he felt "left out" when he was at the father's house and that he wanted to "pound [the father] with [a] mallet." On another occasion, the child told her that he wanted to slit the father's throat. The social worker admitted that she was unaware that the father was the primary custodial parent, and further admitted that she

did not contact the father for several months after seeing the child.

Following the trial, the court concluded that the mother had failed to meet her burden of establishing a change in circumstances. Specifically, the court found that the explanations given by or on behalf of the child concerning why he did not want to live with the father were not supported by the credible evidence. The court further concluded that the child's hostility was "exacerbated by the parents' juvenile inability to agree on appropriate counseling" for the child. The court determined that, although the child would be "somewhat more comfortable" in the mother's house, both households were suitable and neither the mother nor the attorney for the child demonstrated a real need for a change in custody. The court stated its concern that applying the "simple standard" of what is "currently" best for the child would create the "risk [that the child would need to] change residences [from] year to year, season to season, or even month to month." The court, citing *Fox v Fox* (177 AD2d 209), further recognized that a child of 10 or 11 years of age generally is not of sufficient maturity to weigh intelligently the factors necessary to make a wise choice as to custody. Finally, the court noted that the child expressed a strong desire not to reside with the father despite the child's inability to "identify serious specific problems" at the father's house, and stated its belief that "incessant pressure" by the mother to transfer custody of the child to her had affected the child's emotional well-being.

It is well settled that this Court will not disturb a custody determination of Family Court where there is a sound and substantial basis in the record for that determination (*see Matter of Matthews v Matthews*, 72 AD3d 1631, 1632, *lv denied* 15 NY3d 704), particularly if that determination is based upon the court's "first-hand assessment of the credibility of the witnesses" (*Matter of Howden v Keeler*, 85 AD3d 1561, 1562 [internal quotation marks omitted]). Moreover, a party seeking modification of an established custody arrangement must show a change in circumstances reflecting "a real need for change to ensure the best interest[s] of the child" (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417 [internal quotation marks omitted]). The majority concludes that the child's desire to reside with the mother should be considered when determining whether there has been a change in circumstances. As the majority recognizes, a 10-year-old child's preference is not dispositive of the issue whether there has been a change in circumstances, but the express wishes of an older and more mature child may support a finding of a change in circumstances (*see Matter of Burch v Willard*, 57 AD3d 1272, 1273). Here, the court expressly concluded that the child was not of sufficient maturity to make a "wise choice as to custody" (*Fox*, 177 AD2d at 211), and I see no reason to disturb that determination.

The majority also concludes that the child's "anxiety with respect to living with the father" constitutes a sufficient change in circumstances to warrant a best interests analysis. I disagree. As noted, the father was given primary physical custody of the child when the child was four years old, and the mother shortly thereafter sought a modification of that custody arrangement on the ground that the

child was suffering emotional trauma and separation anxiety. At that time, Supreme Court dismissed the 2006 modification petition without a hearing. Clearly, the mother has a pattern of alleging that the child is suffering from emotional disturbances as a result of living with the father. I can only conclude, however, that, at the time of the original custody determination, Supreme Court concluded based on its assessment of the hearing testimony that it was in the best interests of the child to reside with the father.

Even assuming, arguendo, that the mother established a sufficient change in circumstances in the instant matter to warrant a best interests analysis (*see generally Matter of Burrell v Burrell*, 100 AD3d 1545, 1545), I nevertheless disagree with the majority's decision to modify the parties' custody arrangement. Although the majority concludes that the record is sufficient for this Court to make its own best interests determination, I note that there was no expert testimony on that issue, and the only "expert" who testified was a social worker who saw the child at the mother's request and without notification thereof to the father. On this record, I would be reluctant to make a best interests determination without any expert testimony regarding the underlying basis for the child's thoughts of harming the father and the child's anxiety with respect to living with the father. If I were to make a best interests determination, as the majority does, I would conclude that the existing custody arrangement should remain in place. First, the factor regarding the continuity and stability of the existing custody arrangement weighs in favor of the father (*see Fox*, 177 AD2d at 210). Additionally, the record establishes that both parties are relatively fit and loving parents and are equally able to provide for the financial needs of the child. The primary facts favoring the mother as custodial parent are that the child gets along better with his stepfather than with his stepmother, the child is unhappy in the father's house because he feels ignored there, and he feels more nurtured and comfortable with the mother. In my view, the fact that the child gets along better with the members of one of the households should not necessitate a transfer in custody. As the court noted, relying on what is currently "best" for the child would create the risk that the child would need to change residences frequently. Additionally, I hesitate to transfer custody without some expert testimony regarding the child's interactions with the parties. Unlike the majority, I do not believe that this case is "unique," but rather I believe that it involves facts that are common in divorce, i.e., a child suffering from the effects of living in two households, particularly where each parent has remarried and there are step-siblings residing in each household. Thus, I would defer to the judgment of Family Court, which heard voluminous testimony over several days, conducted an in camera interview with the child, and made specific findings of fact and conclusions of law based upon the testimony. I would, therefore, affirm the order.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

392

KA 09-00419

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLARENCE WILLIAMS, DEFENDANT-APPELLANT.

LORENZO NAPOLITANO, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered October 10, 2008. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]) and endangering the welfare of a child (§ 260.10 [1]), defendant contends that he is entitled to a new trial because Supreme Court neglected to give limiting instructions with respect to *Molineux* evidence establishing that he had subjected the victim's brother to physical abuse (*see People v Molineux*, 168 NY 264). As defendant correctly concedes, that contention is unpreserved for our review because his attorney did not request a limiting instruction and failed to object to the court's failure to provide one (*see* CPL 470.05 [2]; *People v Sommerville*, 30 AD3d 1093, 1094-1095; *People v Wright*, 5 AD3d 873, 876, *lv denied* 3 NY3d 651). Because the *Molineux* evidence in question did not relate to prior sexual abuse, and because it appears from the record that defense counsel knew of the court's failure to give limiting instructions and yet remained silent when the error could have been corrected, we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Westbrooks*, 90 AD3d 1536, 1537, *lv denied* 18 NY3d 963; *cf. People v Presha*, 83 AD3d 1406, 1407).

We reject defendant's further contention that he was deprived of effective assistance of counsel due to defense counsel's failure to object to the lack of a limiting instruction. Defense counsel may have had a strategic reason for failing to request a limiting

instruction inasmuch as he may not have wished to draw further attention to the *Molineux* evidence (*see generally People v Benevento*, 91 NY2d 708, 712). In any event, defendant points to no other alleged deficiencies on the part of defense counsel, and this is not one of those "rare" cases where a single alleged error by defense counsel was so egregious that it deprived defendant of effective assistance of counsel (*People v Turner*, 5 NY3d 476, 478; *see generally People v Cosby*, 82 AD3d 63, 67, *lv denied* 16 NY3d 857).

Contrary to defendant's further contention, the court did not improperly assume the function of an advocate at trial by directing the prosecutor to elicit testimony from the victim clarifying that, by referring to defendant's "private part," she meant his penis. A trial court "is entitled to question witnesses to clarify testimony and to facilitate the progress of the trial" and to "elicit relevant and important facts" (*People v Yut Wai Tom*, 53 NY2d 44, 55, 57). A court may also request a prosecutor to ask particular questions to clarify ambiguous testimony (*see People v Medina*, 284 AD2d 122, 122, *lv denied* 96 NY2d 922, citing *People v Moulton*, 43 NY2d 944; *see also People v Soto*, 210 AD2d 5, 6, *lv denied* 84 NY2d 1039). Although a court's power to elicit testimony should "be exercised sparingly, without partiality, bias or hostility" (*People v Jamison*, 47 NY2d 882, 883; *see Yut Wai Tom*, 53 NY2d at 57), there is no indication in the record here that the court was biased against defendant or otherwise hostile toward him. In any event, we note that the victim in her direct testimony sufficiently described defendant's "private part" as his penis inasmuch as she confirmed that his "private part" was the "part" from which he urinated (*see generally People v Pereau*, 45 AD3d 978, 981, *lv denied* 9 NY3d 1037). Thus, clarification on that point was not necessary, and any alleged error of the court was therefore harmless (*see generally People v Crimmins*, 36 NY2d 230, 241–242).

Finally, we have reviewed defendant's contention regarding the alleged defectiveness of the grand jury proceedings and conclude that it lacks merit (*see generally People v Hebert*, 68 AD3d 1530, 1533-1534, *lv denied* 14 NY3d 841).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

408

CA 12-02095

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

DAVID H. DALTON, II, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

AKRON CENTRAL SCHOOLS, RESPONDENT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO, CONGDON FLAHERTY O'CALLAGHAN REID DONLON TRAVIS & FISHLINGER, UNIONDALE (GREGORY A. CASCINO OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 30, 2012. The order granted the application of claimant for leave to serve a late notice of claim.

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

Memorandum: Claimant was allegedly injured when he stepped out of his vehicle and slipped on snow or ice in a parking lot of a school in respondent's school district. Respondent contends that Supreme Court erred in granting claimant's application for leave to serve a late notice of claim because it did not have actual knowledge of the essential facts of the claim within 90 days of the incident; claimant failed to provide an excuse for not serving a timely notice of claim; and it is severely prejudiced because the accident allegedly occurred more than 13 months before claimant sought leave to serve a late notice of claim. We affirm.

A notice of claim must be served within 90 days after the claim accrues, although a court may grant leave extending that time, provided that the application therefor is made before the expiration of the statute of limitations period of one year and 90 days (*see* General Municipal Law § 50-e [1] [a]; [5]). The decision whether to grant such leave "compels consideration of all relevant facts and circumstances," including the "nonexhaustive list of factors" in section 50-e (5) (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539). The three main factors are "whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality" (*Matter of Friend v Town of W. Seneca*, 71 AD3d 1406,

1407; *see generally* § 50-e [5]). "[T]he presence or absence of any one of the numerous relevant factors the court must consider is not determinative" (*Salvaggio v Western Regional Off-Track Betting Corp.*, 203 AD2d 938, 938-939), and "[t]he court is vested with broad discretion to grant or deny the application" (*Wetzel Servs. Corp. v Town of Amherst*, 207 AD2d 965, 965). Absent a "clear abuse" of the court's broad discretion, "the determination of an application for leave to serve a late notice of claim will not be disturbed" (*Matter of Hubbard v County of Madison*, 71 AD3d 1313, 1315 [internal quotation marks omitted]).

A factor to be accorded great weight in determining whether to grant leave to serve a late notice of claim is whether the respondent had actual knowledge of the facts underlying the claim, including knowledge of the injuries or damages (*see e.g. Santana v Western Regional Off-Track Betting Corp.*, 2 AD3d 1304, 1304-1305, *lv denied* 2 NY3d 704), and the claimant bears the burden of demonstrating that the respondent had actual knowledge (*see Matter of Riordan v East Rochester Schs.*, 291 AD2d 922, 923, *lv denied* 98 NY2d 603). Here, the record establishes that claimant met his burden of demonstrating that respondent had actual knowledge of the incident, including knowledge of claimant's injuries. Claimant averred in his affidavit in support of his application that, "[o]n December 2, 2010 at approximately 7:00 a.m., I was injured when I slipped and fell in the contractor's parking lot of Akron Central Schools due to the icy and slippery conditions in the parking lot (hereinafter 'the incident')." Claimant's definition of "the incident" thus includes the manner in which the accident occurred, as well as the injuries resulting therefrom. Claimant further averred in his affidavit that, after he fell, he went inside the school and told school employees about "the incident." Because the incident was defined in his affidavit as both the fall in the parking lot and the injuries resulting therefrom, we conclude that the court did not abuse its discretion in determining that respondent had actual knowledge of the underlying occurrence and claimant's injuries. Moreover, the record establishes that claimant's prompt notice to respondent enabled respondent to commence a timely investigation of the incident and thus there was no prejudice to respondent (*cf. Le Mieux v Alden High Sch.*, 1 AD3d 995, 996-997). The court therefore properly allowed the service of the late notice of claim (*see Wetzel Servs. Corp.*, 207 AD2d at 965; *see also McBee v County of Onondaga*, 34 AD3d 1360, 1360).

All concur except SMITH, J.P., and LINDLEY, J., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent. Where, as here, a claimant does not offer a reasonable excuse for failing to serve a timely notice of claim, Supreme Court may grant leave to serve a late notice of claim only if the respondent has actual knowledge of the essential facts underlying the claim and there is no compelling showing of prejudice to the respondent (*see Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434, 1435; *see also Matter of Trotman v Rochester City Sch. Dist.*, 67 AD3d 1484, 1485). It is well settled that "[k]nowledge of the injuries or damages claimed by a [claimant], rather than mere notice of the underlying occurrence, is necessary to

establish actual knowledge of the essential facts of the claim within the meaning of General Municipal Law § 50-e (5)" (*Santana v Western Regional Off-Track Betting Corp.*, 2 AD3d 1304, 1305, *lv denied* 2 NY3d 704 [internal quotation marks omitted]; *see Lewis v Northpole Fire Co., Inc.*, 11 AD3d 911, 911).

Here, in support of his application for leave to serve a late notice of claim, claimant offered evidence that he provided respondent with actual notice that he had fallen in respondent's parking lot, but he failed to meet his burden of establishing that he had provided respondent with actual notice that he had been injured as a result of that fall. We cannot agree with the majority that claimant averred in his affidavit that he informed respondent's employees of his injury. Indeed, during oral argument of this appeal, claimant's attorney conceded that he did not interpret his client's affidavit in that manner. Moreover, despite the fact that respondent repeatedly asserted in its appellant's brief that it was unaware that claimant had been injured, claimant did not dispute that point in his respondent's brief or even before us at oral argument. Instead, claimant's brief merely asserts that he put respondent "on notice that he had slipped and fallen due to [respondent's] negligent failure to maintain the parking lot as it should have been."

We conclude that, because claimant did not offer a reasonable excuse for failing to serve a timely notice of claim and failed to meet his burden of establishing that respondent had actual notice of the essential facts underlying the claim, the court abused its discretion in granting claimant's application (*see Folmar v Lewiston-Porter Cent. Sch. Dist.*, 85 AD3d 1644, 1645; *Matter of Troutman v Syracuse Hous. Auth.*, 35 AD3d 1252, 1253).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

425

CA 12-01965

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

ANDERSON & ANDERSON, LLP-GUANGZHOU,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

INCREDIBLE INVESTMENTS LIMITED, SHMUEL SHMUELI
AND DAVID HO, DEFENDANTS-RESPONDENTS.

ANDERSON & ANDERSON, LLP, NEW YORK CITY (DAVID C. BUXBAUM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an amended order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered February 16, 2012. The amended order, among other things, denied that part of plaintiff's motion seeking partial summary judgment.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by granting that part of plaintiff's motion seeking to dismiss the affirmative defenses of lack of personal jurisdiction based on improper service of process and as modified the amended order is affirmed without costs.

Memorandum: Plaintiff law firm commenced this action seeking recovery of $57,047.75 for unpaid legal services provided to defendants. The complaint asserts causes of action for breach of contract, quantum meruit, an account stated, and unjust enrichment. Following joinder of issue, plaintiff moved for summary judgment dismissing the affirmative defenses raised by defendants in their respective answers and for "partial" summary judgment on its account stated cause of action. We agree with plaintiff that Supreme Court should have granted that part of plaintiff's motion with respect to the affirmative defenses of lack of personal jurisdiction based on improper service of process. We therefore modify the amended order accordingly. Because defendants failed to move to dismiss the complaint against them on that ground within 60 days after serving their respective answers, which set forth objections to service (*see* CPLR 3211 [e]), they thereby waived those objections (*see JP Morgan Chase Bank v Munoz*, 85 AD3d 1124, 1126-1127; *Garcea v Battista*, 53 AD3d 1068, 1070; *Woleben v Sutaria*, 34 AD3d 1295, 1296). As plaintiff further contends, defendants did not demonstrate the requisite "undue hardship" to justify an extension of defendants' time for moving to dismiss the action on the ground of improper service (CPLR 3211 [e]; *see Woleben*, 34 AD3d at 1296; *B.N. Realty Assoc. v Lichtenstein*, 21 AD3d 793, 796).

We further conclude, however, that the court properly denied that part of plaintiff's motion seeking summary judgment on the account stated cause of action. " 'An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due' " (*Erdman Anthony & Assoc. v Barkstrom*, 298 AD2d 981, 981; *see Sisters of Charity Hosp. of Buffalo v Riley*, 231 AD2d 272, 282). Here, even assuming, arguendo, that plaintiff met its initial burden of establishing its entitlement to judgment as a matter of law with respect to that cause of action, we conclude that defendants raised an issue of fact sufficient to defeat that part of the motion (*see Erdman Anthony & Assoc.*, 298 AD2d at 982). In opposition to the motion, defendants submitted evidence that raised an issue of fact whether they challenged the amounts charged in plaintiff's invoices within a reasonable time. Defendants also denied that they acknowledged the amounts owing, and they disputed plaintiff's assertion that they made a partial payment toward the alleged balance at issue.

Finally, we reject plaintiff's related contention that it is entitled to judgment on the account stated cause of action pursuant to CPLR 3016 (f). That statute provides in relevant part that, where the plaintiff in an action involving the "performing of labor or services" sets forth "the items of his [or her] claim and the reasonable value or agreed price of each," the defendant, in his or her answer, must "indicate specifically those items he [or she] disputes." Plaintiff contends that it is entitled to judgment because defendants' answers set forth only general denials (*see Netguistics, Inc. v Coldwell Banker Prime Props., Inc.*, 23 AD3d 719, 720; *Millington v Tesar*, 89 AD2d 1037, 1037, *lv denied* 58 NY2d 601). Here, however, plaintiff's itemization of the charges fails to meet the specification standards of CPLR 3016 (f). Although plaintiff contends that defendants made a partial payment in the amount of $13,673.20 toward the amount due, plaintiff failed to specify to which of the invoice items defendants' payment was applied (*see Green v Harris Beach & Wilcox*, 202 AD2d 993, 994). As a result, "the [complaint] 'did not trigger a duty on the part of [defendants] to specifically dispute each item' " (*id.*).

In any event, "[w]hen a party's defense 'goes to the entirety of the parties' dealings rather than to the individual contents of the account, specific denials addressed to the account's items are not required' " (*id.*; *see Harbor Seafood v Quality Fish Co.*, 194 AD2d 713, 713; *see generally Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, LLP v Shakedown Records, Ltd.*, 8 AD3d 34, 35-36). Here, defendants are not challenging specific items in the invoices; rather, they dispute the general scope and nature of the work performed by plaintiff and contend that they paid plaintiff's outstanding invoices as of June 2010. Thus, the failure of defendants to include specific denials of plaintiff's allegations in their answers is of no moment.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

430

CA 12-01413

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

UTICA MUTUAL INSURANCE COMPANY, EXPRESSWAY AUTO AUCTION, INC. AND EDWARD MILLER, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ERIE INSURANCE COMPANY, DEFENDANT-APPELLANT. (APPEAL NO. 1.)

HURWITZ & FINE, P.C., BUFFALO (KATHERINE A. FIJAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LESTER SCHWAB KATZ & DWYER, LLP, NEW YORK CITY (JOSHUA C. ZIMRING OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (David A. Murad, J.), entered February 6, 2012 in a declaratory judgment action. The judgment, among other things, granted the motion of plaintiffs for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, plaintiffs' motion is denied, defendant's cross motion is granted, and judgment is granted in favor of defendant as follows:

> It is ADJUDGED and DECLARED that plaintiff Utica Mutual Insurance Company and defendant are both excess insurers with regard to the underlying action, that the excess coverage clauses in each policy cancel out each other, and that each insurer is obligated to pay on a pro rata basis the costs of defending and indemnifying plaintiffs Expressway Auto Auction, Inc. and Edward Miller in the underlying action.

Memorandum: The consolidated appeals in this declaratory judgment action arise from a dispute between plaintiff Utica Mutual Insurance Company (Utica) and defendant, Erie Insurance Company (Erie), over the priority of insurance coverage for injuries sustained by the plaintiff in the underlying negligence action. In appeal No. 1, Erie appeals from a judgment granting plaintiffs' motion for summary judgment, denying Erie's cross motion for summary judgment, and granting judgment declaring that Erie is the primary insurer and that Utica is an excess carrier. The judgment also directed Erie to pay Utica $250,000, and to reimburse Utica for two-thirds of Utica's defense costs in the

underlying action. In appeal No. 2, Erie appeals from a judgment subsequently entered against Erie in favor of Utica in the amount of $260,803, including defense costs and interest. We reverse the judgment in appeal No. 1 and grant Erie's cross motion for summary judgment seeking a declaration that Erie and Utica are co-excess carriers. In view of our determination in appeal No. 1, we vacate the money judgment in appeal No. 2.

The injured plaintiff in the underlying action, Joseph Bunk (Bunk), was attending an automobile auction held on premises owned by plaintiff Expressway Auto Auction, Inc. (Expressway), a defendant in the underlying action, which was insured by Utica with coverage of $1,000,000. Prior to that date, Erie's insured, Twin Tier Auto Transport (Twin Tier), delivered its 1999 Dodge van to Expressway to be auctioned. Erie's policy provided coverage of $500,000. Bunk was injured when he was struck by the van, which was being driven by plaintiff Edward Miller, an employee of Expressway and also a defendant in the underlying action, who had permission from Twin Tier to operate the vehicle. Erie's coverage was thus invoked, inasmuch as its policy covered anyone using a vehicle owned by Twin Tier with Twin Tier's permission. The underlying action against Miller and Expressway eventually settled for $750,000, with Utica paying $500,000 to Bunk and Erie paying the remaining $250,000. As part of the settlement, the parties reserved their right to litigate their dispute over insurance coverage in this action. The central issue on appeal is whether Erie is a primary insurer of Expressway and Miller rather than a co-excess insurer with Utica. There is no dispute that Utica provides only excess coverage.

In resolving disputes between insurers, "we first look to the language of the applicable policies" (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264), and we note that New York law "recognize[s] the right of each insurer to rely upon the terms of its own contract with its insured" (*State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 373; *see Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 21). "[W]here there are multiple policies covering the same risk, and each generally purports to be excess to the other, the excess coverage clauses are held to cancel out each other and each insurer contributes in proportion to its [policy] limit," unless to do so would distort the plain meaning of the policies (*Lumbermens Mut. Cas. Co. v Allstate Ins. Co.*, 51 NY2d 651, 655; *see Federal Ins. Co. v Atlantic Natl. Ins. Co.*, 25 NY2d 71, 75-76; *Cheektowaga Cent. Sch. Dist. v Burlington Ins. Co.*, 32 AD3d 1265, 1267-1268). By contrast, "if one party's policy is primary with respect to the other policy, then the party issuing the primary policy must pay up to the limits of its policy before the excess coverage becomes effective" (*Osorio v Kenart Realty, Inc.*, 48 AD3d 650, 653; *see Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 686-687; *Stout v 1 E. 66th St. Corp.*, 90 AD3d 898, 904).

Here, we conclude that Supreme Court erred in determining that the "other insurance" clause of the policy issued by Erie to Twin Tier is ambiguous and thus unenforceable. The clause reads in relevant part: "This policy provides primary insurance for any owned auto while used by

anyone we protect. If an owned auto is being used in the course of *your garage operations*, this policy will provide excess insurance over all other available insurance coverage" (emphasis added). The term "your" is defined in the policy as "the person(s) or organization(s) named in Item 1 on the Declarations," i.e., Twin Tier, while the term "garage operations" is defined as including, inter alia, "the ownership, maintenance or use of autos we insure shown on the Declarations," i.e., the van that struck Bunk.

The court determined that the clause is ambiguous because there is no separate definition for the phrase "your garage operations." We perceive no such ambiguity. Given the definitions of the terms "your" and "garage operations" in the policy, the phrase "your garage operations" unambiguously means the garage operations of the insured, Twin Tier. Because the claims arising from the subject accident resulted from Twin Tier's ownership of the vehicle, which was delivered to Expressway to be auctioned, the accident occurred in the course of Twin Tier's garage operations as defined in the policy (*see generally Hartford Ins. Group v Rubinshteyn*, 66 NY2d 732, 733-734, *rearg denied* 67 NY2d 647; *Lancer Ins. Co. v Marine Motor Sales, Inc.*, 84 AD3d 1318, 1321-1322, *lv denied* 17 NY3d 714). It thus follows that, pursuant to the "other insurance" clause in question, Erie provides excess coverage.

We reject plaintiffs' alternative contention that the "other insurance" clause is ambiguous because, considering the policy's broad definition of "garage operations," Erie's coverage would *always* be excess despite the reference to primary coverage. In support of that contention, plaintiffs rely on the general rule of construction that courts should interpret an insurance policy " 'in a way that affords a fair meaning to all of the language employed by the parties in the contract and *leaves no provision without force and effect' "* (*Raymond Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162, *rearg denied* 5 NY3d 825 [emphasis added], quoting *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222). Contrary to the underlying premise of plaintiffs' contention, however, there is a scenario whereby Erie can provide primary coverage under its policy. As noted, the "other insurance" clause states that Erie will provide "excess insurance over all other available insurance coverage." It follows that Erie's coverage will be primary if there is no other available insurance coverage.

Inasmuch as both the Utica and Erie policies purport to be excess to the other with respect to the injuries sustained by the injured plaintiff in the underlying action, the excess coverage clauses cancel out each other and each insurer must contribute in proportion to its policy limit (*see Great N. Ins. Co.*, 92 NY2d at 687; *Lumbermens Mut. Cas. Co.*, 51 NY2d at 655; *Matter of Allstate Ins. Co. v Bieder*, 212 AD2d 693, 693-694). Because Utica provides two-thirds of the available coverage, it must pay two-thirds of the settlement amount, or $500,000, with Erie paying the balance. Utica is also responsible for two-thirds

of the defense costs (*see Great N. Ins. Co.*, 92 NY2d at 687).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

431

CA 12-01415

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

UTICA MUTUAL INSURANCE COMPANY, EXPRESSWAY AUTO AUCTION, INC. AND EDWARD MILLER, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ERIE INSURANCE COMPANY, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

HURWITZ & FINE, P.C., BUFFALO (KATHERINE A. FIJAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LESTER SCHWAB KATZ & DWYER, LLP, NEW YORK CITY (JOSHUA C. ZIMRING OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oneida County (David A. Murad, J.), entered June 27, 2012. The judgment awarded plaintiff Utica Mutual Insurance Company the sum of $260,803 against defendant.

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

Same Memorandum as in *Utica Mut. Ins. Co. v Erie Ins. Co.* ([appeal No. 1] ___ AD3d ___ [June 14, 2013]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

438

KA 06-03041

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BILLY J. ARNOLD, JR., DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (MARTIN P. MCCARTHY, II, 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 (Alex R. Renzi, J.), rendered June 28, 2006. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree and coercion in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the DNA databank fee, the sex offender registration fee, and the supplemental sex offender fee and by reducing the mandatory surcharge to $200 and the crime victim assistance fee to $10, and as modified the judgment is 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] [a]) and coercion in the first degree (§ 135.65 [1]). Defendant contends that County Court erred in giving the jury supplemental instructions without giving defense counsel notice of the relevant jury note and an opportunity to be heard with respect thereto. The note from the jury requested a readback of certain testimony of the victim and asked whether the charges encompassed conduct occurring at a certain location only. It is well settled that, "whenever a substantive written jury communication is received by the Judge, it should be marked as a court exhibit and, before the jury is recalled to the courtroom, read into the record in the presence of counsel" (*People v O'Rama*, 78 NY2d 270, 277-278). Here, the record does not indicate that the court gave defense counsel notice of the contents of the note outside the presence of the jury, but it establishes that the court read the note verbatim before the jury, defense counsel, and defendant. Defense counsel raised no objection. The Court of Appeals has clarified that "some departures from the procedures outlined in *O'Rama* may be subject to rules of preservation" (*People v Kisoon*, 8 NY3d 129, 135). Where,

as here, the jury note is read verbatim in open court and defendant had knowledge of the substance of the court's intended response, "[defense] counsel's silence at a time when any error by the court could have been obviated by timely objection renders the claim unpreserved" for our review (*People v Starling*, 85 NY2d 509, 516; *see People v Ramirez*, 15 NY3d 824, 825-826; *People v Woods*, 72 AD3d 1563, 1564, *lv denied* 15 NY3d 811). We decline to exercise our power to address defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Bonner*, 79 AD3d 1790, 1790-1791, *lv denied* 17 NY3d 792).

Defendant further contends that he was deprived of a fair trial by prosecutorial misconduct. Defendant's contention with respect to most of the instances of alleged prosecutorial misconduct have not been preserved for our review (*see People v Mull*, 89 AD3d 1445, 1446, *lv denied* 19 NY3d 965), and we decline to exercise our power to review his contention with respect to those instances of alleged misconduct as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We conclude that the remaining instances of misconduct were "not so egregious as to deprive defendant of a fair trial" (*People v Wittman*, 103 AD3d 1206, 1207; *see People v Freeman*, 78 AD3d 1505, 1505-1506, *lv denied* 15 NY3d 952).

Defendant contends that the evidence with respect to the conviction of course of sexual conduct against a child in the first degree is legally insufficient to establish that two or more incidents of sexual conduct occurred over a period of at least three months. Penal Law § 130.75 (1) (a) provides, in relevant part, that a person is guilty of course of sexual conduct against a child in the first degree when he or she engages in two or more acts of sexual conduct "over a period of time not less than three months in duration." Viewing the evidence in the light most favorable to the People, as we must in the context of a legal sufficiency analysis (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that the course of sexual conduct lasted in excess of three months (*see generally People v Bleakley*, 69 NY2d 490, 495). We further conclude that, when viewed in light of the elements of the crime of course of sexual conduct against a child in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict with respect to that crime is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "Jury resolution of credibility issues, particularly those involving sex-related conduct with a victim of tender years who may have difficulty recalling precise dates and times of the acts, will not be disturbed absent manifest error" (*People v Johnson*, 24 AD3d 967, 968, *lv denied* 6 NY3d 814).

Contrary to defendant's contention, there was no *Brady* violation inasmuch as the email disclosed by the prosecutor after trial was not exculpatory (*see generally People v Fuentes*, 12 NY3d 259, 263, *rearg denied* 13 NY3d 766). In any event, reversal would not be required because there is no reasonable possibility that the email, had it been disclosed earlier, would have changed the result of the proceeding

(*see id.*). Defendant further contends that he received ineffective assistance of counsel because defense counsel failed to make a timely speedy trial motion pursuant to CPL 30.30. That motion would have had little or no chance of success, and we therefore conclude that defendant was not denied effective assistance of counsel (*see People v McDuffie*, 46 AD3d 1385, 1386, *lv denied* 10 NY3d 867; *see generally People v Caban*, 5 NY3d 143, 152).

As defendant contends, and the People correctly concede, however, the court erred in imposing a $50 DNA databank fee, a $50 sex offender registration fee, and a $1,000 supplemental sex offender victim fee because defendant's crime was committed prior to the effective date of the amendments to Penal Law § 60.35, which added those fees (*see People v Caggiano*, 46 AD3d 1405, 1406). Although defendant failed to preserve that contention for our review (*see People v Cooper*, 77 AD3d 1417, 1419, *lv denied* 16 NY3d 742; *People v McCullen*, 63 AD3d 1708, 1710, *lv denied* 13 NY3d 747), we exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We therefore modify the judgment accordingly. In addition, the $250 mandatory surcharge and $20 crime victim assistance fee must be reduced to $200 and $10, respectively, for the same reason (*see People v Febres*, 11 AD3d 319, 319), and we therefore further modify the judgment accordingly.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

453

CA 12-01487

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

GERALD SCHMITT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SANDRA SCHMITT, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

KUSTELL LAW GROUP, LLP, BUFFALO (CARL B. KUSTELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from a judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 22, 2012 in a divorce action. The judgment, inter alia, directed plaintiff to pay maintenance and child support and equitably distributed marital assets.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating decretal paragraphs 5, 6, 7, and 30 and that part of decretal paragraph 23 ordering that plaintiff shall be solely obligated for all debt that is held jointly by the parties, and by granting that part of the posttrial motion seeking to set aside the direction contained in the 30th decretal paragraph of the judgment and as modified the judgment is affirmed without costs, and the matter is remitted to the Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: These consolidated appeals arise from a matrimonial action. We note at the outset that, in appeal No. 1, plaintiff appeals from a judgment of divorce. That appeal also brings up for review the propriety of the order denying plaintiff's posttrial motion to set aside certain parts of the judgment (appeal No. 2), and thus the appeal from the order in appeal No. 2 must be dismissed (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1]).

With respect to appeal No. 1, we reject plaintiff's contention that Supreme Court erred in awarding defendant durational maintenance in the amount of $16,833.75 per year for 10 years. The court providently exercised its discretion in making that award to allow defendant the opportunity to become self-supporting after 25 years of marriage during which she was the stay-at-home parent (*see Bogannam v Bogannam*, 60 AD3d 985, 986; *see generally O'Brien v O'Brien*, 66 NY2d 576, 585; *Sperling v Sperling*, 165 AD2d 338, 340-345). We reject plaintiff's further contention that the court erred in failing to

subtract maintenance payments from his income for the purpose of calculating his child support obligation. The relevant statute provides that maintenance paid or to be paid should be subtracted from the payor's income only where "the order or agreement provides for a specific adjustment . . . in the amount of child support payable upon the termination of alimony or maintenance" (Domestic Relations Law § 240 [1-b] [b] [5] [vii] [C]). Here, the judgment does not provide for an automatic adjustment of child support upon the termination of maintenance, and such an adjustment was not warranted because plaintiff's maintenance obligation will outlast his child support obligation (*see Huber v Huber*, 229 AD2d 904, 905; *see also* § 240 [1-b] [b] [5] [vii] [C]; *Kessinger v Kessinger*, 202 AD2d 752, 753-754).

We agree with plaintiff, however, that the court erred in concluding that defendant met her burden of establishing that the parties' third eldest child was emancipated during the time she resided with plaintiff in 2011 (*cf. Matter of Cedeno v Knowlton*, 98 AD3d 1257, 1257; *Matter of Gold v Fisher*, 59 AD3d 443, 444). Although the child in question worked two jobs in 2010, defendant did not submit any evidence regarding the child's income in 2011. Further, the fact that plaintiff paid for the subject child's rent and utility costs demonstrates that the child was not economically independent and self-supporting (*see Cedeno*, 98 AD3d at 1257; *Matter of Drumm v Drumm*, 88 AD3d 1110, 1112-1113). Inasmuch as the record is insufficient for us to determine defendant's child support obligation with respect to the subject child, we modify the judgment in appeal No. 1 by vacating the fifth, sixth and seventh decretal paragraphs relating to plaintiff's child support obligation, and we remit the matter to Supreme Court for consideration of defendant's child support obligation and for a recomputation of the parties' respective child support obligations, following a hearing if necessary (*see generally Drumm*, 88 AD3d at 1113-1114).

We also agree with plaintiff that the court failed to set forth the statutory factors it relied upon in allocating all of the marital debt to him. In distributing debt, a court is required to consider the factors set forth in Domestic Relations Law § 236 (B) (5) (d) and to state the factors that influenced its decision in accordance with section 236 (B) (5) (g) (*see Vanyo v Vanyo*, 79 AD3d 1751, 1753; *Burns v Burns*, 70 AD3d 1501, 1503). We thus further modify the judgment in appeal No. 1 accordingly, and we remit the matter to Supreme Court for further consideration of that issue, including a hearing if necessary (*see generally Capasso v Capasso*, 119 AD2d 268, 272).

Finally, we agree with plaintiff that the court erred in failing to afford the charging lien (*see* Judiciary Law § 475) of his attorney priority in plaintiff's interest in the proceeds from the sale of the marital residence over the judgment awarding defendant attorney's fees. Although plaintiff's attorney did not timely file the retainer agreement as required by 22 NYCRR 1400.3, it is the right of the client, not the adversary spouse, to assert noncompliance with those rules as a basis for refusing to pay attorney's fees (*see generally Matter of Winkelman v Furey*, 281 AD2d 908, 908, *affd* 97 NY2d 711;

Petosa v Petosa, 56 AD3d 1296, 1298; *Johnner v Mims*, 48 AD3d 1104, 1105). Here, the record establishes that plaintiff submitted an affidavit waiving his attorney's compliance with that filing requirement. We therefore conclude that the court erred in determining in the context of plaintiff's posttrial motion that plaintiff's attorney did not have a charging lien with priority from the date of commencement of the action (*see* Judiciary Law § 475). Thus, the court erred in directing plaintiff's attorney to satisfy the judgment filed on January 17, 2012 with respect to the attorney's fees of defendant from plaintiff's share of the proceeds of the sale of the marital residence, which was held in the attorney trust account of plaintiff's attorney. We therefore further modify the judgment in appeal No. 1 by vacating the 30th decretal paragraph and by granting that part of plaintiff's posttrial motion seeking to set aside the direction contained therein.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

454

CA 12-01488

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

GERALD SCHMITT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SANDRA SCHMITT, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

KUSTELL LAW GROUP, LLP, BUFFALO (CARL B. KUSTELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered May 11, 2012 in a divorce action. The order denied plaintiff's posttrial motion to set aside certain parts of a judgment entered February 22, 2012 and directed counsel for plaintiff to satisfy a judgment filed on January 17, 2012 with respect to attorney's fees of defendant from plaintiff's share of proceeds of the sale of the marital residence, which was held in the attorney trust account of plaintiff's attorney.

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

Same Memorandum as in *Schmitt v Schmitt* ([appeal No. 1] ___ AD3d ___ [June 14, 2013]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

455

CA 12-01489

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

GERALD SCHMITT, PLAINTIFF-APPELLANT,

V ORDER

SANDRA SCHMITT, DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

KUSTELL LAW GROUP, LLP, BUFFALO (CARL B. KUSTELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from a judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), entered July 13, 2012 in a divorce action. The judgment granted defendant's attorney a default money judgment of $7,250.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* CPLR 5511; *Johnson v McFadden Ford*, 278 AD2d 907).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

456

CA 12-01490

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

GERALD SCHMITT, PLAINTIFF-APPELLANT,

V ORDER

SANDRA SCHMITT, DEFENDANT-RESPONDENT.
(APPEAL NO. 4.)

KUSTELL LAW GROUP, LLP, BUFFALO (CARL B. KUSTELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered July 13, 2012 in a divorce action. The order, inter alia, denied the motion of plaintiff for leave to reargue his posttrial motion.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City,* 167 AD2d 983, 984).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

461

KA 09-00461

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH J. THOMAS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered December 19, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, assault in the third degree, aggravated criminal contempt and criminal contempt 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 following a jury trial of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]) and aggravated criminal contempt (§ 215.52 [1]), for forcing his way into the apartment of the victim's mother and beating the victim with his fists and a metal rod. At the time of the offenses, there was a valid order of protection in effect prohibiting defendant from having contact with the victim. Defendant contends that he is entitled to a new trial because County Court erred in refusing to allow defense counsel to cross-examine the victim and her mother about their alleged bipolar disorder. We reject that contention. It is well settled that, absent a sufficient offer of proof, cross-examination of a witness concerning his or her mental illness may properly be disallowed (*see People v Barner*, 30 AD3d 1091, 1092, *lv denied* 7 NY3d 809; *People v Middlebrooks*, 300 AD2d 1142, 1143, *lv denied* 99 NY2d 630). Here, when asked for an offer of proof, defense counsel stated that it was his client's "belief" that the two witnesses each suffered from bipolar disorder. Defense counsel offered no basis for his client's belief, and he stated that he did not intend to call an expert witness to testify that bipolar disorder can affect a person's credibility or ability to recall events (*see generally Barner*, 30 AD3d at 1092; *Middlebrooks*, 300 AD2d at 1143).

In any event, even assuming, arguendo, that the court erred in

refusing to allow defense counsel to cross-examine the witnesses concerning their alleged mental illness, we conclude that any error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242). The victim's testimony was corroborated by that of her mother, who was present when the crimes were committed, as well as that of the superintendent of the apartment building, who lived directly adjacent to the victim's mother. The superintendent testified that, after hearing screaming and banging noises, he stepped into the common hallway where he observed defendant fleeing from the apartment in which the victim was located. Upon entering the apartment, the superintendent saw that the victim was bleeding from her head. In addition, shortly after the attack, defendant pinned a note to the victim's door acknowledging his guilt and seeking her forgiveness, and he also made an admission to the police following his arrest. The evidence of guilt is thus overwhelming, and there is no significant probability that defendant otherwise would have been acquitted (*see id.*).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

466

KA 11-01065

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NOEL BARRIOS-RODRIGUEZ, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN C. RUSSO-MCLAUGHLIN 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 (Thomas P. Franczyk, J.), rendered April 25, 2011. The judgment convicted defendant, upon a nonjury verdict, 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 following a nonjury trial of criminal contempt in the first degree (Penal Law § 215.51 [c]), defendant contends that the evidence is legally insufficient to establish that he intended to violate the no-contact order of protection that had been issued in favor of the victim, and that the verdict is against the weight of the evidence in that regard. We reject those contentions. Even assuming, arguendo, that the victim initiated the contact with defendant on the day in question, as defendant contends, we note that the People presented evidence establishing that defendant followed the victim outside the house in which he was located and, after speaking to her briefly, he then followed her to a nearby restaurant. The victim entered the restaurant, where she telephoned the police. Shortly thereafter, the police located defendant in a parking lot that was approximately a quarter of a mile from the restaurant. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that defendant intentionally violated the order of protection (*see generally People v Bleakley*, 69 NY2d 490, 495). We further conclude that, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), and affording great deference to County Court's credibility determinations (*see People v White*, 43 AD3d 1407, 1408, *lv denied* 9 NY3d 1010), the verdict is not against the weight of the evidence (*see generally*

Bleakley, 69 NY2d at 495).

There is no merit to defendant's additional contention that the court erred in denying his motion to set aside the verdict pursuant to CPL 330.30. Even assuming, arguendo, that the victim's testimony at the persistent felony offender hearing constitutes newly discovered evidence as defendant suggests, we conclude that the testimony is not "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 330.30 [3]). Finally, given defendant's significant criminal history, which includes five prior felony convictions and multiple convictions based on his violation of court orders, we perceive no basis to modify his sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

472

CAF 11-02448

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

IN THE MATTER OF JOSEPH A.T.P.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JULIA P., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DEBRA D. WILSON, LOCKPORT, FOR RESPONDENT-APPELLANT.

SUSAN M. SUSSMAN, NIAGARA FALLS, FOR PETITIONER-RESPONDENT.

THOMAS J. CASERTA, JR., ATTORNEY FOR THE CHILD, NIAGARA FALLS.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered November 23, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the 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 these consolidated appeals, respondent mother appeals from orders that terminated her parental rights with respect to three of her children. Following an evidentiary hearing, Family Court determined that the mother is presently and for the foreseeable future unable to provide proper and adequate care for her children by reason of her mental retardation (*see* Social Services Law § 384-b [4] [c]; [6] [b]; *Matter of Michael F.*, 16 AD3d 1116, 1116). We reject the mother's contention that petitioner failed to meet its burden of proof at the fact-finding hearing. At the hearing, petitioner relied largely upon the testimony of a psychologist who conducted a court-ordered evaluation of the mother. The psychologist testified that the mother functioned at a very low level and that her IQ score of 63 placed her in the first percentile. The psychologist further testified that the mother's low IQ had remained unchanged over time, and he explained that it is highly unusual for an IQ score to change dramatically absent some type of trauma. According to the psychologist, the mother had a "documented history of mental retardation dating back to her early childhood." With regard to the effect of the mother's diminished capacity on the children, the psychologist concluded from his evaluation that the mother lacked a "basic intellectual understanding of the needs of a child" and that

she is unable to "recognize and identify fundamental tasks of parenting." He further testified that, despite the services made available to the mother, she demonstrated "very little improvement in her functioning effectively as a parent." Although the mother testified that she appropriately cared for the children and presented the testimony of family members to that effect, she "failed to present any contradictory expert evidence" with respect to her intellectual capacity (*Matter of Darius B. [Theresa B.]*, 90 AD3d 1510, 1511). We thus conclude that petitioner established by clear and convincing evidence that the mother is mentally retarded and that, as a result thereof, she is unable to provide proper and adequate care for her children now and in the foreseeable future (§ 384-b [4] [c]).

We reject the mother's further contention that the court erred in denying her request for posttermination visitation with the subject children, inasmuch as the courts are without authority to direct continuing contact between parents and children once parental rights have been terminated pursuant to Social Services Law § 384-b (*see Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 437-438; *Matter of Elsa R. [Gloria R.]*, 101 AD3d 1688, 1688, *lv denied* 20 NY3d 862).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

473

CAF 11-02449

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

IN THE MATTER OF ANGELA N.S.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

JULIA P., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MEMORANDUM AND ORDER

DEBRA D. WILSON, LOCKPORT, FOR RESPONDENT-APPELLANT.

SUSAN M. SUSSMAN, NIAGARA FALLS, FOR PETITIONER-RESPONDENT.

THOMAS J. CASERTA, JR., ATTORNEY FOR THE CHILD, NIAGARA FALLS.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered November 23, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject child to petitioner.

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

Same Memorandum as in *Matter of Joseph A.T.P.* (___ AD3d ___ [June 14, 2013]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

474

CAF 11-02450

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

IN THE MATTER OF CELESSA M.P.P.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JULIA P., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

DEBRA D. WILSON, LOCKPORT, FOR RESPONDENT-APPELLANT.

SUSAN M. SUSSMAN, NIAGARA FALLS, FOR PETITIONER-RESPONDENT.

THOMAS J. CASERTA, JR., ATTORNEY FOR THE CHILD, NIAGARA FALLS.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered November 23, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject child to petitioner.

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

Same Memorandum as in *Matter of Joseph A.T.P.* (___ AD3d ___ [June 14, 2013]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

478

CA 12-01827

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

SUE/PERIOR CONCRETE & PAVING, INC.,
PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

LEWISTON GOLF COURSE CORPORATION, SENECA NIAGARA FALLS GAMING CORPORATION, SENECA GAMING CORPORATION, JEFFREY L. GILL, MARK I. HALFTOWN, GLORIA HERON, MAURICE A. JOHN, SR., MICHAEL L. JOHN, KAREN KARSTEN, INA K. LOCKE, ROBERT E. MELE, RICHARD K. NEPHEW, MARIBEL PRINTUP, COCHISE N. REDEYE, GARY SANDEN, KEVIN W. SENECA, BARRY E. SNYDER, SR., AND STEVE TOME, DEFENDANTS-APPELLANTS,
NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

PHILLIPS LYTLE LLP, BUFFALO (MICHAEL BRIAN POWERS OF COUNSEL), AND HOBBS STRAUS DEAN & WALKER LLP, PORTLAND, OREGON (EDMUND C. GOODMAN, OF THE OREGON AND WASHINGTON BARS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (GREGORY P. PHOTIADIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Catherine Nugent Panepinto, J.), entered March 1, 2012. The order denied the motion of defendants-appellants to dismiss the first amended complaint.

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

Opinion by PERADOTTO, J.:

The central question on this appeal is whether defendant Lewiston Golf Course Corporation (LGCC), a corporation formed under the laws of the Seneca Nation of Indians (Nation or SNI), is protected by the Nation's sovereign immunity. Contrary to the contention of defendants-appellants, we conclude that Supreme Court properly denied that part of their motion seeking to dismiss the first amended

complaint against LGCC on sovereign immunity grounds inasmuch as LGCC is not an "arm of the tribe" for purposes of sovereign immunity. We conclude, however, that the court should have granted that part of their motion seeking to dismiss the third cause of action, and thus that the order should be modified accordingly.

I

This matter arises out of the construction of the Hickory Stick Golf Course on a parcel of vacant land in the Town of Lewiston, New York. Defendant Seneca Niagara Falls Gaming Corporation (SNFGC) purchased the 250-acre parcel in 2006 from a private party on the open market for $2.1 million. SNFGC is a wholly-owned subsidiary of defendant Seneca Gaming Corporation (SGC), which, in turn, is wholly owned by the Nation. In July 2007, SNFGC conveyed the parcel to LGCC, a wholly-owned subsidiary of SNFGC created for the purpose of developing and operating a golf course on the property. SGC, SNFGC, and LGCC are all "corporation[s] . . . duly formed under the laws of [SNI]." The Nation's legislative body, the Council, appoints the members of SGC's board of directors, and the boards of SNFGC and LGCC are comprised "solely of the members of the board of directors of [SGC]."

In August 2007, LGCC contracted with plaintiff to construct an "18-hole championship golf course with an associated driving range, club house and pro shop" on the Lewiston property for the sum of $12.7 million. In connection with the project, LGCC applied for and received over $1 million in tax breaks through agreements with defendant Niagara County Industrial Development Agency (NCIDA). The project had a substantial completion date of November 30, 2008, but it was not completed until December 2, 2009. Upon the completion of construction, plaintiff claimed that LGCC owed it $4.1 million for extra work performed by plaintiff and for delay-related damages. LGCC disputed the sums sought by plaintiff and refused to pay. As a result, plaintiff filed a mechanic's lien against the property in February 2010 and thereafter commenced this action asserting causes of action for foreclosure of the mechanic's lien, breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, promissory estoppel, and fraud. LGCC, SNFGC, SGC, NCIDA, the Niagara Mohawk Power Corporation, and various individuals were named as defendants in the first amended complaint.

Defendants-appellants, i.e., LGCC, SNFGC, SGC, and the individual directors and/or officers thereof (hereafter, defendants), moved to dismiss the first amended complaint against them on sovereign immunity grounds, asserting that they are "entitled to the full protection of the Nation's sovereign immunity, which prevents the [c]ourt from exercising jurisdiction over [them]." They further moved to dismiss the third cause of action, for breach of the implied covenant of good faith and fair dealing, and the sixth cause of action, for fraud, as duplicative of the breach of contract cause of action. In support of the motion, defendants submitted, inter alia, LGCC's bylaws; minutes from an August 2002 Council session enacting the charters of SNFGC and SGC; minutes from a June 2007 Council session approving the creation

of the LGCC; certificates of existence for SNFGC, SGC and LGCC; and LGCC's Charter.

In approving the creation of LGCC, the Council declared that the "economic success of the Nation's gaming operations is vitally important to the economy of the Nation and the general welfare of its members" and that, "in furtherance of the economic success of the Nation's gaming operations, [SNFGC] has commenced development of a . . . golf course located in the Town of Lewiston, New York, including related clubhouse, retail and food and beverage operations, at a total projected cost of up to $20 million."

According to the Council:

> "[T]he Lewiston Golf Course will be developed and operated as an amenity to the SNFGC's casino operations, together with the casino's lodging, dining, retail and entertainment amenities, the purpose of which amenities is to enhance the overall success and profitability of the casino's operations consistent with the powers described in SNFGC's charter and the purposes for which SNFGC was formed . . . [T]he use of a separate corporation or legal entity to own and operate the Lewiston Golf Course is advisable due to various legal and accounting considerations, including the status of the Lewiston Golf Course as an off-territory business venture of the Nation, subject to legal, tax and other requirements that are not applicable to the Nation's on-territory business . . . [T]he Nation desires to establish [LGCC] as a separate legal entity, governmental instrumentality of the Nation, and wholly-owned subsidiary of SNFGC, for the purpose of developing and operating the Lewiston Golf Course in the Town of Lewiston, New York, and legally doing business in such jurisdictions."

The Council therefore authorized and directed SNFGC and LGCC "to develop and implement legitimate tax strategies to minimize any tax obligations of [LGCC], including, but not limited to, maximizing the tax savings benefits offered by [NCIDA]."

LGCC's Charter states that it was "organized for the purpose of developing, constructing, owning, leasing, operating, managing, maintaining, promoting and financing the Lewiston Golf Course on land (currently owned by SNFGC as of the date of this Charter) in the Town of Lewiston, New York." According to the Charter, LGCC is "indirectly owned by the Nation through [SGC] and its wholly-owned subsidiary, SNFGC, and shall constitute a governmental instrumentality of the Nation, having autonomous existence separate and distinct from the Nation." The Charter further provides that "the Nation shall not be liable for the debts or obligations of [LGCC], and [LGCC] shall have no power to pledge or encumber the assets of the Nation."

Plaintiff opposed the motion, contending, inter alia, that LGCC was not entitled to sovereign immunity. In opposition to the motion, plaintiff submitted, inter alia, an October 2007 agent agreement between NCIDA and LGCC; a Payment-in-Lieu of Taxes (PILOT) agreement between NCIDA and LGCC; and a November 2007 lease and leaseback agreement between NCIDA and LGCC. The agreements between NCIDA and LGCC specify that they are governed by and enforced in accordance with the laws of New York State, and that the parties agree to submit to the personal jurisdiction of federal or state courts located in Niagara County, New York. The PILOT agreement provides that "[t]he parties hereto recognize that the purpose of the Project is to create or retain permanent private sector jobs in Niagara County," and that LGCC would be obligated to pay only a portion of its normal tax burden during the five-year term of the agreement.

NCIDA supported that part of defendants' motion seeking to dismiss the third and sixth cause of actions as duplicative of the second cause of action, but opposed the motion insofar as it sought dismissal of the first amended complaint against defendants on sovereign immunity grounds. NCIDA asserted that LGCC, through its predecessor Seneca Management Development Corporation (SMDC), "consistently held [itself] out as a profit making corporation, separate and independent from the [Nation]." According to NCIDA, in applying for tax exemptions and deferrals relative to the golf course project, LGCC did not "imply that it is an arm of the [Nation's] government or that it is entitled to the protections of sovereign immunity. To the contrary, the application shows that the LGCC and the SMDC are separate and independent for[-]profit corporations intended to construct and operate a championship level golf course on non[-] native land to support tourism in the Niagara Region." NCIDA thus contended that "LGCC is not entitled to the protections of sovereign immunity afforded to the [Nation]."

NCIDA submitted, inter alia, an affidavit of its former assistant director, and LGCC's application for assistance in connection with the project. The former assistant director averred that, when SMDC representatives approached NCIDA to secure tax breaks for the golf course project, they indicated "that the land and project would not be considered part of the native territory, but instead would remain on the tax rolls under the jurisdiction of the State of New York." SMDC "also indicated that the land would be owned, and the golf course would be operated, by a for[-]profit corporation independent of [SNI]." According to the former assistant director, SMDC "represented that this project was intended to be a profit making venture outside the compact territories[, and] held [itself] out as a separate and independent profit making corporation." NCIDA granted the project partial real property tax abatements and sales and use tax exemptions for purchases and rentals related to the acquisition, construction and equipping of the golf course, which were worth an estimated $1 million.

In its application for assistance, SMDC stated that it was "looking to create a championship level public/semi-private golf course offering the millions of visitors of the Niagara Falls region

and the patrons of the Seneca Niagara Casino & Hotel a new tourist destination project that will attract golf enthusiasts from Canada and the United States and to capitalize on the growing tourist market, which will create new jobs and allow for prolonged stays in the area." It requested sales tax exemptions of $429,503 and real property tax exemptions of $618,790.

The court denied defendants' motion, concluding, inter alia, that LGCC is not an "arm" of the Nation entitled to sovereign immunity under the factors set forth in *Matter of Ransom v St. Regis Mohawk Educ. & Community Fund* (86 NY2d 553, 558-560). This appeal ensued. Plaintiff has since withdrawn its claims against SGC, SNFGC, and the individual defendants, so only LGCC is at issue on this appeal.

II

It is well settled that "Indian tribes are immune from lawsuits in both state and federal court unless 'Congress has authorized the suit or the tribe has waived its immunity' " (*Warren v United States*, 859 F Supp 2d 522, 539, *affd* 2013 WL 1748957 [2d Cir 2013], quoting *Kiowa Tribe of Okla. v Manufacturing Tech., Inc.*, 523 US 751, 754; *see Breakthrough Mgt. Group, Inc. v Chukchansi Gold Casino & Resort*, 629 F3d 1173, 1182, *cert dismissed* ___ US ___, 132 S Ct 64; *see also Ransom*, 86 NY2d at 558-559). As particularly relevant here, "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation" (*Kiowa Tribe of Okla.*, 523 US at 760; *see Allen v Gold Country Casino*, 464 F3d 1044, 1046, *cert denied* 549 US 1231).

Less settled is the law governing whether, and to what extent, economic entities created by a tribe share in the tribe's immunity from suit (*see generally American Prop. Mgt. Corp. v Superior Court*, 206 Cal App 4th 491, 500). "Tribal subagencies and corporate entities created by the Indian Nation to further governmental objectives, such as providing housing, health and welfare services, may also possess attributes of tribal sovereignty, and cannot be sued absent a waiver of immunity" (*Ransom*, 86 NY2d at 558-559; *see Breakthrough Mgt. Group, Inc.*, 629 F3d at 1183). The critical question is "whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe" (*Allen*, 464 F3d at 1046), i.e., whether the entity is "so closely allied with and dependent upon the [t]ribe that it is entitled to the protection of tribal sovereign immunity" (*Ransom*, 86 NY2d at 560; *see Gristede's Foods, Inc. v Unkechuage Nation*, 660 F Supp 2d 442, 477).

Federal and state courts have articulated various factors to be considered in evaluating whether a particular entity is an "arm" of a tribal government for sovereign immunity purposes (*see e.g. Warren*, 859 F Supp 2d at 540, *affd* 2013 WL 1748957; *Breakthrough Mgt. Group, Inc.*, 629 F3d at 1187-1188; *Gristede's Foods, Inc.*, 660 F Supp 2d at 477-478; *Ransom*, 86 NY2d at 559; *Seneca Niagara Falls Gaming Corp. v Klewin Bldg. Co., Inc.*, 2005 WL 3510348, *3-5 [Conn]). In *Ransom*, the

New York Court of Appeals stated that, "[a]lthough no set formula is dispositive, in determining whether a particular tribal organization is an 'arm' of the tribe entitled to share the tribe's immunity from suit, courts generally consider such factors as whether:

> the entity is organized under the tribe's laws or constitution rather than Federal law; the organization's purposes are similar to or serve those of the tribal government; the organization's governing body is comprised mainly of tribal officials; the tribe has legal title or ownership of property used by the organization; tribal officials exercise control over the administration or accounting activities of the organization; and the tribe's governing body has power to dismiss members of the organization's governing body . . . *More importantly, courts will consider whether the corporate entity generates its own revenue, whether a suit against the corporation will impact the tribe's fiscal resources, and whether the subentity has the 'power to bind or obligate the funds of the [tribe]' . . .* The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe" (*id.* at 559-560 [emphasis added]).

Factors cited by other courts include whether the tribe intended to cloak the entities with sovereign immunity and whether the fundamental purposes of tribal sovereign immunity, i.e., "promot[ing] the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development" (*Oklahoma Tax Commn. v Citizen Band Potawatomi Indian Tribe of Okla.*, 498 US 505, 510 [internal quotation marks omitted]), are served by extending immunity to the entities (*see Breakthrough Mgt. Group, Inc.*, 629 F3d at 1181; *Dixon v Picopa Constr. Co.*, 160 Ariz 251, 258, 772 P2d 1104, 1111). "[C]ommon among these factors is that the tribal entity operates 'not as a mere business,' . . . but rather as an extension of the tribe's own economic activity, 'so that its activities are properly deemed to be those of the tribe' itself" (*Gristede's Foods, Inc.*, 660 F Supp 2d at 478). Notably, "the burden of proof for an entity asserting immunity as an arm of a sovereign tribe is on the entity to establish that it is, in fact, an arm of the tribe" (*id.* at 466).

III

As defendants correctly note, several federal and state courts have determined that SGC and SNFGC are entitled to sovereign immunity as subordinate arms or instrumentalities of SNI (*see e.g. Warren*, 859 F Supp 2d at 541 ["SGC is a governmental instrumentality entitled to tribal immunity"]; *Myers v Seneca Niagara Casino*, 488 F Supp 2d 166, 168 n 2 [SNFGC "enjoys all of the privileges and immunities of the Nation"]; *Seneca Niagara Falls Gaming Corp.*, 2005 WL 3510348, at *6

[SNFGC "is a tribal entity entitled to tribal immunity"]). Defendants contend that there is "no legally relevant distinction" between SGC, SNFGC, and LGCC, and thus that LGCC is similarly protected by the Nation's sovereign immunity. We reject that contention. Applying the *Ransom* factors and the general principles enunciated by the federal courts and our sister states, we conclude that LGCC is not an "arm" of the Nation and therefore falls outside the Nation's cloak of sovereign immunity (*see generally Dixon*, 160 Ariz at 252-259, 772 P2d at 1105-1112).

As the court properly found, several of the *Ransom* factors weigh in favor of extending sovereign immunity to LGCC. There is no question that LGCC is "organized under the tribe's laws or constitution rather than Federal law" (*id.* at 559). Further, LGCC's "governing body is comprised mainly of tribal officials," and "the tribe's governing body has power to dismiss members of the organization's governing body" (*id.*). LGCC's board is comprised "solely of the members of the board of directors of [SGC]," all of whom are appointed by the Nation's Council. SGC's board consists of between four and seven members, a supermajority of whom must be enrolled members of the Nation. The Council may remove a board member for cause "upon a recommendation of the majority of the [b]oard" or on its own initiative with the votes of at least 10 members of the Council. Moreover, the Nation "exercise[s] control over the administration or accounting activities of [LGCC]" (*id.*). LGCC's Charter requires it to seek the Council's "review and approval" before engaging in any activities that "require a significant expenditure of Company resources." Similarly, although LGCC can give guarantees and incur liabilities, "significant guarantees or liabilities shall be subject to the approval of [the] Council." Any contracts or agreements with governmental entities must be approved by the Council. Further, "purchases of real property and significant expenditures of personal property shall be subject to the approval of [the] Council." LGCC is required to prepare quarterly reports and an annual report, copies of which are provided to the Council, and the Nation may inspect LGCC's books, records, and property at all reasonable times.

Other factors, however, including what the Court of Appeals has characterized as the "[m]ore important[]" financial factors, weigh in favor of a determination that LGCC does not share in the Nation's sovereign immunity (*id.*). With respect to whether LGCC's "purposes are similar to or serve those of the tribal government" (*id.*), we conclude that this factor supports the denial of sovereign immunity to LGCC. In minutes from its August 2002 meeting approving the creation of SGC, the Council declared that "it is . . . the policy of the Nation to promote the welfare and prosperity of its members and to actively promote, attract, encourage and develop economically sound commerce and industry through governmental action for the purpose of preventing unemployment and economic stagnation," and that "the Gaming industry is vitally important to the economy of the Nation and the general welfare of its members." To that end, the Council created SNFGC for the purpose of "developing, financing, operating and conducting the Nation's gaming operations on its Niagara Falls Territory at the Niagara Falls Gaming Facility." In creating the

LGCC, the Council declared that, "in furtherance of the economic success of the Nation's gaming operations, [SNFGC] has commenced development of a . . . golf course located in the Town of Lewiston, New York[, which] *will be developed and operated as an amenity to . . . SNFGC's casino operations*, . . . the purpose of which amenities is to enhance the overall success and profitability of the casino's operations" (emphasis added). In that manner, the Council believed that the golf course project "may reasonably be expected to benefit, directly *or indirectly*, the Nation" (emphasis added). Thus, the Council's own statements reflect that the purpose of LGCC – to develop a golf course as an "amenity" to the Nation's gaming operations – is several steps removed from the purposes of tribal government, e.g., "promoting tribal welfare, alleviating unemployment, [and] providing money for tribal programs" (*Gristede's Foods, Inc.*, 660 F Supp 2d at 477; *cf. Ransom*, 86 NY2d at 560).

The documents LGCC submitted to NCIDA in support of its request for tax relief and other economic assistance further indicate that the central purpose of the golf course project was not to provide funds for traditional governmental programs or services but, rather, was to serve as a regional economic engine (*see generally Dixon*, 160 Ariz at 258, 772 P2d at 1111). In the PILOT agreement, LGCC and NCIDA explicitly recognized that the purpose of the project "is to *create or retain permanent private sector jobs in Niagara County*" (emphasis added). In its application for assistance, LGCC's predecessor in interest asserted that it was

> "looking to create a championship level public/semi-private golf course *offering the millions of visitors of the Niagara Falls region and the patrons of the Seneca Niagara Casino & Hotel a new tourist destination project* that will attract golf enthusiasts from Canada and the United States and to capitalize on the growing tourist market, *which will create new jobs and allow for prolonged stays in the area*" (emphasis added).

Notably absent is any reference to improving the quality of life on reservation lands, creating jobs for Native Americans living on the reservation, or generating funds to support educational, social, or other government-related programs for tribal members. Indeed, even in the construction of the golf course, LGCC pledged to use Niagara County contractors and subcontractors (not tribal businesses) for the project.

Moreover, contrary to the assertion of defendants, the record establishes that LGCC, not the Nation, "has legal title or ownership of" the golf course property (*Ransom*, 86 NY2d at 559). The only alleged support for defendants' assertion that the Nation "owns all of [LGCC]'s improvements and assets, including the golf course property" is the provision in LGCC's Charter that, upon LGCC's dissolution or liquidation, its "remaining property and assets . . . shall be

distributed to SNFGC or, at the Nation's direction, to one or more organizations designated pursuant to a plan of distribution." That fact does not, however, establish legal title or ownership of the property at issue. With respect to what defendants term the "financial interconnectedness factors" (*see id.* at 559-560), we conclude that such factors weigh *against* extending the Nation's sovereign immunity to LGCC. With respect to the *Ransom* financial factors, we note that: (1) LGCC generates its own revenue; (2) there is no evidence in the record (and there is significant evidence to the contrary) that a suit against LGCC would impact the Nation's fiscal resources; and (3) LGCC does not have binding authority over the Nation's funds (*see id.*). In creating the LGCC, the Council stated that it decided to form a "separate corporation or legal entity to own and operate the Lewiston Golf Course . . . due to various legal and accounting considerations, including the status of the Lewiston Golf Course as an off-territory business venture of the Nation, subject to legal, tax and other requirements that are not applicable to the Nation's on-territory businesses." To that end, the Council "authorized and directed" LGCC to "develop and implement legitimate tax strategies to minimize any tax obligations of [LGCC], including, but not limited to, maximizing the tax savings benefits offered by the [NCIDA] and utilizing net operating losses, if any, incurred by the Company, to offset the Company's future profits." Thus, unlike the Nation itself or its closely-associated gaming entities, i.e., SNG and SNFGC, LGCC was intended to function as a regular business entity, with profits, losses, and legal and tax obligations applicable to any other business operated outside the confines of an Indian reservation by a non-native entity.

Further, LGCC's Charter clearly provides that LGCC has no power to bind or otherwise obligate the funds of the Nation, stating, inter alia, that "[n]o activity of the Company nor any indebtedness incurred by it shall encumber, implicate or in any way involve assets of the Nation or another Nation Entity not assigned or leased in writing to the Company"; "the Nation shall not be liable for the debts or obligations of the Company, and the Company shall have no power to pledge or encumber the assets of the Nation"; "[t]he Obligations of the Company shall not be a debt of the Nation or of [SGC] or any other Nation-chartered Gaming corporation"; and "[t]he Company shall not have[] any power . . . to borrow or lend money on behalf of the Nation, or to grant or permit or purport to grant or permit any right, lien, encumbrance or interest in or on any of the assets of the Nation" (*see id.* at 559).

Moreover, the record is devoid of evidence that a lawsuit against LGCC would adversely impact the Nation's treasury either directly or indirectly (*see id.* at 559-560). Unlike SGC, SNFGC, and other tribal entities that are obligated to pay large sums to the Nation on a regular basis (*see Warren*, 859 F Supp 2d at 541, *affd* 2013 WL 1748957 ["(Al)though a suit against SGC will not directly impact the Nation's fiscal revenues, a large judgment could render it unable to meet its significant financial obligations to the SNI"]; *Breakthrough Mgt. Group, Inc.*, 629 F3d at 1194-1195 [casino required to pay up to $1 million each month to the tribe]), there is no evidence on this record

that LGCC is so obligated. Indeed, LGCC's certificate of existence states that "the corporation has no obligation to pay any franchise taxes to [SNI]." Further, unlike the Nation's heavily regulated gaming operations, the revenue from which must only be used "to fund tribal government operations or programs . . . [,] to provide for the general welfare of the Indian tribe and its members . . . [,] to promote tribal economic development . . . [,] to donate to charitable organizations[,] or . . . to help fund operations of local government agencies" (25 USC § 2710 [b] [2] [B]), there is no evidence that the funds generated by the golf course project are earmarked for the Nation in general or its governmental programs in particular (*cf. Breakthrough Mgt. Group, Inc.*, 629 F3d at 1195 ["(T)he evidence reveals that the Tribe depends heavily on the Casino for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities. One hundred percent of the Casino's revenue goes to the Authority and then to the Tribe. Therefore, . . . any reduction in the Casino's revenue that could result from an adverse judgment against it would therefore reduce the Tribe's income"]).

Finally, we note that declining to extend sovereign immunity to LGCC under the circumstances of this case will not diminish the policies underlying tribal sovereign immunity. "Indeed, an Indian tribe's ability to create a legally distinct non-immune entity . . . promotes commercial dealings between Indians and non-Indians by allowing tribes to participate in commercial transactions without the added complexity and expense that sovereign immunity concerns bring to a transaction" (*American Prop. Mgt. Corp.*, 206 Cal App 4th at 507-508). Here, permitting LGCC to retreat behind the Nation's cloak of sovereign immunity after it held itself out as an independent, market-participating entity subject to the jurisdiction of the State of New York, including its courts, would discourage non-Indians from entering into business relationships with the Nation's corporations, which "may well retard [the Nation's] economic growth" and undermine one of the purposes of its sovereign immunity (*Dixon*, 160 Ariz at 259, 772 P2d at 1112). We thus conclude that the court properly denied that part of defendants' motion seeking to dismiss the first amended complaint against LGCC on sovereign immunity grounds.

IV

We agree with defendants, however, that the court should have granted that part of their motion seeking to dismiss plaintiff's third cause of action, which alleges breach of the implied covenant of good faith and fair dealing, as duplicative of the breach of contract cause of action inasmuch as the first amended complaint "fails to allege defendants' violation of a duty independent of the . . . agreement" (*Williams v Coppolla*, 23 AD3d 1012, 1013, *lv dismissed* 7 NY3d 741; *see Makuch v New York Cent. Mut. Fire Ins. Co.*, 12 AD3d 1110, 1111). We therefore modify the order accordingly.

Contrary to the further contention of defendants, however, we conclude that the court properly denied that part of their motion seeking to dismiss the sixth cause of action, which alleges fraud.

Plaintiff stated a cause of action for fraudulent inducement sufficient to withstand a motion to dismiss (*see generally Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956; *Wagner Trading Co. v Tony Walker Retail Mgt. Co.*, 277 AD2d 1012, 1012) and, on this record, it cannot be determined whether the fraud cause of action is merely duplicative of the breach of contract cause of action (*see generally Contacare, Inc. v CIBA-Geigy Corp*., 49 AD3d 1215, 1216, *lv denied* 10 NY3d 714; *Crawford Furniture Mfg. Corp. v Pennsylvania Lumbermens Mut. Ins. Co.*, 244 AD2d 881, 881-882).

V

Accordingly, we conclude that the order should be modified by granting that part of defendants' motion seeking to dismiss the third cause of action and that the order should otherwise be affirmed.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

518

CA 12-02040

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

IN THE MATTER OF ROSEANN KILDUFF,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROCHESTER CITY SCHOOL DISTRICT, BOARD OF EDUCATION OF ROCHESTER CITY SCHOOL DISTRICT AND DR. BOLGEN VARGAS, IN HIS CAPACITY AS ACTING SUPERINTENDENT OF ROCHESTER CITY SCHOOL DISTRICT, RESPONDENTS-RESPONDENTS.

RICHARD E. CASAGRANDE, LATHAM (ANTHONY J. BROCK OF COUNSEL), FOR PETITIONER-APPELLANT.

EDWIN LOPEZ-SOTO, GENERAL COUNSEL, ROCHESTER (CARA M. BRIGGS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered August 3, 2012 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is granted, the determination is annulled and respondents are directed to reinstate petitioner to her position as a tenured teacher forthwith with full back pay and benefits and to remove all references to the discipline imposed from petitioner’s personnel file.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking, inter alia, to annul the determination suspending her for 30 days without pay from her position as a tenured teacher with respondent Rochester City School District. Supreme Court denied the petition, and petitioner appeals.

We agree with petitioner that respondents failed to comply with the requirements of Education Law § 3020 (1) when they disciplined petitioner without affording her a hearing pursuant to Education Law § 3020-a. When presented with a question of statutory interpretation, “courts should construe unambiguous language [in a statute] to give effect to its plain meaning” (*Matter of Daimler Chrysler Corp. v Spitzer*, 7 NY3d 653, 660). We agree with petitioner that the plain language of Education Law § 3020 (1) provides that a tenured teacher facing discipline, and whose terms and conditions of employment are

covered by a collective bargaining agreement (CBA) that became effective on or after September 1, 1994, is entitled to elect either the disciplinary procedures specified in Education Law § 3020-a or the alternative procedures contained in the CBA. Here, the CBA at issue went into effect on July 1, 2006. Thus, petitioner was entitled to choose whether to be disciplined under the procedures set forth in the CBA or those set forth in section 3020-a, which allowed petitioner to elect a hearing (*see* § 3020-a [c]). Respondents, however, incorrectly denied petitioner's written request for a section 3020-a hearing. We therefore reverse the judgment, grant the petition, annul the determination, and we direct respondents to reinstate petitioner with back pay and benefits retroactive to the date of her suspension, and to remove all references to the discipline imposed from petitioner's personnel file (*see generally Matter of Winter v Board of Educ. for Rhinebeck Cent. Sch. Dist.*, 79 NY2d 1, 9, *rearg denied* 79 NY2d 978; *Matter of Diggins v Honeoye Falls-Lima Cent. Sch. Dist.*, 50 AD3d 1473, 1474).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

519

CA 12-01962

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

MARC A. NICOMETI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE VINEYARDS OF FREDONIA, LLC,
WINTER-PFOHL, INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

SCOTT PFOHL, ET AL., THIRD-PARTY PLAINTIFFS,

V

WESTERN NEW YORK PLUMBING-ELLICOTT PLUMBING
AND REMODELING CO., INC.,
THIRD-PARTY DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ROBERT D. LEARY OF COUNSEL), FOR DEFENDANT-APPELLANT WINTER-PFOHL, INC.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-APPELLANT THE VINEYARDS OF FREDONIA, LLC.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (LOUIS B. DINGELDEY, JR., OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

THE BALLOW LAW FIRM, P.C., BUFFALO (JASON A. RICHMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Thomas J. Drury, J.), entered June 12, 2012. The order, inter alia, granted the motion of plaintiff for partial summary judgment on liability against defendants The Vineyards of Fredonia, LLC and Winter-Pfohl, Inc.

It is hereby ORDERED that the order so appealed from is modified on the law by denying plaintiff’s motion and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this common-law negligence and Labor Law action seeking damages for injuries he sustained when he fell at a construction site. Plaintiff moved for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) claim, defendant Winter-Pfohl, Inc., cross-moved for, inter alia, summary judgment dismissing that claim against it, defendant The

Vineyards of Fredonia, LLC (The Vineyards) opposed plaintiff's motion and also sought dismissal of the Labor Law § 240 (1) claim, and third-party defendant opposed both the motion and the cross motion. The Vineyards, Winter-Pfohl, Inc., and third-party defendant (collectively, defendants) appeal from an order that, among other things, granted the motion and denied the cross motion.

Contrary to the contention of defendants, Supreme Court properly concluded that plaintiff's fall was the result of an elevation-related risk for which Labor Law § 240 (1) provides protection. Plaintiff alleged that he fell when his stilts slipped on ice while he was installing insulation at an elevated level, i.e., the ceiling. It is well settled that "[t]he contemplated hazards [covered by the statute] are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514). Here, the "risk was created by the need to elevate plaintiff to the height [of the ceiling], and the [stilts were] the . . . safety device provided to protect the worker from the risk inherent in having to work at a height" (*Felker v Corning Inc.*, 90 NY2d 219, 224). Inasmuch as the stilts "failed while plaintiff was installing the [insulation on the ceiling]—work requiring the statute's special protections" (*Melber v 6333 Main St.*, 91 NY2d 759, 763-764), the court properly concluded that the statute applies to plaintiff's section 240 (1) claim. Consequently, the court properly denied the cross motion.

Nevertheless, we agree with defendants' further contention that the court erred in granting the motion because we conclude that there is a triable issue of fact whether plaintiff's actions were the sole proximate cause of his injuries. Although plaintiff met his initial burden on the motion (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324), defendants raised a triable issue of fact by introducing evidence that he was directed not to work in the area where the ice was located. Thus, " '[u]nlike those situations in which a safety device fails for no apparent reason, thereby raising the presumption that the device did not provide proper protection within the meaning of Labor Law § 240 (1), here there is a question of fact [concerning] whether the injured plaintiff's fall [resulted from] his own misuse of the safety device and whether such conduct was the sole proximate cause of his injuries' " (*Thome v Benchmark Main Tr. Assoc., LLC*, 86 AD3d 938, 940). We therefore modify the order accordingly.

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

All concur except FAHEY and WHALEN, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. We agree with the majority that Supreme Court properly concluded that plaintiff is a covered worker under Labor Law § 240 (1). We cannot agree with the majority, however, that there is a triable issue of fact whether plaintiff's conduct was the sole proximate cause of the

accident. We therefore conclude that the court properly granted plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240 (1) and would affirm.

This action arises out of an accident that occurred as plaintiff worked from stilts to install insulation on a ceiling at an apartment complex. The stilts were set in such a way that the bottoms of plaintiff's feet were between three and five feet off of the floor. Plaintiff and plaintiff's supervisor (supervisor) both testified at their depositions that they saw ice on the floor of the area in which plaintiff was working, and the supervisor recalled that the ice covered approximately a four-foot by four-foot area and was not more than one-eighth of an inch thick. Although, in his words, the ice was "clear like water," the supervisor merely told plaintiff "not to be in that area," and took no measures to protect plaintiff from that hazard. Indeed, despite the fact that plaintiff's work required plaintiff to look up and away from the floor to complete his assigned task, the supervisor did not guard the ice with caution tape, barricades or similar devices, and thus left plaintiff unprotected from that hazard.

As the majority notes, plaintiff alleges that he fell when the stilts slipped on the ice while he was working. We respectfully disagree with the majority that there is an issue of fact whether plaintiff's conduct was the sole proximate cause of his accident inasmuch as the record establishes that plaintiff was not provided with a proper safety device. "[T]he nondelegable duty . . . under Labor Law § 240 (1) 'is not met merely by providing safety instructions . . . , but [rather is met] by *furnishing*, *placing* and operating such devices so as to give [plaintiff] proper protection' " (*Long v Cellino & Barnes, P.C.*, 68 AD3d 1706, 1707 [emphasis added and internal quotation marks omitted]). In our view, "stilts on ice" is the wrong device from which to work at an elevation, and we thus conclude that plaintiff was not furnished with a proper safety device as a matter of law (*see Ewing v ADF Constr. Corp.*, 16 AD3d 1085, 1086). "Where, as here, there is a statutory violation that is a proximate cause of the injuries, 'plaintiff cannot be solely to blame for [it]' " (*id.*, quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290). Even assuming, arguendo, that plaintiff was provided with proper protection, we further conclude that his actions cannot be the sole proximate cause of the accident because under the circumstances of this case the stilts were not " 'so . . . placed . . . as to give proper protection' to plaintiff" (*Ward v Cedar Key Assoc., L.P.*, 13 AD3d 1098, 1098; *see Blake*, 1 NY3d at 290).

Finally, we note that *Thome v Benchmark Main Tr. Assoc., LLC* (86 AD3d 938) does not compel a different result here. In that Labor Law § 240 (1) case, the majority concluded that there was a question of fact whether the plaintiff fell as a result of his own misuse of a scissor lift, and whether that conduct was the sole proximate cause of his injuries (*id.* at 939-940). There, the defendants tendered "evidence that plaintiff was aware that holes had been cut into the concrete floor of the building in which he was working and that, on

the morning of his accident, plaintiff had been specifically directed not to operate the scissor lift in the area where the holes had been cut" (*id.*). The defendants also offered "evidence that plaintiff drove the raised lift into that area while looking at the ceiling rather than where the lift was going" (*id.* at 940).

Our review of the record in *Thome*, however, reveals that the plaintiff in that case was not merely instructed to stay away from a hazard. The "holes" in question in *Thome*, although not protected by caution tape, barricades or cones, were marked by wood pallets that "came up a little bit" inside those depressions, which measured three feet by three feet and were six inches deep. Although those wood pallets were apparently difficult to distinguish from the depressions at issue at the time of the accident because it had rained earlier on the morning of the accident, the fact remains that there was at least some demarcation of the hazard in that case. Here, the ice that formed the dangerous condition covered an unmarked four-foot by four-foot area. Moreover, the ice was undeniably unremarkable to the extent that it was not more than one-eighth of an inch thick and, in the supervisor's words "clear like water." Consequently, *Thome* does not bind us here.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

520

CA 12-01882

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

S.J. KULA, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN CARRIER AND SHELLY CARRIER, DOING BUSINESS AS CARRIER SALVAGE AND RECYCLING, LLC, DEFENDANTS-APPELLANTS.

HALL AND KARZ, CANANDAIGUA (PETER ROLPH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MERKEL AND MERKEL, ROCHESTER (DAVID A. MERKEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Yates County (W. Patrick Falvey, A.J.), entered December 15, 2011. The judgment awarded plaintiff money damages after a nonjury trial.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the award of damages and interest and substituting therefor an award of $8,290 with interest at a rate of 9% per annum commencing August 2, 2008 and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action for, inter alia, quantum meruit, alleging that defendants owed a balance of $31,720 based on their failure to pay plaintiff for the construction of a horseshoe driveway at defendants' place of business. Defendant Kevin Carrier (Kevin) asserted a counterclaim seeking damages for plaintiff's repossession of a "lowboy" semitrailer, which plaintiff had agreed to sell to Kevin, and for which plaintiff had accepted $7,000 as partial payment. After a nonjury trial, Supreme Court granted plaintiff judgment on its cause of action for quantum meruit in the amount of $31,720, less an offset of $7,255 for damages awarded to Kevin against plaintiff on his counterclaim, for total damages in the amount of $24,465. The court also awarded plaintiff statutory interest of $7,339.50 on those damages from the period of August 2, 2008, i.e., the date of plaintiff's invoice for work on the driveway, and thus entered judgment against defendants in the amount of $31,804.50.

We reject defendants' contention that the amended complaint failed to place defendants on notice of plaintiff's claim for damages on the theory of quantum meruit (*see Clark v Torian*, 214 AD2d 938,

938; *see also* CPLR 3013, 3026). We also conclude that there is no merit to defendants' contention that plaintiff failed to prove at trial the "good faith" element of quantum meruit (*see generally Pulver Roofing Co., Inc. v SBLM Architects, P.C.*, 65 AD3d 826, 827).

We agree with defendants, however, that there is no fair interpretation of the evidence supporting the court's conclusion that plaintiff is entitled to $24,465 in damages (*cf. Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170). Plaintiff advanced a claim for approximately $30,000 based largely on the self-serving testimony of plaintiff's representative as to the extent and value of the project. Although plaintiff submitted in evidence an invoice to defendants in support of its claim, we note that the invoice contains no meaningful detail; incorrectly totals the amount due for the work, resulting in a mathematical error, which the court appears not to have acknowledged; and was not prepared contemporaneously with the completion of the project, but was tendered to defendants approximately seven months after the work was finished. Moreover, plaintiff failed to submit any evidence—such as worksheets, receipts, or other documentation—supporting the charges listed in the invoice.

The testimony of plaintiff's representative with respect to the extent and value of the project was also contradicted by defendants' witnesses at trial. One of plaintiff's former employees who testified on behalf of defendants undermined significant portions of the testimony of plaintiff's representative with respect to the extent of the project. With respect to value, that employee, drawing on his experience in gravel driveway installation, also estimated the price of the project at approximately $8,000. A former employee of Kevin, who had estimated "over a thousand" similar gravel driveway projects, likewise testified that a reasonable price for plaintiff's services in constructing defendants' driveway would be between $6,500 and $8,000. In addition, an excavation and driveway installation expert who testified for defendants estimated that the subject work should have cost approximately $8,290. We reject plaintiff's contention that the expert's estimate lacked a proper foundation because it was based on the unsupported factual assumption that there was a preexisting driveway. To the contrary, two other witnesses testified that there had been a preexisting driveway, and thus we conclude that there was a proper factual foundation for the expert's estimate (*see Latour v Hayner Hoyt Corp.*, 13 AD3d 1147, 1148).

Plaintiff is correct that "[p]roof of damages may be based upon oral testimony alone, so long as the witness has knowledge of the actual costs" (*Reed Paving v Glen Ave. Bldrs.*, 148 AD2d 934, 935; *see CNP Mech., Inc. v Allied Bldrs., Inc.*, 84 AD3d 1748, 1749), and that the customary means of calculating damages on a quantum meruit basis in a construction case is actual job costs plus profit minus amount paid (*see TY Elec. Corp. v DelMonte*, 101 AD3d 1626, 1626). Nevertheless, we cannot conclude that the court's award of $31,720 is supported by a fair interpretation of the evidence (*cf. Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d at 170; *see generally Home Insulation & Supply, Inc. v Buchheit*, 59 AD3d 1078,

1079; *Vineyard Oil & Gas Co. v Standard Energy Corp.*, 45 AD3d 1291, 1292). That award was based on plaintiff's self-serving testimony and invoice, while defendants presented the testimony and estimates of three nonparty witnesses establishing that plaintiff's work was not worth more than $8,290. Under the unique circumstances of this case, i.e., the seven-month lapse between the time that plaintiff completed the project and the time that he drafted and tendered the invoice to defendants, we conclude that the proper remedy is to adopt the highest of the project estimates from defendants' trial witnesses as the basis for the award of damages (*see generally Iacampo v State of New York*, 267 AD2d 963, 964). Consequently, we modify the judgment by vacating the award of damages and interest and substituting therefor an award of $8,290, with interest at a rate of 9% per annum commencing August 2, 2008.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

529

KA 11-01156

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GENNA A. TURNER, 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 (Vincent M. Dinolfo, J.), rendered May 12, 2011. The judgment convicted defendant, upon her plea of guilty, of attempted murder in the second degree, burglary in the first degree and criminal contempt in the first degree.

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

Memorandum: On appeal from a judgment convicting her upon a plea of guilty of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that County Court erred in refusing to suppress the statements that she made during an interview at the police station and that she did not knowingly, voluntarily and intelligently enter her plea because the court did not advise her that she would be subject to a five-year period of postrelease supervision (PRS) (*see generally People v Catu*, 4 NY3d 242, 245).

We conclude that the court (Castro, A.J.) properly refused to suppress the statements defendant made at the police station. Although defendant made an inculpatory statement after she was placed in a patrol vehicle and additional inculpatory statements after she was transported to the police station, the court granted suppression of the statement made in the patrol vehicle on the ground that her detention constituted an arrest for which the police officer lacked probable cause. The court refused, however, to suppress the subsequent statements at the police station based on its determination that they were "attenuated from the unlawful arrest." We agree with the People that the record supports the court's determination (*see generally People v Bradford*, 15 NY3d 329, 333-334). Although there was a period of only one hour between the time of the illegal arrest and the time of defendant's statements at the police station (*cf. People v Russell*, 269 AD2d 771, 772), we note that defendant was given *Miranda* warnings before the stationhouse interview (*see Bradford*, 15 NY3d at 334; *Russell*, 269 AD2d at 772; *People v Salami*, 197

AD2d 715, 715-716, *lv denied* 83 NY2d 876). Moreover, the victim's identification of defendant as the perpetrator constitutes a significant intervening event (*see Bradford*, 15 NY3d at 334; *Russell*, 269 AD2d at 772) inasmuch as that identification provided the police with probable cause for defendant's arrest (*see People v Divine*, 21 AD3d 767, 767, *affd* 6 NY3d 790; *Salami*, 197 AD2d at 715). Lastly, there was no flagrant misconduct or bad faith on the part of the police officer who took defendant into custody (*see Bradford*, 15 NY3d at 334; *Divine*, 21 AD3d at 767).

We reject defendant's contention that the court erred in effectively giving the People a "second bite at the apple" when it reopened the suppression hearing (*see generally People v Havelka*, 45 NY2d 636, 643). The prosecutor established that it was unclear whether defendant was challenging her statements as involuntarily made (*see* CPL 60.45) or as the fruit of an illegal arrest. In any event, we conclude that the court properly exercised its discretion in reopening the hearing (*see e.g. People v Binion*, 100 AD3d 1514, 1516; *People v Ramirez*, 44 AD3d 442, 443, *lv denied* 9 NY3d 1008; *People v Cestalano*, 40 AD3d 238, 238, *lv denied* 9 NY3d 921).

Following the court's suppression ruling, defendant agreed to enter a plea of guilty to the indictment with the understanding that the court would impose a sentence of incarceration of 15 years. It is undisputed that there was no mention of PRS during the course of the plea allocution. "Because a defendant pleading guilty to a determinate sentence must be aware of the [PRS] component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of [PRS] requires reversal of the conviction" (*Catu*, 4 NY3d at 245; *see People v Hill*, 9 NY3d 189, 191, *cert denied* 553 US 1048). It is axiomatic that "a plea cannot be knowing, voluntary and intelligent if a defendant is ignorant of a direct consequence because of a deficiently conducted allocution" (*People v Louree*, 8 NY3d 541, 545).

The Court of Appeals has held that, generally, preservation of a *Catu* error is not required. "If the trial judge does not mention [PRS] at the allocution, . . . a defendant can hardly be expected to move to withdraw his [or her] plea on a ground of which he [or she] has no knowledge. [Moreover,] if the trial judge informs the defendant of [PRS] during the course of sentencing, . . . a defendant may no longer move to withdraw the plea since a motion may only be made under CPL 220.60 (3) '[a]t any time *before* the imposition of sentence' (emphasis added)" (*Louree*, 8 NY3d at 546). The Court of Appeals has also held in at least one instance, however, that a defendant is required to preserve a *Catu* error (*see People v Murray*, 15 NY3d 725).

In *Murray*, the defendant was informed prior to his plea that he faced a two-year period of PRS but, when he appeared for sentencing, the court informed him "at the outset of the sentencing proceeding" of the exact sentence that would be imposed, which included a three-year period of PRS (*id.* at 726-727). The defendant did not object to the imposition of the three-year period of PRS and, on appeal, the Court wrote that,

"[b]ecause [the] defendant could have sought relief from the sentencing court in advance of the sentence's imposition, *Louree's* rationale for dispensing with the preservation requirement is not presently applicable" (*id.* at 727).

Since *Louree*, courts have attempted to identify at what point a defendant "could have sought relief . . . in advance of the sentence's imposition" (*id.*). For example, in both *People v Young* (85 AD3d 1489, 1490) and *People v Lee* (80 AD3d 1072, 1073, *lv denied* 16 NY3d 832), the Third Department followed the holding of *Murray* and required preservation where the defendants were informed, at the outset of the sentencing proceeding, that a greater period of PRS would be imposed. In contrast, the Court of Appeals has not required preservation where a defendant was informed of the period of PRS "only moments before" the court imposed the sentence (*People v McAlpin*, 17 NY3d 936, 938).

In *People v Burroughs* (71 AD3d 1447, 1448, *lv denied* 15 NY3d 802), the court failed to inform the defendant of the PRS component of the sentence at the time of the plea. The defendant, however, received that information "approximately one month before sentencing" and was granted two adjournments to prepare a postallocution motion (*id.*). At no time did the defendant move to withdraw his plea on the ground that the court would impose PRS (*see id.*). Inasmuch as the defendant had notice of the error and an opportunity to be heard on that issue, this Court rejected the defendant's contention that his plea of guilty should be vacated (*see id.*). In *People v Madison* (71 AD3d 1422, 1422, *lv denied* 15 NY3d 753), the court failed to advise the defendant at the time of the plea that a period of PRS would be imposed. Several hours later, after the court had recognized the omission, the defendant was brought back to court and informed of the PRS component of the sentence (*see id.*). Upon questioning by the court, the defendant "indicated that such information did not affect his willingness to adhere to the plea agreement" (*id.* at 1422-1423). On appeal we rejected the defendant's request to vacate the plea on the ground that he "had the requisite notice that a period of [PRS] would be imposed and an opportunity to withdraw his plea" (*id.* at 1423). In *Burroughs* and *Madison*, each defendant had sufficient opportunity to preserve any issue with respect to PRS by bringing a postallocution motion to withdraw the plea.

Where the record is not clear that a defendant was informed of the PRS component of the sentence before imposition of the sentence or the record does not establish that the defendant had an opportunity to withdraw the plea, we have followed the decision in *Louree* and vacated the pleas even in the absence of preservation (*see People v Cornell*, 75 AD3d 1157, 1159, *affd* 16 NY3d 801; *People v Colon*, 101 AD3d 1635, 1638). As we wrote in *Cornell*, "the court ha[s] a constitutional duty to ensure that [a] defendant [is] aware that his [or her] sentence [will] include a period of PRS" (*Cornell*, 75 AD3d at 1159).

We conclude that this case is distinguishable from *McAlpin*, *Cornell* and *Colon.* In this case the prosecutor informed the court, " '*before* the imposition of sentence' " (*Louree*, 8 NY3d at 546; *see generally* CPL 220.60 [3]), that he could not recall whether PRS had been

discussed at the time of the plea. The prosecutor noted that they "should probably make a record of that . . . so it is clear." At that point, the court informed defendant that it "intend[ed] to make a five year period of [PRS]." Defendant was then asked if she had a chance to talk about that with her attorney, and defendant answered, "[y]es." Defendant was also asked if she understood that the PRS was a "part of [her] plea" and that she would be on parole supervision for five years at the end of her prison sentence. Defendant answered, "[c]orrect." When asked if she "still wish[ed] to go through with sentencing today," defendant again answered, "[y]es."

In our view, the record is clear that "defendant could have sought relief from the sentencing court in advance of the sentence's imposition," and thus "*Louree's* rationale for dispensing with the preservation requirement is not presently applicable" (*Murray*, 15 NY3d at 727; *see Madison*, 71 AD3d at 1422-1423*; Burroughs*, 71 AD3d at 1448; *see also People v Brady*, 59 AD3d 748, 748). In any event, we conclude that defendant waived her right to assert the *Catu* error inasmuch as "there is ample evidence in the record supporting the . . . conclusion that defendant agreed to the bargain and did so voluntarily with a full appreciation of the consequences" (*People v Seaberg*, 74 NY2d 1, 11; *see generally People v Cox*, 71 AD2d 798, 798).

All concur except SCONIERS and MARTOCHE, JJ., who dissent and vote to reverse the judgment in accordance with the following Memorandum: We respectfully dissent. "Because a defendant pleading guilty to a determinate sentence must be aware of the postrelease supervision [PRS] component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of postrelease supervision requires reversal of the conviction" (*People v Catu*, 4 NY3d 242, 245). Contrary to the conclusion of the majority, we agree with defendant that the plea was not knowingly, voluntarily and intelligently entered and that she was not required to preserve for our review her challenge to the voluntariness of the plea (*see People v Boyd*, 12 NY3d 390, 393; *People v Louree*, 8 NY3d 541, 545-546). It is undisputed that there was no mention of PRS at the plea proceeding and, based on our review of the record, we conclude that defendant was not "advised of what the sentence would be, including its PRS term, at the outset of the sentencing proceeding" (*People v Murray*, 15 NY3d 725, 727). Rather, defendant did not learn that PRS would be imposed until "moments before imposi[tion of] the sentence" (*People v McAlpin*, 17 NY3d 936, 938).

Significantly, the brief reference to PRS by the prosecutor at sentencing "cannot substitute for [County Court's] duty to ensure, at the time the plea is entered, that the defendant is aware of the terms of the plea . . . , especially in light of the fact that it was not stated that [PRS] was required to be part of any sentence with a determinate prison term" (*People v Pett*, 77 AD3d 1281, 1282 [internal quotation marks omitted]), and we conclude that the brief reference does not support the People's position that "*Louree's* rationale for dispensing with the preservation requirement is not presently applicable" (*Murray*, 15 NY3d at 727; *see People v Rivera*, 91 AD3d 498, 498). Moreover, the majority's position, raised sua sponte, that defendant waived her right to assert

the *Catu* error is not supported by the record. The prosecutor told defendant *incorrectly* just before the court imposed sentence that PRS was "part of [her] plea," and she was offered no option other than to proceed to sentencing. Defendant indicated that she had discussed PRS with her attorney and understood what the prosecutor had said. When the prosecutor then asked if she "still wish[ed] to go through with sentencing today," defendant responded in the affirmative. Despite that exchange, the record fails to demonstrate that defendant was ever informed that there was an alternative to going forward with sentencing, namely, that she was entitled to withdraw her guilty plea because of the court's failure to advise her of PRS at the plea proceeding. As a result, defendant said nothing during the sentencing proceeding that amounted to a waiver, i.e., "an intentional relinquishment or abandonment of a known right or privilege" (*Johnson v Zerbst*, 304 US 458, 464). In particular, defendant did not waive her "right to be sentenced in accordance with the plea agreement" (*People v McDermott*, 68 AD3d 1453, 1453). We therefore vote to reverse the judgment, vacate the plea, and remit the matter to County Court for further proceedings on the indictment.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

534

CA 12-02132

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

RICHARD L. GRAY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TALISMAN ENERGY USA INC., DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

ROSSETTIE ROSETTIE & MARTINO LLP, CORNING (GABRIEL V. ROSSETTIE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE WEST FIRM, PLLC, ALBANY (THOMAS S. WEST OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered April 25, 2012. The order granted the motion of defendant Talisman Energy USA Inc., to compel arbitration and stayed the action.

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

Memorandum: On appeal from an order granting the motion of Talisman Energy USA Inc. (defendant) to compel arbitration and to stay the action pursuant to CPLR 7503 (a), plaintiff contends that the contractual arbitration clause was nullified by the operation of General Obligations Law § 15-304. We reject that contention.

In August 2000, plaintiff property owner entered into an oil and gas lease (hereafter, lease) with defendant's predecessor in interest. The primary term of the lease was five years, with an option to renew. The lease also permitted extension beyond its primary term if the lessee or its assignee were engaged in operations on the leased property or "lands pooled therewith" at the time of expiration of the primary term. As relevant here, the lease contains an arbitration clause providing that "[a]ny question concerning this lease or performance thereunder" shall be submitted to arbitration. The lease further provided that, "[i]f this lease becomes forfeited, terminated or expires, the lessee . . . is required to provide a document canceling the lease as of record . . . If the lessee . . . fails to cancel the lease, the current landowner may compel a cancellation pursuant to section 15-304 of the General Obligations Law." In February 2005, plaintiff extended the primary term of the lease for an additional three years, and defendant's predecessor in interest applied for a permit to drill a natural gas well on several "pooled" properties, including plaintiff's property. In August 2010,

plaintiff served defendant with a notice of termination of the lease, asserting that the lease was terminated as of August 2005 because: (1) the five-year primary term of the lease had expired on that date; (2) the primary term was not extended by agreement between the parties to the lease; and (3), as of that date, "no other circumstance causing extension or continuation of the [l]ease was then in effect." Defendant, however, asserted that the lease term had not expired and that "the entire [l]ease remains in full force and effect."

Plaintiff thereafter commenced this action pursuant to RPAPL article 15 seeking, inter alia, "to compel the determination of claims to the real property described herein," and defendant moved to compel arbitration under the lease and to stay the action. Supreme Court properly granted the motion.

"Where parties have entered into an agreement containing a broad arbitration provision, the question of whether the arbitration clause governs a particular aspect of the controversy, as well as the determination of the merits of the dispute, are matters within the exclusive province of the arbitrator" (*Remco Maintenance, LLC v CC Mgt. & Consulting, Inc.*, 85 AD3d 477, 479-480 [internal quotation marks omitted]). "Once it appears that there is, or is not[,] a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract, the court's inquiry is ended. Penetrating definitive analysis of the scope of the agreement must be left to the arbitrators whenever the parties have broadly agreed that any dispute involving the interpretation and meaning of the agreement should be submitted to arbitration" (*Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 96; *see General Mills v Steuben Foods*, 244 AD2d 868, 868). Thus, contrary to plaintiff's contention, it is not entitled to a judicial determination with respect to the continued force and effect of the lease, i.e., "the ultimate issue in this case" (*Nationwide*, 37 NY2d at 95), before submitting the matter to arbitration.

With respect to plaintiff's contention that the arbitration clause is ambiguous because the lease also permits cancellation of the lease by specific reference to General Obligations Law § 15-304, we note that section 15-304 must be referenced in any oil, gas, or mineral lease, or it will be incorporated by operation of General Obligations Law § 5-333 (1). We therefore cannot conclude that section 15-304 thereby renders the arbitration clause ambiguous. Moreover, there was no need to include a "survival provision" for the arbitration clause inasmuch as the parties dispute the continuing effect of the lease, which, as noted, is the ultimate issue for arbitration (*see Remco*, 85 AD3d at 479-480; *General Mills*, 244 AD2d at 868). Contrary to plaintiff's further contention, we conclude that he "expressly waive[d]" the right to litigate issues concerning the lease in a court of law because he signed a lease with a clear and broad arbitration clause (*see generally Williams v Progressive Northeastern Ins. Co.*, 41 AD3d 1244, 1245, *lv denied* 9 NY3d 808) .

Finally, we reject plaintiff's characterization of General Obligations Law § 15-304 as "a simple procedural means of cancelling the Lease." The purpose of that provision is to allow landowners to clear the title of their real property when a lease has expired or has been

terminated or forfeited, not to cancel an existing lease (*see* § 15-304; Attorney General's Mem, Bill Jacket, L 1984, ch 565 at 8-9). The parties' disputes, including the threshold issue of whether the lease was still in effect when plaintiff filed the notice of termination, must be submitted to arbitration pursuant to the terms of the lease (*see Nationwide*, 37 NY2d at 96; *Remco*, 85 AD3d at 479-480; *General Mills*, 244 AD2d at 868).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

543

CA 12-02133

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

STEVEN A. RICH, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RONALD R. BENJAMIN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICE OF RONALD R. BENJAMIN, BINGHAMTON (MARYA C. YOUNG OF COUNSEL), FOR DEFENDANT-APPELLANT.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered July 16, 2012. The order denied the motion of defendant for summary judgment dismissing the complaint and granted the cross motion of plaintiff to compel disclosure.

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

Memorandum: Defendant, an attorney, orally contracted with plaintiff to consult on pharmaceutical products liability cases at an hourly rate of $500 per hour. After the initial $5,000 retainer was expended, plaintiff invoiced defendant for the services that he had rendered. Defendant did not pay the invoice, but assured plaintiff that payment would be forthcoming. After rendering additional consulting services, plaintiff subsequently invoiced defendant for all services rendered, but defendant likewise did not pay that invoice. Plaintiff thereafter commenced this action for, inter alia, breach of contract seeking damages in the amount stated in the second invoice.

In appeal No. 1, defendant contends that Supreme Court erred in denying his motion seeking, inter alia, summary judgment dismissing the complaint on the ground that he was only an agent to known principals, i.e., his clients, and thus cannot be held personally liable to plaintiff for the amounts owed. We reject that contention. "[A]n attorney who, on his [or her] client's behalf, obtains goods or services in connection with litigation [may] be held personally liable unless the attorney expressly disclaims such responsibility" (*Urban Ct. Reporting v Davis*, 158 AD2d 401, 402; *see* 2 NY PJI3d 4:1 at 751 [2013]). Here, the agreement between the parties was oral and it is disputed whether defendant "expressly disclaim[ed]" personal liability for the consulting services rendered by plaintiff (*Urban Ct. Reporting*, 158 AD2d at 402).

We thus conclude that a triable issue of fact precludes summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In appeal No. 2, we agree with defendant that the court improvidently exercised its discretion in denying those parts of his motion to compel plaintiff to disclose items 8 and 9 of defendant's demand for production and inspection that pertained to plaintiff's experience as an expert in pharmaceutical litigation, including the retainer agreements and compensation arrangements associated therewith (*see generally Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845). Specifically, inasmuch as the factfinder must determine the meaning of disputed terms of the parties' agreement (*see Hudak v Hornell Indus.*, 304 NY 207, 214; *Patten v Pancoast*, 109 NY 625, 626), we conclude that the documents requested in items 8 and 9 of defendant's demand for production and inspection are relevant and must be disclosed (*see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407). We therefore modify the order accordingly. We note that defendant's contention regarding item 10 of his demand for production and inspection is raised for the first time on appeal and thus that portion of his contention is not properly before us (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Finally, we note that defendant's attorney conceded at oral argument of this appeal that items 4 and 5 of defendant's demand for production and inspection are overbroad and unduly burdensome on plaintiff, and defendant therefore has abandoned any contentions on appeal with respect to those items (*see Ciesinski*, 202 AD2d at 985).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

544

CA 12-02138

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

STEVEN A. RICH, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RONALD R. BENJAMIN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LAW OFFICE OF RONALD R. BENJAMIN, BINGHAMTON (MARYA C. YOUNG OF COUNSEL), FOR DEFENDANT-APPELLANT.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARTZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered August 31, 2012. The order, inter alia, denied the motion of defendant to compel discovery responses and for a protective order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of defendant's motion to compel plaintiff to disclose the documents sought in items 8 and 9 of defendant's demand for production and inspection and as modified the order is affirmed without costs.

Same Memorandum as in *Rich v Benjamin* ([appeal No. 1] ___ AD3d ___ [June 14, 2013]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

552

KA 10-01380

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOE SEYMOUR, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK 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 October 6, 2009. 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 modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him, upon his guilty plea, of criminal sexual act in the first degree (Penal Law § 130.50 [4]), defendant contends that his agreed upon sentence is illegal and that he must therefore be afforded the opportunity to withdraw his plea. We agree. Pursuant to the plea agreement, County Court sentenced defendant as a second violent felony offender to a determinate term of imprisonment of 12 years to be followed by a period of five years of postrelease supervision (PRS). As the People correctly concede, that sentence is illegal because the minimum period of PRS that could be imposed on defendant, as a second violent felony offender, is 10 years (*see* Penal Law § 70.45 [2-a] [i]). Thus, under the circumstances presented here, we modify the judgment by vacating the sentence, and we remit the matter to County Court to afford defendant the opportunity to withdraw his plea or be resentenced to a legal period of PRS (*see People v Lee*, 64 AD3d 1236, 1237; *see also People v Griffin*, 72 AD3d 1496, 1497; *People v Motley* [appeal No. 3], 56 AD3d 1158, 1159).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

556

CA 12-01903

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

FRED DAVIES AND MARC FISHER, AS CO-EXECUTORS OF THE ESTATE OF IRVING H. ROSENBERG, DECEASED, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MADELYNE JERRY AND GULF & WESTERN AERO DEVELOPMENT, LLC, DEFENDANTS-RESPONDENTS.

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (SUZANNE M. MESSER OF COUNSEL), FOR DEFENDANT-RESPONDENT MADELYNE JERRY.

LAW OFFICE OF DANIEL R. SEIDBERG, LLC, SYRACUSE (DANIEL R. SEIDBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT GULF & WESTERN AERO DEVELOPMENT, LLC.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 29, 2012. The judgment granted the motions of defendants for a declaratory judgment and summary judgment, denied the cross motion of plaintiffs for summary judgment and directed plaintiffs to provide written notice of intent to transfer decedent’s membership interest.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion of defendant Gulf & Western Aero Development, LLC, insofar as it seeks a declaration that the purchase price of the membership interest of Irving H. Rosenberg must be determined by that defendant’s accountant, and granting judgment in favor of defendants as follows:

> It is ADJUDGED AND DECLARED that Irving H. Rosenberg is deemed to have offered his membership interest in defendant Gulf & Western Aero Development, LLC, to that defendant and/or Madelyne Jerry upon his death;
>
> It is further ADJUDGED AND DECLARED that the estate of Irving H. Rosenberg must give written notice of its intent to sell; and
>
> It is further ADJUDGED AND DECLARED that the purchase price of the membership interest shall be based on the

appraised valuation of the commercial real property of defendant Gulf & Western Aero Development, LLC, as of December 20, 2010,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs, coexecutors of the estate of Irving H. Rosenberg (Estate), commenced this action for, inter alia, breach of contract, an accounting, and dissolution. Rosenberg and defendant Madelyne Jerry entered into an Operating Agreement for defendant Gulf & Western Aero Development, LLC (Gulf LLC), in November 2002. Gulf LLC was formed for the purpose of acquiring undeveloped real property and developing a commercial subdivision for the construction and operation of hotels. Rosenberg died on December 20, 2010. After plaintiffs commenced this action, each defendant answered and asserted a counterclaim seeking, inter alia, a declaration of the rights of the parties. Defendants thereafter moved for summary judgment on their counterclaims, and plaintiffs cross-moved for summary judgment on the complaint. Supreme Court granted defendants' motions and denied plaintiffs' cross motion. Although the court properly determined that defendants are entitled to summary judgment, the court failed to declare the rights of the parties. We therefore modify the judgment by making the requisite declarations (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954).

We reject plaintiffs' contention that the Estate is not required to give written notice of its intention to transfer Rosenberg's membership interest. It is well settled that a "written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569; *see W.W.W. Assoc. v Giancontieri,* 77 NY2d 157, 162). Section 12.2 of the Operating Agreement provides that, if a member dies, "such Member shall be deemed to have offered their [*sic*] Membership Interest to the other Members for sale *and* shall give written notice to the other Members of his, her or its intention to transfer such Membership Interest" (emphasis added). The plain language of that section thus requires the Estate to give written notice of its intent to sell. Contrary to plaintiffs' further contention, the court properly interpreted section 12.2 in determining that the date of valuation of Rosenberg's membership interest is the date of his death (*see generally Oriskany Falls Fuel v Finger Lakes Gas Co.*, 186 AD2d 1021, 1021-1022).

Section 8.2 of the Operating Agreement provides that "[t]he purchase price [of a membership interest] shall be determined . . . based upon a fair market appraisal of the real property owned by [Gulf LLC] prepared by a qualified MAI appraiser with at least ten (10) years of experience appraising commercial real property . . . The value of [Gulf LLC] as above stated . . . is and shall be inclusive of the value of goodwill." Plaintiffs contend that they would be entitled to essentially nothing under that provision because Gulf LLC now owns only a small, vacant parcel of land, having transferred the valuable real property it had previously owned in exchange for an

interest in two entities that developed hotels on that property. At oral argument of this appeal, however, defendants acknowledged that the value of Gulf LLC is not limited to the value of the small, vacant parcel of land owned by Gulf LLC, but, rather, includes the appraised value of the hotels presently existing on the real property in which Gulf LLC has an interest.

Although Gulf LLC sought in its motion a declaration that the purchase price of Rosenberg's membership interest be determined by Gulf LLC's accountant, it did not seek that relief in its counterclaim, and we therefore agree with plaintiffs that, to the extent that the court granted that part of Gulf LLC's motion, the judgment should be modified by denying that part of the motion. We have considered plaintiffs' remaining contentions and conclude that they are without merit.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

557

CA 12-01901

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

KEITH J. CUSTER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JONATHAN JORDAN, ET AL., DEFENDANTS,
AND RANDY EWINGS, DEFENDANT-RESPONDENT.

FESSENDEN, LAUMER & DEANGELO, JAMESTOWN (MARY B. SCHILLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment and order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered January 23, 2012. The judgment and order, insofar as appealed from, granted that part of the motion of defendant Randy Ewings for summary judgment dismissing the Labor Law § 240 (1) claim against him and denied plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the judgment and order insofar as appealed from is unanimously reversed on the law without costs, that part of the motion of defendant Randy Ewings for summary judgment dismissing the Labor Law § 240 (1) claim is denied, that claim is reinstated, and plaintiff's cross motion for partial summary judgment on liability with respect to Labor Law § 240 (1) against defendant Randy Ewings is granted.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained while he was installing siding on a single-family home. According to plaintiff, he fell from a stepladder placed on scaffolding provided to him by defendant Jonathan Jordan (Jordan). The property on which plaintiff was injured was the subject of a contract pursuant to which Randy Ewings (defendant) agreed to sell the property to Jordan. The contract required, inter alia, that Jordan adhere to a payment plan, notify defendant of any work that was contracted out with respect to the property, and provide defendant with a certificate of insurance before any work was commenced. The contract also provided that, upon receiving the purchase price from Jordan, defendant was to deliver to Jordan an abstract of title and a warranty deed in order to convey a fee simple title to Jordan, and that Jordan was required to pay for a survey prior to the execution of the contract. Although Jordan made his final payment on the property in the fall of 2008, defendant and

Jordan did not close on the sale of that property until after the accident, which occurred in November 2009.

Defendant moved for summary judgment dismissing the complaint against him, and plaintiff cross-moved for partial summary judgment on liability pursuant to Labor Law § 240 (1) against defendant. Supreme Court granted defendant's motion and denied plaintiff's cross motion. As limited by his brief, plaintiff contends that the court erred in granting that part of defendant's motion with respect to the section 240 (1) claim and in denying his cross motion with respect to that claim. We agree.

Addressing first defendant's motion, we agree with plaintiff that the court erred in granting that part of defendant's motion for summary judgment dismissing the Labor Law § 240 (1) claim against him on the ground that defendant was not an owner of the property for purposes of section 240 (1). Inasmuch as defendant retained title to the property at the time of the accident, and inasmuch as the requirements of the contract with respect to the survey and the delivery of the deed were unsatisfied at that time, we conclude that defendant was an "owner" of the property for the purposes of the Labor Law (*see* Real Property Law § 244; *Manhattan Life Ins. Co. v Continental Ins. Cos.*, 33 NY2d 370, 372; *see generally M&T Real Estate Trust v Doyle*, 20 NY3d 563, 567-568). We are mindful that, even under a liberal construction of section 240 (1), ownership of the premises where the accident occurred, standing alone, is insufficient to impose liability under section 240 (1) on an out-of-possession property owner who does not contract for the injury-producing work. Rather, a prerequisite to the imposition of liability upon such an owner is "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest" (*Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 51; *see Morton v State of New York*, 15 NY3d 50, 56; *Scaparo v Village of Ilion*, 13 NY3d 864, 866). Under the circumstances of this case, however, we conclude that defendant's status as an out-of-possession property owner does not shield him from liability under section 240 (1) (*see Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 339-340; *Coleman v City of New York*, 91 NY2d 821, 822-823; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560; *cf. Abbatiello*, 3 NY3d at 51-52; *see generally Nephew v Barcomb*, 260 AD2d 821, 822; *Marks v Morehouse*, 222 AD2d 785, 787).

We also agree with plaintiff that the court erred in granting that part of defendant's motion with respect to Labor Law § 240 (1) on the alternative ground that defendant qualifies for the homeowner exemption. "Owners and contractors are subject to strict liability pursuant to Labor Law § 240 (1) . . . 'except owners of one and two-family dwellings who contract for but do not direct or control the work.' 'The exception was enacted to protect those people who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against the absolute liability imposed by section 240 (1)' (*Lombardi v Stout*, 80 NY2d 290, 296; *see also*, *Van Amerogen v Donnini*, 78 NY2d 880, 882). '[T]he existence of both residential and commercial uses on a property does not automatically disqualify a dwelling owner from invoking the exemption.

Instead, whether the exemption is available to an owner in a particular case turns on the site and purpose of the work' (*Cannon v Putnam*, 76 NY2d 644, 650; *see also*, *Khela v Neiger*, 85 NY2d 333, 337)" (*Hook v Quattrociocchi*, 231 AD2d 882, 883). Here, inasmuch as defendant never lived in the home at issue and he derived a commercial benefit from the property by earning interest on Jordan's payments under the contract, we conclude that defendant is not entitled to the benefit of the homeowner exemption (*see Van Amerogen*, 78 NY2d at 882-883; *Greenman v Page*, 4 AD3d 752, 753-754; *Sweeney v Sanvidge*, 271 AD2d 733, 733-735, *lv denied* 95 NY2d 931; *Trala v Egloff*, 258 AD2d 924, 924-925).

We next address plaintiff's cross motion for partial summary judgment on liability pursuant to Labor Law § 240 (1), and we agree with plaintiff that the court erred in denying it. Here, plaintiff met his initial burden on the cross motion by establishing that he was engaged in a protected activity, that he " 'was not furnished with the requisite safety devices and that the absence of appropriate safety devices was a proximate cause of his injuries' " (*Kuhn v Camelot Assn., Inc.* [appeal No. 2], 82 AD3d 1704, 1705; *see Felker v Corning Inc.*, 90 NY2d 219, 224; *see generally Scally v Regional Indus. Partnership*, 9 AD3d 865, 867). Plaintiff's work of installing siding is protected under section 240 (1) as an "alteration" (*see Belding v Verizon N.Y., Inc.*, 14 NY3d 751, 752-753; *see also Fiorentine v Militello*, 275 AD2d 990, 990-991; *Paterson v Hennessy*, 206 AD2d 919, 919). Moreover, plaintiff submitted evidence establishing that he fell 12 feet to the ground and shattered one of his elbows after the scaffolding that supported the ladder on which he was working shifted and caused the ladder to "flip[ ]" (*see Kin v State of New York*, 101 AD3d 1606, 1607; *Kirbis v LPCiminelli, Inc.*, 90 AD3d 1581, 1582; *Evans v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 1136).

In order to defeat the cross motion, defendant was required to "raise a triable issue of fact whether plaintiff's 'own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of [the] accident' " (*Kuhn*, 82 AD3d at 1705, quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40; *see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8). Defendant was thus "required to present 'some evidence that the device furnished was adequate and properly placed and that [plaintiff's] conduct . . . may [have been] the sole proximate cause of his . . . injuries' " (*Kirbis*, 90 AD3d at 1582). Defendant failed to meet that burden. Defendant appears to contend that a factfinder could conclude that the accident was the result of plaintiff's conduct rather than the equipment that he used, inasmuch as he failed to tie off the ladder and scaffolding prior to his fall. We reject that contention. Plaintiff testified that he was forced to place the ladder on top of the scaffolding to perform his work, and the scaffolding Jordan provided to plaintiff subsequently proved inadequate to protect him from the elevation-related risk attendant upon that work. Moreover, although plaintiff was a carpenter experienced in the use of that type of scaffolding, defendant failed to submit any evidence that plaintiff knew or should have known to tie off the scaffolding and/or the ladder

(*see Kin*, 101 AD3d at 1608; *Kuhn*, 82 AD3d at 1705-1706). We therefore reverse the judgment and order insofar as appealed from, deny that part of defendant's motion for summary judgment seeking dismissal of the section 240 (1) claim, reinstate that claim, and grant plaintiff's cross motion for partial summary judgment on liability with respect to that claim.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

560

CA 12-01542

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

IN THE MATTER OF THE ARBITRATION BETWEEN
JEFFREY GEE AND JAMAICA GEE,
PETITIONERS-APPELLANTS,

AND MEMORANDUM AND ORDER

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY, RESPONDENT-RESPONDENT.

THE GOLDEN LAW FIRM, UTICA (B. BROOKS BENSON OF COUNSEL), FOR PETITIONERS-APPELLANTS.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered May 2, 2012 in a proceeding pursuant to CPLR article 75. The order granted the motion of respondent to dismiss the petition to vacate the arbitration awards.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by confirming the awards and as modified the order is affirmed without costs.

Memorandum: Petitioners sustained injuries in an automobile accident in June 1996, and thereafter submitted their no-fault claims for loss of earnings and medical expenses to respondent. Following respondent's denial of most of those claims in April 1997, petitioners timely commenced a civil action in June 2002, i.e., within the six-year statute of limitations, rather than pursuing arbitration under the Insurance Law. In December 2005, shortly before the scheduled trial date, the parties agreed to submit the matter to arbitration. Petitioners' counsel notified Supreme Court (Daley, J.), in January 2006 that the case would proceed to arbitration and requested removal of the case from the trial calendar. In December 2009, petitioners filed their request for arbitration and thereafter, in the context of the arbitration, respondent moved to dismiss petitioners' claims on the ground that they were barred by the statute of limitations because more than 12 years had passed from accrual of the claims. The arbitrator agreed and dismissed the claims as time-barred, and a master arbitrator subsequently affirmed those awards. Petitioners thereafter commenced this proceeding in Supreme Court (Siegel, A.J.) pursuant to CPLR article 75 seeking to vacate the awards, and they now appeal from an order that, inter alia, granted respondent's motion to

dismiss the petition. Although we agree with respondent that petitioners were not entitled to vacatur of the awards, we note that the court erred in failing to confirm the awards pursuant to CPLR 7511 (e). We therefore modify the order accordingly.

Inasmuch as petitioners voluntarily pursued arbitration after they commenced a civil action, we conclude that our review is limited by the terms of CPLR 7511 (b) (1) and, "in the absence of proof of fraud, corruption, or other misconduct, the arbitrator's determination on [the] issue[] of . . . the application of the [s]tatute of [l]imitations . . . is conclusive" (*Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223). Here, petitioners offered no such proof. Contrary to petitioners' contention, "the arbitrator had the discretion to consider whether to apply . . . the bar [of the statute of limitations]" (*Siegel v Landy*, 95 AD3d 989, 992). Furthermore, we reject petitioners' contention that the master arbitrator exceeded his power by making a de novo finding that the agreement to arbitrate lacked a waiver of the statute of limitations by respondent (*see generally* CPLR 7511 [b] [1] [iii]). "To exclude a substantive issue from arbitration" (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308), the limitation upon the arbitrator's power "must be set forth as part of the arbitration clause" (*id.* at 307). Because no express limitation regarding the master arbitrator's power was specified in the parties' agreement to arbitrate, we conclude that the master arbitrator's finding was not in excess of his power (*see id.* at 307-308).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

571

KA 12-01656

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REMEHER PULLEY, 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 (William D. Walsh, J.), rendered December 15, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him based upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]), defendant contends that his waiver of the right to appeal is unenforceable and that his agreed-upon sentence is unduly harsh and severe. We perceive no infirmity in defendant's waiver of the right to appeal. County Court adequately advised defendant during the plea colloquy of his right to appeal, and defendant then signed a written waiver of the right to appeal. The record thus establishes that defendant 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 14, 2013

Frances E. Cafarell
Clerk of the Court

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

572

KA 12-00365

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROGER L. HUEBER, DEFENDANT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR DEFENDANT-APPELLANT.

ROGER L. HUEBER, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered January 5, 2012. The judgment convicted defendant, upon a nonjury verdict, of failure to register a change of address.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of failure to register a change of address as a sex offender (Correction Law § 168-f [4]), arising from the discovery by members of the Niagara Falls Police Department that no one resided at the address defendant had registered with the Division of Criminal Justice Services. Insofar as defendant contends that Supreme Court's determination after the suppression hearing that he had an expectation of privacy at the registered address rendered the evidence at trial legally insufficient as a matter of law to establish that he failed to "register with the division no later than ten calendar days after any change of address" (*id.*), defendant failed to preserve that contention for our review (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit because, even accepting that defendant had an expectation of privacy at the registered address, the evidence submitted at trial pursuant to the parties' stipulation is legally sufficient to establish that the house was vacant and defendant was living elsewhere (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that the court erred in denying his motion to dismiss the indictment because the local sex offender residency ordinances restricting his ability to find housing were preempted by state law or were otherwise unconstitutional. We reject

that contention. Inasmuch as defendant was charged with and convicted of a violation of Correction Law § 168-f (4) rather than a local ordinance, the local ordinances are not applicable herein.

To the extent that defendant contends in his pro se supplemental brief that defense counsel's failure to preserve certain contentions for our review deprived him of his right to effective assistance of counsel, that contention involves matters outside the record on appeal and must be raised by way of a motion pursuant to CPL article 440 (*see People v Stachnik*, 101 AD3d 1590, 1591, *lv denied* 20 NY3d 1104). Finally, we have reviewed the remaining contentions raised by defendant in his pro se supplemental brief and conclude that they are not preserved for our review (*see generally Gray*, 86 NY2d at 19), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

580

CA 12-02297

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

IN THE MATTER OF JON M. LADELFA, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF CHARLES MICHAEL LADELFA, DECEASED, PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

GERALD A. CONIGLIO, OBJECTANT-APPELLANT.

JONES & SKIVINGTON, GENESEO (PETER K. SKIVINGTON OF COUNSEL), FOR OBJECTANT-APPELLANT.

Appeal from a modified decree of the Surrogate's Court, Livingston County (Dennis S. Cohen, S.), entered March 13, 2012. The modified decree judicially settled the final account of Jon M. LaDelfa, Administrator of the Goods, Chattels and Credits of Charles Michael LaDelfa, deceased.

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

Memorandum: Objectant appeals from a modified decree of Surrogate's Court that settled the final account of petitioner, the administrator of decedent's estate, and, in doing so, denied objectant's claim against the estate for unpaid rent allegedly owed to him by decedent. In a prior appeal involving the same parties and the same claim against the estate, we held that, "[o]nce objectant's claim was allowed by petitioner, as the administrator, and no parties who would be adversely affected by the claim filed objections thereto, the claim was prima facie valid . . . Indeed, it was 'just as effective . . . as a judgment of a court of competent jurisdiction' . . . The Surrogate was thus required to 'confirm the allowance . . . and direct that [it] be paid' . . . , and the Surrogate could not require petitioner, as the administrator, to prove that the claim was legally valid" (*Matter of LaDelfa [Coniglio]*, 82 AD3d 1683, 1683-1684). We modified the decree by granting objectant's claim, and we remitted the matter "for further proceedings" (*id.* at 1683). On remittal, the Surrogate refused to sign petitioner's proposed amended decree and, in reliance on *Matter of Stortecky v Mazzone* (85 NY2d 518), denied objectant's subsequent motion seeking approval of his claim.

Contrary to our statement in *LaDelfa* that a Surrogate is required to confirm an accounting in the absence of an objection, the Court of Appeals has held that a Surrogate has an independent, statutory duty to "settle the account as justice requires . . . , [and] to require the Surrogate to 'rubber stamp' the account because the parties do not

object to it would vitiate [that] statutory directive . . . Indeed, it would seem self-evident that if a Surrogate acts judicially in approving an account and may not be compelled to enter a decree, then the court must have the correlative power to deny a decree or, when inquiry is warranted, to satisfy itself on questions arising during the proceedings" (*Stortecky*, 85 NY2d at 524; *see* SCPA 201 [3]; 2211 [1]; *Matter of Schultz*, 104 AD3d 1146, 1149). Thus, to the extent that our decision in *LaDelfa* held that a Surrogate is required to confirm an accounting in the absence of an objection, the decision should not be followed.

It is well settled that, until a decision of this Court is " 'modified or reversed by a higher court, . . . the trial court is bound by our decision' " (*J.N.K. Mach. Corp. v TBW, Ltd.*, 98 AD3d 1259, 1260; *see Senf v Staubitz*, 11 AD3d 997, 997), regardless of whether our decision was correctly decided (*see Bolm v Triumph Corp.*, 71 AD2d 429, 434, *lv dismissed* 50 NY2d 801, 928). We thus conclude that the Surrogate erred in failing to comply with our prior decision. Nevertheless, this Court is not likewise required to follow our prior decision under the doctrine of law of the case. Indeed, for the reasons that follow, we conclude that we should not apply the doctrine of law of the case herein, and we therefore affirm the modified decree denying objectant's claim against the estate.

"As the doctrine of . . . law of the case is not one of inflexible law, but permits a reasoned exercise of a certain degree of discretion in its application, the better rule is that the doctrine should not be utilized to accomplish an obvious injustice, or applied where the former appellate decision was clearly, palpably, or manifestly erroneous or unjust . . . [T]he effect of a prior ruling by an appellate court in a later appeal before that court, or in a subsequent stage of the same appeal before that court, presents the problem of balancing the interest in foreclosing reconsideration of the prior decision with the desire for a just result . . . Most jurisdictions still consider the former adjudication binding except where the prior decision was clearly erroneous or worked manifest injustice" (*People v Palumbo*, 79 AD2d 518, 524-525, *affd* 53 NY2d 894 [internal quotation marks omitted]).

We recognize that our earlier decision was "clearly erroneous" (*Palumbo*, 79 AD2d at 525 [internal quotation marks omitted]), as "shown by contrary authority emanating from [the Court of Appeals,] whose rulings . . . are controlling" (Schopler, E. H., Annotation, *Erroneous Decision as Law of the Case on Subsequent Appellate Review*, 87 ALR2d 271, § 2; *see Stortecky*, 85 NY2d at 524). We also conclude that "correction of the error made on the former appeal [will] create no injustice or hardship, [inasmuch as] no change has been made in the status of the parties in reliance upon the ruling in the former appeal" (Schopler, E. H., 87 ALR2d 271 at § 15 [a]). No one has "surrendered, in reliance thereon, substantial and valuable rights [that] cannot be restored by the court, and . . . no rights of property have become vested" (*id.*). Moreover, "the decision on the first appeal was erroneous as a matter of substantive law and this error [will] . . . affect[ ] not only the parties to the proceeding .

. . but also, by virtue of the strength of the former decision as a precedent, all other persons in the jurisdiction" (*id.* at § 16).

In accordance with the controlling decision of the Court of Appeals in *Stortecky*, we conclude that the Surrogate retained the independent authority to review the final account submitted by petitioner, and we further conclude that the Surrogate's determination that "a true landlord/tenant relationship . . . absolutely, positively . . . [did not] exist" was not against the weight of the credible evidence (*see generally Matter of Piotrowski*, 25 AD3d 965, 966, *lv denied* 7 NY3d 703). There was no rental agreement or arrangement between objectant and the deceased, and the deceased "never paid rent" over a period of 28 to 32 months. While objectant may have performed "a favor" for decedent to "help him out," the Surrogate determined that objectant's generosity did not establish a legal claim against the estate. We see no basis to disturb the Surrogate's findings, "which are entitled to great weight inasmuch as they 'hinged on the credibility of the witnesses' " (*Matter of Makitra*, 101 AD3d 1579, 1581; *see generally Matter of Poggemeyer*, 87 AD2d 822, 823).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

584

CA 13-00044

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

BRIAN HORST, PLAINTIFF,
AND GEORGIE HORST, INDIVIDUALLY AND AS PARENT AND GUARDIAN OF JENNIFER A. HAM AND VERNON M. HORST,
PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

GERALD J. GLOGOWSKI, DEFENDANT-RESPONDENT,
AND JOHN T. NOTHNAGLE, INC., DOING BUSINESS AS NOTHNAGLE REALTORS, DEFENDANT-APPELLANT.

KNAUF SHAW LLP, ROCHESTER (DWIGHT E. KANYUCK OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

BENDER & BENDER, LLP, BUFFALO (THOMAS W. BENDER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MILBER MAKRIS PLOUSADIS & SEIDEN, LLP, WILLIAMSVILLE (RICHARD A. LILLING OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered March 14, 2012. The order granted the cross motion of defendant Gerald J. Glogowski for summary judgment, dismissed the complaint against defendant Gerald J. Glogowski and denied the motion of defendant John T. Nothnagle, Inc., doing business as Nothnagle Realtors, for summary judgment dismissing the complaint.

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

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

587

CA 12-02172

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

DIPIZIO CONSTRUCTION COMPANY, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA FRONTIER TRANSPORTATION AUTHORITY,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (DAVID H. ELIBOL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered October 11, 2012. The order granted the motion of defendant for partial summary judgment.

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

Memorandum: Defendant entered into a contract with plaintiff for the construction and renovation of certain runways and taxiways at the Buffalo Niagara International Airport. Following completion of the project, plaintiff commenced this action seeking damages for, inter alia, breach of contract based upon allegations that defendant's conduct caused delays in the work and defendant refused to grant extensions of time to complete the work. Supreme Court granted defendant's motion for partial summary judgment seeking dismissal of all but the 3rd and 15th causes of action, and a portion of the fourth cause of action. The ninth cause of action was previously dismissed. We affirm.

Contrary to plaintiff's contention, defendant established that plaintiff failed to comply with the notice and reporting requirements contained in the contract. Thus, we conclude that the court properly granted those parts of defendant's motion with respect to the first, second, fifth, sixth, and seventh causes of action, as well as the 10th and 14th causes of action. Clauses of a contract that "require the contractor to promptly notice and document its claims made under the provisions of the contract governing the substantive rights and liabilities of the parties . . . are . . . conditions precedent to suit or recovery" (*A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92

NY2d 20, 30-31, *rearg denied* 92 NY2d 920). Here, the contract required that claims for extra costs due to delays "shall be in sufficient detail to enable the Engineer to ascertain the basis and amount of said claims" and that "[a]ny claim . . . for equitable adjustment on account of delay for any cause must be accompanied by a revised progress schedule reflecting the effects of the delay and proposals to minimize those effects." The contract further provided that "[f]ailure to submit such information and details will be sufficient cause for denying the Contractor's claims." We conclude that defendant established that plaintiff failed to comply with those notice and reporting requirements, and plaintiff did not raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to plaintiff's further contention, the "assertion that [it was] extremely difficult to calculate the extra . . . costs does not justify [plaintiff's] failure to comply with the notice and reporting requirements of the contract" (*Rifenburg Constr., Inc. v State of New York*, 90 AD3d 1498, 1499).

Plaintiff further contends that the court erred in granting defendant's motion insofar as it sought summary judgment dismissing that part of the fourth cause of action seeking damages caused by defendant's alleged refusal to allow plaintiff to use half-inch thick steel plates as a temporary measure for covering holes on the airport runways and taxiways. We reject that contention. Defendant established that the contract did not allow plaintiff to use unsafe materials and that three separate engineering firms, including one employed by plaintiff, determined that half-inch thick steel plates could not support the weight of the aircraft that used the airport, and plaintiff failed to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

We also reject plaintiff's contention that the court erred in granting that part of defendant's motion with respect to the eighth cause of action, for breach of the duty of good faith and fair dealing, inasmuch as that cause of action was duplicative of the breach of contract causes of action (*see Utility Servs. Contr., Inc. v Monroe County Water Auth.*, 90 AD3d 1661, 1662, *lv denied* 19 NY3d 803; *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426, *lv denied* 15 NY3d 704). Likewise, the court properly granted those parts of defendant's motion with respect to the 11th cause of action, for quantum meruit, and the 12th cause of action, for unjust enrichment, as duplicative of the breach of contract causes of action (*see Leo J. Roth Corp. v Trademark Dev. Co., Inc.*, 90 AD3d 1579, 1581). Contrary to plaintiff's further contention, the court properly granted that part of defendant's motion with respect to the 13th cause of action, for promissory estoppel, because "the representations made by defendant[] d[id] not constitute a clear and unambiguous promise to plaintiff" (*Chemical Bank v City of Jamestown*, 122 AD2d 530, 531, *lv denied* 68 NY2d 608; *see New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491). In light of our determination, we do not address plaintiff's remaining contentions.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

588

CA 12-02173

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

DIPIZIO CONSTRUCTION COMPANY, INC.,
PLAINTIFF-APPELLANT,

V ORDER

NIAGARA FRONTIER TRANSPORTATION AUTHORITY,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (DAVID H. ELIBOL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered October 11, 2012. The order granted the motion of defendant to settle the order on defendant's prior motion for partial summary judgment.

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

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

592

KA 11-02142

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN RAYNOR, 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 (Kenneth F. Case, J.), rendered August 24, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted rape 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 rape in the first degree (Penal Law §§ 110.00; 130.35 [4]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). County Court advised defendant at the time of the waiver of the potential maximum term of incarceration, and thus the waiver encompasses defendant's present challenge to the severity of his sentence (*see People v Grant*, 96 AD3d 1697, 1697, *lv denied* 19 NY3d 997; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

598

KA 12-02317

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IAN GOREE, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ 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 (M. William Boller, A.J.), rendered October 14, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, aggravated unlicensed operation of a motor vehicle in the third degree and driving without a safety belt.

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, inter alia, criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]), defendant contends that Supreme Court failed to conduct a sufficient inquiry pursuant to *People v Outley* (80 NY2d 702) into his violation of the conditions of the plea agreement before imposing an enhanced sentence. We conclude that defendant's contention is not preserved for our review inasmuch as he failed to request such a hearing and did not move to withdraw his plea on that ground (*see People v Scott*, 101 AD3d 1773, 1773; *People v Anderson*, 99 AD3d 1239, 1239, *lv denied* 20 NY3d 1059), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Scott*, 101 AD3d at 1773; *People v Darcy*, 34 AD3d 230, 231, *lv denied* 8 NY3d 879). We further conclude that the enhanced sentence is not unduly harsh or severe.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

600

CA 12-01504

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

IN THE MATTER OF MICHAEL GONZALEZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DALE ARTUS, SUPERINTENDENT, GOWANDA CORRECTIONAL FACILITY, AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

MICHAEL GONZALEZ, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Penny M. Wolfgang, J.), dated June 26, 2012 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus. Supreme Court (Feroleto, J.) converted the proceeding to one pursuant to CPLR article 78. The case was then assigned to a different Supreme Court Justice (Wolfgang, J.), who ultimately dismissed the petition. Petitioner appeals, and we affirm.

Respondents concede that the record does not conclusively establish that petitioner failed to exhaust his administrative remedies, and thus we reach the merits of this appeal (*cf. generally Matter of Karlin v Cully*, 104 AD3d 1285, 1286). Here, petitioner pleaded guilty to violating two conditions of his parole. Petitioner now challenges the parole revocation determination on the ground that one of the conditions of parole at issue, i.e., the condition precluding fraternization with any person petitioner knows to have a criminal record (fraternization condition) (*see* 9 NYCRR 8003.2 [g]), is unconstitutionally vague. That challenge survives petitioner's guilty plea (*see People v Hansen*, 95 NY2d 227, 231 n 2*; People v Lee*, 58 NY2d 491, 494), but is not properly before us inasmuch as the record does not establish that it was raised before the motion court (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985; *cf. Palermo v Taccone*, 79 AD3d 1616, 1618). Petitioner's further contention that

the fraternization condition was arbitrarily applied to him is foreclosed by his guilty plea (*see Hansen*, 95 NY2d at 231 n 3; *People v Rodriguez*, 55 NY2d 776, 777). Additionally, with respect to both of the conditions of parole at issue, we note that petitioner's "plea of guilty . . . precludes [a] challenge to the legal sufficiency of the evidence of guilt" and, "[i]n any event, the guilty plea constitutes substantial evidence of his guilt" (*Matter of Holdip v Travis*, 9 AD3d 825, 826). We have reviewed petitioner's remaining contention and conclude that it lacks merit.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

612

KA 11-01649

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAVON TURRENTINE, 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 (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 15, 2011. The judgment convicted defendant, upon his plea of guilty, of vehicular manslaughter 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 vehicular manslaughter in the second degree (Penal Law § 125.12 [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 14, 2013

Frances E. Cafarell
Clerk of the Court

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

616

KA 08-02220

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHERROD CARTER, DEFENDANT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered August 26, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and 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, following a jury trial, of murder in the second degree (Penal Law § 125.25 [3]) and robbery in the first degree (§ 160.15 [1]), defendant contends that the evidence is legally insufficient to establish that any robbery occurred and thus legally insufficient to establish that the victim died "in the course of and in furtherance of" a robbery (§ 125.25 [3]). Defendant's contention, however, "is not preserved for our review because defendant failed to renew his motion for a trial order of dismissal after presenting proof" (*People v Youngs*, 101 AD3d 1589, 1590, *lv denied* 20 NY3d 1105; *see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, defendant's contention lacks merit. As the Court of Appeals wrote in deciding the appeals of defendant's two accomplices, "[w]hen three men beat a fourth man unconscious in a field, and emerge from the field as a group with one of them carrying a pair of sneakers, the inference that the sneakers came from the beating victim is a strong one" (*People v Becoats*, 17 NY3d 643, 654, *cert denied* ___ US ___, 132 S Ct 1970). We likewise reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to renew the motion for a trial order of dismissal (*see People v Pytlak*, 99 AD3d 1242, 1243, *lv denied* 20 NY3d 988; *People v Tolliver*, 93 AD3d 1150, 1151, *lv denied* 19 NY3d 968; *see generally People v Caban*, 5 NY3d 143, 152).

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). Although defense counsel impeached portions of the testimony of the eyewitness, defendant's statement to the police corroborated most of her testimony. The only portion of the eyewitness's testimony not corroborated by defendant's statement concerned the conduct of defendant after the victim got up and tried to run away. According to the eyewitness, defendant continued to aid his accomplices in their assault of the victim. A defense witness testified, however, that defendant left the scene at that time, while defendant in his statement to the police stated that he was too drunk to recall what he did after the victim tried to run away. Thus, it was for the jury to determine whether to credit the testimony of the defense witness or the eyewitness on that issue. Inasmuch as the testimony of the eyewitness " 'was not so inconsistent or unbelievable as to render it incredible as a matter of law[,]' . . . [we] see no reason to disturb the jury's resolution of credibility issues" (*People v Adams*, 59 AD3d 928, 929, *lv denied* 12 NY3d 813; *see People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925; *People v Coffin*, 38 AD3d 1316, 1316-1317, *lv denied* 9 NY3d 841).

In view of our conclusion that the evidence presented at trial is legally sufficient to support the conviction, defendant's "contention that the evidence presented to the grand jury was legally insufficient is not reviewable on appeal" (*People v Brown*, 96 AD3d 1561, 1562, *lv denied* 19 NY3d 1024; *see People v Snyder*, 100 AD3d 1367, 1368; *see generally* CPL 210.30 [6]). We further conclude that Supreme Court did not abuse its discretion in admitting the victim's autopsy photographs in evidence (*see generally People v Stevens*, 76 NY2d 833, 835). Defendant was initially charged with intentional murder (Penal Law § 125.25 [1]), and those photographs were relevant to establish the severity of the assault and defendant's intent in committing the crimes charged (*see People v Hernandez*, 79 AD3d 1683, 1684, *lv denied* 16 NY3d 895; *People v Jones*, 43 AD3d 1296, 1297-1298, *lv denied* 9 NY3d 991, *reconsideration denied* 10 NY3d 812).

Defendant further contends that the court erred in determining that the eyewitness's identification of defendant from a single photograph was a confirmatory identification. We reject that contention. The evidence at the suppression hearing established that the eyewitness was familiar with defendant from the neighborhood, knew the nicknames of all the alleged perpetrators, had interacted with defendant on the day of the incident and had an opportunity to view him during most of the criminal transaction (*see e.g. People v Whitlock*, 95 AD3d 909, 909-911, *lv denied* 19 NY3d 978; *People v Corbin*, 90 AD3d 478, 478-479, *lv denied* 19 NY3d 972; *People v Perez*, 12 AD3d 1028, 1030, *lv denied* 4 NY3d 801; *cf. People v Coleman*, 73 AD3d 1200, 1202-1203).

To the extent that defendant contends that the count of the indictment charging him with robbery is facially duplicitous, that contention is not preserved for our review (*see Becoats*, 17 NY3d at 650). In any event, that contention lacks merit (*see Becoats*, 71 AD3d

1578, 1579, *affd* 17 NY3d 643; *People v Wright*, 63 AD3d 1700, 1702, *revd on other grounds* 17 NY3d 643), and we thus conclude that defendant was not denied effective assistance of counsel based on defense counsel's failure to preserve that contention for our review (*see Caban*, 5 NY3d at 152; *People v Harris*, 97 AD3d 1111, 1111-1112, *lv denied* 19 NY3d 1026). Finally, although defendant's contention that the robbery count was rendered duplicitous by the trial testimony does not require preservation (*see People v Bradford*, 61 AD3d 1419, 1420-1421, *affd* 15 NY3d 329; *People v Snyder*, 100 AD3d 1367, 1367), we reject that contention (*see Becoats*, 71 AD3d at 1579, *affd* 17 NY3d 643; *Wright*, 63 AD3d at 1702, *revd on other grounds* 17 NY3d 643).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

639

KA 12-00205

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RALPH A. PRINCIPIO, DEFENDANT-APPELLANT.

TIMOTHY J. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered December 22, 2011. The judgment convicted defendant, upon a jury verdict, of menacing a police officer or peace officer, menacing in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of menacing a police officer or peace officer (Penal Law § 120.18), menacing in the first degree (§ 120.13), and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant failed to preserve for our review his contention that he was deprived of a fair trial by certain remarks made by the prosecutor during his summation (*see People v Figgins*, 72 AD3d 1599, 1600, *lv denied* 15 NY3d 893; *People v Lawson*, 40 AD3d 657, 658, *lv denied* 9 NY3d 877). In any event, any prejudice arising from the prosecutor's single misstatement regarding defendant's testimony was dispelled when that testimony was read back to the jury during the course of its deliberations (*see generally People v Mills*, 159 AD2d 437, 437, *lv denied* 76 NY2d 739). Moreover, County Court expressly instructed the jurors prior to summations that they alone were the finders of fact, that if one of the attorneys asserted a fact not in evidence, it must be disregarded, and that it was the jurors' own recollection of the evidence that controlled (*see People v Lawson*, 40 AD3d 657, 658, *lv denied* 9 NY3d 877; *People v Gibson*, 18 AD3d 335, 335, *lv denied* 5 NY3d 789).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes of menacing a police officer or peace officer and menacing in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict with regard to

those crimes is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "Although there was evidence at trial that defendant consumed a significant quantity of alcohol on the night of the incident, [a]n intoxicated person can form the requisite criminal intent to commit a crime, and it is for the trier of fact to decide if the extent of the intoxication acted to negate the element of intent" (*People v Felice*, 45 AD3d 1442, 1443, *lv denied* 10 NY3d 764 [internal quotation marks omitted]; *see People v Mateo*, 70 AD3d 1331, 1331, *lv denied* 15 NY3d 753). Affording deference to the jury's credibility determinations here, "we cannot say that the jury improperly weighed the evidence in deciding in the People's favor the extent of defendant's intoxication" (*People v Scott*, 47 AD3d 1016, 1019, *lv denied* 10 NY3d 870). Nor was it improper for the jury to reject defendant's contention that his head injury prevented him from forming the requisite intent to commit the crimes. Further, the weight of the evidence supports the jury's conclusion that defendant knew or reasonably should have known that the victim was a police officer (*see* Penal Law § 120.18).

Finally, the sentence is not unduly harsh or severe.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

640

KA 12-00605

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWIGHT MOSS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered March 5, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that defendant is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that Supreme Court violated Correction Law § 168-n (3) by making an upward departure from the presumptive risk level without requiring the People to provide him with prior notice of their intent to seek such a departure. We reject that contention. The Risk Assessment Instrument (RAI) prepared by the Board of Examiners of Sex Offenders assigned defendant 115 points, rendering him a presumptive level three risk. At the SORA hearing, the court agreed with defendant that he was incorrectly assessed 10 points for the recency of his prior offense, and thus the court reduced his RAI score by that amount, which placed him at the high end of the range for a presumptive level two risk. The court, however, properly concluded that, because defendant had convictions for two prior sex offenses, he is nevertheless a level three risk based on the presumptive override for a prior felony conviction of a sex crime (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 3-4 [2006]; *People v Barnes*, 34 AD3d 1227, 1227-1228, *lv denied* 8 NY3d 803; *see also People v Iverson*, 90 AD3d 1561, 1562, *lv denied* 18 NY3d 811). Defendant's reliance on the relevant notice provisions in Correction Law § 168-n (3) is misplaced inasmuch as the People did not

seek an upward departure.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

644

KA 10-02341

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RONALD WENDT, II, ALSO KNOWN AS RONALD J. WENDT, II, ALSO KNOWN AS RONALD J. WENDT, DEFENDANT-APPELLANT.

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 November 15, 2010. The judgment convicted defendant, upon a jury verdict, of aggravated vehicular homicide, vehicular manslaughter in the second degree, manslaughter in the second degree, driving while intoxicated, a misdemeanor (two counts), vehicular assault in the second degree (two counts), aggravated vehicular assault, assault in the second degree (two counts) and assault in the third degree.

Now, upon reading and filing the stipulation of discontinuance signed by the defendant and by the attorneys for the parties on June 5, 2013,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

647

KA 10-02201

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL M. LARRABEE, DEFENDANT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered August 19, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and possession of burglar's tools.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]) and possession of burglar's tools (§ 140.35). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as he made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19), and he failed to renew that motion after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). 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 further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 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]).

We agree with defendant that County Court erred in admitting evidence with respect to modifications made to the victim's home after the burglary and as to the effect of the burglary on the children who resided in that home (*see People v Kelly*, 71 AD3d 1520, 1521, *lv denied* 15 NY3d 775; *see generally People v Scarola*, 71 NY2d 769, 777). We note that, even assuming, arguendo, that defendant's contention is unpreserved for our review, we would nevertheless exercise our power

to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We conclude, however, that the error is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the admission of that testimony (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

648

KA 12-00470

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON STEVENSON, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered September 28, 2011. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, the superior court information is dismissed and the matter is remitted to Erie County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [1]). Defendant was charged by felony complaint with the forcible rape of one individual, but after arraignment and his waiver of indictment, County Court granted the People's motion to amend the superior court information (SCI) to charge defendant with the forcible rape of a different individual. The court accepted defendant's guilty plea to the charge of forcible rape with respect to the second individual.

As the People correctly concede, the SCI is jurisdictionally defective, and we therefore reverse the judgment of conviction. We note that defendant's contention that the SCI is jurisdictionally defective does not require preservation, and that contention survives defendant's valid waiver of the right to appeal (*see People v Cieslewicz*, 45 AD3d 1344, 1345; *People v Edwards*, 39 AD3d 875, 876-877). "[T]he designation of a[n individual] in the [SCI] different from the [individual] named in the felony complaint renders the crime contained in the information a different crime entirely" (*Edwards*, 39 AD3d at 876). Thus, defendant was not held for action of a grand jury on the charge in the SCI inasmuch as "it was not an offense charged in the felony complaint or a lesser-included offense of an offense charged in the felony complaint" (*Cieslewicz*, 45 AD3d at 1345

[internal quotation marks omitted]; *see generally* CPL 195.20).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

665

KA 12-00813

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHAN A. WROBLEWSKI, DEFENDANT-APPELLANT.

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

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered March 30, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree, attempted burglary in the first degree, and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]), defendant contends that his sentence is unduly harsh and severe. As part of the plea agreement, however, defendant waived his right to appeal. Because County Court advised defendant of the maximum sentence that could be imposed prior to his waiver and defendant does not otherwise challenge the voluntariness of his waiver, he is foreclosed from challenging the severity of his sentence on appeal (*see People v Lococo*, 92 NY2d 825, 827; *People v Grant*, 96 AD3d 1697, 1697, *lv denied* 19 NY3d 997; *cf. People v Newman*, 21 AD3d 1343, 1343).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

670

KA 11-01652

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL IMES, 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 R. PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 17, 2011. The judgment convicted defendant, upon a nonjury verdict, of rape in the first degree, sexual abuse in the first degree, reckless endangerment in the first degree and unlawfully fleeing a police officer in a motor vehicle 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, following a nonjury trial, of rape in the first degree (Penal Law § 130.35 [1]), sexual abuse in the first degree (§ 130.65 [1]), reckless endangerment in the first degree (§ 120.25), and unlawfully fleeing a police officer in a motor vehicle in the third degree (§ 270.25), defendant contends that the verdict is against the weight of the evidence insofar as Supreme Court found him guilty of rape and sexual abuse. We reject that contention. Defendant specifically contends that a finding that any sexual contact he had with the victim was consensual would not have been unreasonable, particularly in view of the questionable credibility of the victim. "[T]he appropriate standard for evaluating a weight of the evidence argument on appeal is the same regardless of whether the finder of fact was a judge or a jury . . . because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record" (*People v Lane*, 7 NY3d 888, 890). Viewing the evidence in light of the elements of the crimes of rape and sexual abuse in this nonjury trial (*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). "Although there was conflicting testimony and thus 'an acquittal would not have been unreasonable' "

(*People v Burroughs*, 57 AD3d 1459, 1460, *lv denied* 12 NY3d 756), the weight of the credible evidence supports the verdict (*see generally Bleakley*, 69 NY2d at 495). We further conclude that the sentence is not unduly harsh or severe.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

671

CAF 12-00968

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

IN THE MATTER OF TIMOTHY RADLEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KATHY RADLEY, RESPONDENT-APPELLANT.

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

DONALD P. VAN STRY, ATTORNEY FOR THE CHILDREN, SYRACUSE.

Appeal from an order of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered May 9, 2012. The order, among other things, awarded petitioner sole legal and physical custody of the parties' children.

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

Memorandum: Respondent mother appeals from an order that, inter alia, awarded petitioner father sole legal and physical custody of the parties' children and granted visitation to the mother. We reject the mother's contentions that Supreme Court placed too much emphasis upon the wishes of the children and that the award of custody to the father was not in the children's best interests. The court's determination is "entitled to great deference" and will not be disturbed where, as here, "the record establishes that it is the product of 'careful weighing of [the] appropriate factors' . . . and it has a sound and substantial basis in the record" (*Matter of McLeod v McLeod*, 59 AD3d 1011, 1011). Although the wishes of the children are "but one factor to be considered" when determining the relative fitness of the parties and the custody arrangement that serves the best interests of the children (*Eschbach v Eschbach*, 56 NY2d 167, 173), we conclude that the court properly weighed and considered all of the relevant factors, some of which favored the father while others favored the mother. Giving due deference to the court's "superior ability to evaluate the character and credibility of the witnesses" (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625), we perceive no basis to disturb its award of custody to the father. We reject the mother's alternate contention that this Court should award the parties joint custody, inasmuch as "the deterioration of the parties' relationship and their inability to coparent renders [a] joint custody arrangement unworkable" (*Matter of York v Zullich*, 89 AD3d 1447, 1448; *see Matter of Ingersoll v Platt*,

72 AD3d 1560, 1561; *Matter of Francisco v Francisco*, 298 AD2d 925, 925, *lv denied* 99 NY2d 504).

We have considered the mother's remaining contention and conclude that it is without merit.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

674

CAF 12-00947

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

IN THE MATTER OF CASEY C.T.,
RESPONDENT-APPELLANT.

GENESEE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

CHARLES PLOVANICH, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (DURIN B. ROGERS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 1, 2012 in a proceeding pursuant to Family Court Act article 3. The order adjudged respondent to be a juvenile delinquent and placed him on probation for a period of twelve months.

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

Memorandum: Respondent appeals from an order adjudicating him to be a juvenile delinquent based upon his admission that he committed acts that, if committed by an adult, would constitute the crime of criminal mischief in the fourth degree (Penal Law § 145.00 [1]). We reject respondent's contention that the petition was jurisdictionally defective because the allegations of the factual part of the petition consisted solely of hearsay, in violation of Family Court Act § 311.2 (3). The petition states that the information contained therein was derived from "statements and admissions of Respondent and/or the statements and depositions of witnesses now filed with this court." Those statements included confessions from respondent and his accomplices, as well as depositions of various other witnesses. There is no support in the record for respondent's assertion that the statements in question were not actually filed with the petition. In any event, we note that respondent's assertion was refuted by the clerk of Family Court, who submitted an affidavit in support of petitioner's motion to strike that portion of respondent's reply brief in which he makes the assertion. We thus conclude that "the non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof" (§ 311.2 [3]; *see Matter of Angel A.*, 92 NY2d 430, 433).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

683

KA 11-02464

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JORDAN J. ELLISON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered December 7, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree and petit larceny.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Monroe County Court for further proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of burglary in the third degree (Penal Law § 140.20) and petit larceny (§ 155.25). Contrary to defendant's contention concerning the burglary count, the evidence is legally sufficient to establish that he knowingly entered Macy's Department Store (Macy's) at the Marketplace Mall, after having been banned from entering the mall for his lifetime, with the intent to commit a crime (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's further contention, County Court did not abuse its discretion in permitting the People to question him on cross-examination with respect to five prior convictions for petit larceny and one for burglary in the third degree, but refusing to permit the People to question him with respect to several other petit larceny convictions (*see generally People v Smith*, 18 NY3d 588, 593; *People v Hayes*, 97 NY2d 203, 207). "[A]n 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).

Defendant also contends that the People failed to meet their burden of establishing that there was probable cause to arrest him because the arrest was based upon information received in a call from Macy's security personnel that did not satisfy the *Aguilar-Spinelli*

test, which requires " 'a showing that the informant is reliable and has a basis of knowledge for the information imparted' " (*People v Flowers*, 59 AD3d 1141, 1142). We reject that contention. The Sheriff's deputies who responded to the radio call from security personnel at Macy's were in their office located at the Marketplace Mall when they were advised that a black male carrying a garbage bag containing clothing for which he had not paid had exited the store at the mall entrance. The Sheriff's deputies immediately proceeded toward the Macy's store and encountered defendant, who matched the description provided by Macy's security personnel, as well as the security personnel who had made the call and had followed defendant out of the store (*cf. People v Parris*, 83 NY2d 342, 350; *People v Dodt*, 61 NY2d 408, 415-416). We therefore conclude that the court properly determined that there was probable cause to arrest defendant. Inasmuch as there was no " 'police-arranged confrontations between a defendant and an eyewitness' " (*People v Dixon*, 85 NY2d 218, 222), we reject defendant's contention that the court erred in determining that no *Wade* hearing was required with respect to the identification of defendant by security personnel. We have reviewed defendant's remaining contention and conclude that it has no merit.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

686

KA 11-01414

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYSHAWN BUSH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS 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 (Penny M. Wolfgang, J.), rendered March 21, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that the suppression court (DiTullio, J.) erred in refusing to suppress the weapons seized from the vehicle he was driving and the statements he made to police officers following his arrest. The credibility determinations of the suppression court "are entitled to great deference on appeal and will not be disturbed unless clearly unsupported by the record" (*People v Spann*, 82 AD3d 1013, 1014 [internal quotation marks omitted]). Contrary to defendant's contention, the testimony of two of the police officers that they observed defendant drinking from a Budweiser beer bottle as he drove the vehicle is not incredible as a matter of law (*see People v Villanueva*, 137 AD2d 852, 853, *lv denied* 71 NY2d 1034). Nor is the arresting officer's testimony that he observed a revolver in plain view inside the vehicle "unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v James*, 19 AD3d 617, 618, *lv denied* 5 NY3d 829). The suppression court was entitled to credit the testimony of the officers (*see People v Gandy*, 85 AD3d 1595, 1596, *lv denied* 17 NY3d 859) and, on the basis of that testimony, properly concluded that the People met their burden of establishing "the legality of the police conduct in the first instance" (*People v Berrios*, 28 NY2d 361,

367; *see Spann*, 82 AD3d at 1014).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

688

KA 04-02820

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KELVIN ROBINSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), rendered November 3, 2004. 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 reversed on the law, the plea is vacated and the matter is remitted to Niagara County Court for further proceedings on the indictment.

Memorandum: We previously granted defendant's motion for a writ of error coram nobis (*People v Robinson*, 98 AD3d 1324). We therefore review, de novo, defendant's appeal from a judgment convicting him, upon his plea of guilty in 2004, of depraved indifference murder (Penal Law § 125.25 [2]) in connection with the stabbing death of his wife.

Defendant's contention that his plea was not knowing and voluntary survives his waiver of the right to appeal (*see People v Seaburg*, 74 NY2d 1, 10). Preservation of the contention is not required inasmuch as defendant correctly contends that his statements during the plea colloquy cast significant doubt upon his guilt (*see People v Mox*, 84 AD3d 1723, 1724, *affd* 20 NY3d 936). Defendant stated that he struggled with his wife for control of the knife and that he acted recklessly when he stabbed her, and thus his statements suggest that he did not act with the requisite "depraved indifference state of mind" (*People v Jones*, 64 AD3d 1158, 1159, *lv denied* 13 NY3d 860). Indeed, it is well established that a "one-on-one . . . knifing . . . can almost never qualify as depraved indifference murder" (*People v Payne*, 3 NY3d 266, 272, *rearg denied* 3 NY3d 767; *see People v Suarez*, 6 NY3d 202, 211-212). We therefore conclude that County Court erred by accepting the plea without further inquiry to ensure that

defendant's plea was knowing and voluntary (*see Mox*, 84 AD3d at 1724). We note that, "[a]lthough defendant entered his guilty plea before the Court of Appeals decided [*People v*] *Feingold* [(7 NY3d 288, 296)], which definitively stated for the first time that the depraved indifference element of depraved indifference murder is a culpable mental state rather than the circumstances under which the killing is committed . . . , we nevertheless conclude that *Feingold* applies herein" inasmuch as defendant's direct appeal in *People v Robinson* (41 AD3d 1314, *lv denied* 9 NY3d 880) was pending when *Feingold* was decided (*Jones*, 64 AD3d at 1159). We therefore reverse the judgment of conviction, vacate the plea and remit the matter to County Court for further proceedings on the indictment.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

706

TP 12-02304

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

IN THE MATTER OF ERIC FECHTER, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES AND NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

HOGAN & WILLIG, PLLC, AMHERST (KEVIN S. MAHONEY OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT NEW YORK STATE OFFICE OF CHILDREN AND FAMILY 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, Niagara County [Ralph A. Boniello, III, J.], entered August 13, 2012) to review a determination of respondent New York State Office of Children and Family Services. The determination denied petitioner's request that an indicated report of maltreatment be amended to unfounded.

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 to review a determination, made after a fair hearing, denying his request to amend an indicated report of maltreatment with respect to his daughter to an unfounded report, and to seal it (*see* Social Services Law § 422 [8] [a] [v]; [c] [ii]). "Our review . . . is limited to whether the determination was supported by substantial evidence in the record on the petitioner['s] application for expungement" (*Matter of Mangus v Niagara County Dept. of Social Servs.*, 68 AD3d 1774, 1774, *lv denied* 15 NY3d 705 [internal quotation marks omitted]). Upon conducting such a review, we conclude that the agency's determination is supported by substantial evidence (*see generally Matter of Draman v New York State Off. of Children & Family Servs.*, 78 AD3d 1603, 1603-1604; *Mangus*, 68 AD3d at 1775; *Matter of Theresa G. v Johnson*, 26 AD3d 726, 726-727).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

711

KA 11-01990

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMAR JONES, DEFENDANT-APPELLANT.

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

JAMAR JONES, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Erie County Court (Michael F. Pietruszka, J.), rendered August 31, 2011. Defendant was resentenced upon his conviction of attempted assault in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: In November 1999, defendant entered an *Alford* plea to attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]), in satisfaction of an indictment charging him with assault in the first degree (§ 120.10 [1]) and criminal use of a firearm in the first degree (§ 265.09 [1] [a]). The period of postrelease supervision mandated by Penal Law § 70.45 was not mentioned during the plea colloquy or at sentencing, nor did County Court impose a period of postrelease supervision at sentencing. In 2011, the New York State Department of Correctional Services informed the court that defendant was a "designated person" within the meaning of Correction Law § 601-d (1), and sought resentencing of defendant "because a mandatory period of postrelease supervision was not included in his original determinate sentences" (*People v Elliott*, 93 AD3d 957, 958).

At the beginning of the resentencing proceeding, defense counsel indicated that defendant wished to withdraw his plea, and requested an adjournment to permit him to make such a motion. The court granted that request, along with a subsequent request for an additional adjournment, granted defendant's first motion for substitution of counsel, and permitted oral argument of defendant's motion to withdraw

his plea. The court then denied defendant's second request for substitution of counsel and, with the People's consent, resentenced defendant to the original sentence without a period of postrelease supervision. Contrary to defendant's contention in his pro se supplemental brief, we conclude that he was not entitled to withdraw his plea "inasmuch as the court properly resentenced defendant pursuant to Penal Law § 70.85" (*People v Williams*, 82 AD3d 1576, 1577-1578, *lv denied* 17 NY3d 810).

We reject defendant's further contention in his pro se brief that the court erred in denying his second request for substitution of counsel. Defendant's disagreements with counsel over strategy did not establish the requisite good cause for substitution of counsel (*see People v Medina*, 44 NY2d 199, 208-209; *see generally People v Sides*, 75 NY2d 822, 824). Defendant's contention that he did not have time to consult with new counsel prior to the argument of his motion to withdraw the plea is belied by the record. Contrary to defendant's contention in his main brief, the court did not abuse its discretion in denying defense counsel's request for a third adjournment of the resentencing proceeding (*see People v Ippolito*, 242 AD2d 880, 880-881, *lv denied* 91 NY2d 874; *see also People v Brown*, 101 AD3d 1627, 1628). We have reviewed defendant's remaining contention in his pro se supplemental brief and conclude that it is without merit.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

716

KA 09-01149

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN E. SIGL, 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 Monroe County Court (John R. Schwartz, A.J.), rendered November 10, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree and sodomy in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the first degree (Penal Law § 140.30 [3]) and sodomy in the first degree (former § 130.50 [1]), defendant contends that County Court erred in refusing to dismiss the indictment as time-barred. We reject that contention. Contrary to defendant's contention, the court properly applied CPL 30.10 (4) (a) (ii), which tolls the statute of limitations where a defendant's "whereabouts were continuously unknown and continuously unascertainable by the exercise of reasonable diligence." That statute applies where, as here, "the police are unable to identify the perpetrator of a crime despite the exercise of reasonable diligence or have identified the perpetrator but cannot find him [or her] after a diligent investigation" (*People v Quinto*, 18 NY3d 409, 419). Here, "[t]he record supports the court's determination that the identity of defendant as the sexual assailant, and thus his whereabouts, were not ascertainable by diligent efforts" before 2008, when the State DNA Indexing System matched the DNA profile from the semen found on the victim's night shirt with DNA obtained from defendant in conjunction with an unrelated 2007 conviction (*People v Jackson*, 21 AD3d 1355, 1356, *lv denied* 6 NY3d 777, *reconsideration denied* 7 NY3d 757).

Contrary to defendant's further contention, the court properly refused to suppress the statements he made to the police. Defendant contends, inter alia, that the statements should have been suppressed

on the ground that they were the product of an arrest made inside his home without a warrant in violation of his rights as set forth in *Payton v New York* (445 US 573). We agree with the court that *Payton* does not apply because defendant was not arrested inside his apartment but, rather, he voluntarily agreed to accompany the officers to the police station. Even assuming, arguendo, that there was a warrantless arrest of defendant in his apartment, we note that it is well settled that "tacit consent by a person with apparent authority . . . [is] sufficient to obviate any possible violation of the *Payton* rule" (*People v Schof*, 136 AD2d 578, 579, *lv denied* 71 NY2d 1033; *see generally Schneckloth v Bustamonte*, 412 US 218, 219). Here, the People established that the police officers entered the apartment with the consent of defendant's father (*see People v Johnson*, 46 AD3d 276, 276-277, *lv denied* 10 NY3d 865; *People v Barnhill*, 34 AD3d 933, 934, *lv denied* 8 NY3d 843; *People v Smith*, 239 AD2d 219, 220-221, *lv denied* 90 NY2d 911). Although "the police may not have received express permission to enter the premises, [the] gesture [of defendant's father] of opening the door, leaving it wide open, and then walking away from it could certainly be interpreted by the police to consist of tacit approval for them to enter" (*People v Brown*, 234 AD2d 211, 213, *affd* 91 NY2d 854).

Finally, 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). "Although a different result would not have been unreasonable, the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

717

CAF 12-01506

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

IN THE MATTER OF IRENE A. DUBOIS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STEVE M. PIAZZA, SR., RESPONDENT-APPELLANT.

THE FIX LAW FIRM, OSWEGO (ROBERT H. FIX OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Oswego County (Donald E. Todd, J.), entered August 2, 2012. The order committed respondent to the Oswego County Correctional Facility for a term of six months.

It is hereby ORDERED that said appeal from the order insofar as it concerns commitment to jail is unanimously dismissed and the order is otherwise modified on the law by striking that part adjudging respondent to be in willful violation of a support order dated January 8, 1999 and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to article 4 of the Family Court Act, petitioner mother filed a petition alleging that respondent father willfully failed to pay child support in violation of an existing order of support. Shortly after an initial appearance on the petition in which the father requested counsel (*see* § 262 [a] [vi]) and before counsel appeared for the father, the Support Magistrate found that the father willfully violated that child support order. In addition, the Support Magistrate referred the matter to Family Court, which subsequently conducted a hearing on the issue whether the father had violated the terms of his probation by failing to pay child support. In a bench decision issued at the conclusion of the hearing, the court determined that the father "violated probation insofar as he has failed to comply with the terms and conditions of . . . his support order" and sentenced him to a six-month jail term. The written order of commitment (order) issued by the court after the hearing reflects that term of confinement, and also "adjudg[ed] [the father] to be in willful violation of [an existing] order [of child support]."

To the extent that the father contends on appeal that a jail term was improperly imposed upon his violation of the child support order, we conclude that such contention is moot inasmuch as that part of the order has expired by its own terms (*see Matter of Cattaraugus County Dept. of Social Servs. v Gore*, 101 AD3d 1739, 1740; *Matter of Alex*

A.C. [Maria A.P.], 83 AD3d 1537, 1538). We further conclude, however, that the court erred in confirming the Support Magistrate's finding that the father had willfully violated the existing support order before counsel appeared before the Support Magistrate on the father's behalf (*see* Family Ct Act § 262 [a] [vi]; *see generally Matter of Kissel v Kissel*, 59 AD2d 1036, 1036-1037). We therefore modify the order accordingly. Given the enduring consequences flowing from the finding of a willful violation of a Family Court order, we note that the father's challenge to the Support Magistrate's finding of willfulness is not rendered moot because the jail sentence has been served (*see Matter of Telsa Z. [Rickey Z.]*, 75 AD3d 776, 777 n). Inasmuch as the court's bench decision reflects that the court's determination that the father violated his probation is independent of the Support Magistrate's finding of a willful violation of an existing child support order, we decline to disturb the part of the order determining that the father violated the terms of his probation. To the extent that the order reflects that the father was found to have violated his probation due to a willful breach of an existing child support order, we note that the court's bench decision rendered following the hearing includes no such finding as to willfulness and, "where 'an order and decision conflict, the decision controls' " (*Matter of Triplett v Scott*, 94 AD3d 1421, 1421).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

723

CA 12-01789

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

CAMBRIDGE INTEGRATED SERVICES GROUP, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN J. JOHNSON, DEFENDANT-RESPONDENT,
AND KENNETH P. BERNAS, DEFENDANT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (KATHERINE M. LIEBNER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered April 13, 2012. The order granted the motion of defendant Brian J. Johnson to compel plaintiff to comply with the release agreement entered into by the parties.

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

Memorandum: Supreme Court erred in granting the motion of Brian J. Johnson (defendant) to compel plaintiff to comply with the release agreement between plaintiff and defendants. Defendant brought his motion after the related third-party action was settled and an unconditional stipulation of discontinuation as to him with respect to this action was signed by the attorneys for plaintiff and defendant and filed. Although a trial court has the power "to exercise supervisory control over all phases of pending actions and proceedings" (*Teitelbaum Holdings v Gold*, 48 NY2d 51, 54), it lacks jurisdiction to entertain a motion after the action has been "unequivocally terminated . . . [by the execution of] an express, unconditional stipulation of discontinuance" (*id.* at 56; *see Yonkers Fur Dressing Co. v Royal Ins. Co.*, 247 NY 435, 444; *DiBella v Martz*, 58 AD3d 935, 937; *Germanovich v Bethlehem Steel Corp.* [appeal No. 1], 270 AD2d 863, 863).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

731

KA 10-00861

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY JONES, 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 (Joseph E. Fahey, J.), rendered January 14, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We agree with defendant that the waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]; *see People v Hamilton*, 49 AD3d 1163, 1164; *People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767). Indeed, on this record there is no basis upon which to conclude that the court ensured "that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256). We nevertheless reject defendant's contention that the court abused its discretion in denying his request for youthful offender status (*see People v Guppy*, 92 AD3d 1243, 1243, *lv denied* 19 NY3d 961; *People v Potter*, 13 AD3d 1191, 1191, *lv denied* 4 NY3d 889), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see generally People v Shrubsall*, 167 AD2d 929, 930-931). Finally, we conclude that "the court's reliance on the presentence report for its determination that defendant would not be afforded youthful offender status 'constitutes an adequate explanation for the denial of defendant's request for such status' " (*People v Wargula*, 86

AD3d 929, 930, *lv denied* 17 NY3d 862).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

732

TP 12-01701

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

IN THE MATTER OF JAMES SMITH, PETITIONER,

V ORDER

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

JAMES SMITH, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ANDREW B. AYERS 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, Cayuga County [Thomas G. Leone, A.J.], entered September 11, 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 the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

733

KA 11-01377

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRENCE M. DEARMYER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE 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 Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered May 2, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that his waiver of the right to appeal is unenforceable and that his sentence is unduly harsh and severe. As the People correctly concede, defendant's waiver of the right to appeal does not encompass his challenge to the severity of the sentence because his purported waiver of the right to appeal occurred before Supreme Court advised him of the maximum sentence he could receive (*see People v Monaghan*, 101 AD3d 1686, 1686; *People v Farrell*, 71 AD3d 1507, 1507, *lv denied* 15 NY3d 804). Nevertheless, we conclude that the sentence is not unduly harsh or severe. Although defendant faced a maximum sentence of seven years' imprisonment (*see* Penal Law 70.06 [6] [c]), the court sentenced him to 4½ years' imprisonment, which was only 1½ years more than the minimum sentence permitted by law. We note that, according to the presentence investigation report, defendant "failed to take any responsibility for the present offense and showed no remorse" for the injuries he inflicted upon the victim. We also note that defendant had been sentenced to probation on a prior felony conviction, but violated the conditions of probation and was resentenced to a term of incarceration. Under the circumstances, we perceive no basis for modifying defendant's sentence as a matter of discretion in the

interest of justice (*see* CPL 470.15 [6] [b]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

734

KA 11-01654

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEREK MCIVER, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (JAMES R. GARDNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered August 1, 2011. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of promoting prison contraband in the first degree (Penal Law § 205.25 [2]), defendant contends that the evidence of his possession of the dangerous contraband is legally insufficient to support the conviction. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that defendant constructively possessed the weapon in question by exercising dominion and control over the area from which the weapon was seized (*see* § 10.00 [8]; *People v Gayle*, 53 AD3d 857, 859, *lv denied* 11 NY3d 832; *see generally People v Manini*, 79 NY2d 561, 573).

With respect to defendant's further contention that he was deprived of a fair trial by prosecutorial misconduct during summation, we conclude that " 'the prosecutor [did not] vouch for the credibility of the People's witnesses. Faced with defense counsel's focused attack on their credibility, the prosecutor was clearly entitled to respond by arguing that the witnesses had, in fact, been credible . . . An argument by counsel that his [or her] witnesses have testified truthfully is not vouching for their credibility' " (*People v Roman*, 85 AD3d 1630, 1632, *lv denied* 17 NY3d 821; *see People v Mendez*, 80 AD3d 523, 524, *lv denied* 16 NY3d 861; *People v Ruiz*, 8 AD3d 831, 832, *lv denied* 3 NY3d 711). In any event, the two comments challenged by

defendant were not so egregious as to deny defendant a fair trial (*see People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954; *People v Pringle*, 71 AD3d 1450, 1451, *lv denied* 15 NY3d 777; *People v White*, 291 AD2d 842, 843, *lv denied* 98 NY2d 656).

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

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

735

KA 09-01390

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HAROLD SCOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered November 19, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (three counts), attempted robbery in the first degree (two counts) and assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of three counts of burglary in the first degree (Penal Law § 140.30 [1], [2], [4]), and two counts each of attempted robbery in the first degree (§§ 110.00, 160.15 [2], [4]) and assault in the second degree (§ 120.05 [2], [6]). Defendant contends that the evidence is legally insufficient to convict him as an accomplice because there is no evidence that he shared the requisite intent with the principal or that he assisted anyone in the commission of the offenses. To the extent that defendant asserts that the People failed to prove that he shared the principal's intent to commit the crimes, that contention is unpreserved for our review (*see People v Gray*, 86 NY2d 10, 19; *People v Villa*, 56 AD3d 1242, 1242, *lv denied* 12 NY3d 763). In any event, we conclude that the evidence with respect to defendant's actions during and after the relevant incidents is legally sufficient to establish that defendant was more than merely present at the scene and that he shared the principal's intent (*see People v Cabey*, 85 NY2d 417, 421; *People v Davis*, 278 AD2d 886, 886, *lv denied* 96 NY2d 757; *People v Alexander*, 190 AD2d 1052, 1052-1053, *lv denied* 81 NY2d 967). The testimony of one of the victims established that defendant, the principal and at least one other individual entered that victim's enclosed porch and attempted to rob the victims at gunpoint. When the first victim was shot, the second victim attempted to flee, but defendant temporarily restrained him. Once released, the

second victim fled, and defendant again assisted the gunman by pointing to the location where the second victim fled. The gunman then shot the second victim. Thus, even assuming, arguendo, that defendant's "assistance was not initially planned, [we conclude that] the totality of the evidence permits only the conclusion that he knowingly participated and continued to participate even after his companion's intentions became clear" (*People v Allah*, 71 NY2d 830, 832).

Finally, 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).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

737

KA 12-02387

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID LEMERY, DEFENDANT-APPELLANT.

BRUCE R. BRYAN, SYRACUSE, 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 July 11, 2012. The judgment convicted defendant, upon a jury verdict, 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 a jury verdict of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [a]). Contrary to defendant's contention, County Court properly exercised its discretion in precluding defendant from introducing expert testimony with respect to whether defendant, as the result of chemotherapy treatments, had a diminished mental capacity that prevented him from understanding what he was saying in taped conversations he had with the victim that were inculpatory in nature (*see People v Covington*, 298 AD2d 930, 930, *lv denied* 99 NY2d 557). "As a general rule, the admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court" (*People v Lee*, 96 NY2d 157, 162; *see People v Williams*, 97 NY2d 735, 736; *People v Cronin*, 60 NY2d 430, 433). Under the circumstances of this case, we conclude that evaluating defendant's recorded conversations with the victim was "within the ken of the typical juror" (*Cronin*, 60 NY2d at 433; *see Covington*, 298 AD2d at 930). Additionally, the proposed expert was unable to testify to a reasonable degree of medical certainty that chemotherapy treatments caused defendant's purported deficits (*see generally People v Allweiss*, 48 NY2d 40, 50).

Contrary to defendant's further contention, we conclude that the court properly prohibited defendant from cross-examining the victim with respect to her prior juvenile adjudication. It is "impermissible to use a youthful offender or juvenile delinquency adjudication as an

impeachment weapon, because these adjudications are not convictions of a crime" (*People v Gray*, 84 NY2d 709, 712 [internal quotation marks omitted]). The extent to which a party may use the " 'illegal or immoral acts underlying such adjudications' " to impeach the credibility of a witness is a matter that is generally left to the discretion of the court (*id.*; *see generally People v Sandoval*, 34 NY2d 371, 375). Here, the court properly exercised its discretion in precluding cross-examination with respect to the prior bad acts underlying the victim's juvenile adjudication inasmuch as they did not reflect on her credibility (*cf. People v Bell*, 265 AD2d 813, 814, *lv denied* 94 NY2d 916; *see generally Sandoval*, 34 NY2d at 376).

Additionally, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), 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 victim's testimony was not incredible as a matter of law, and we afford " 'deference to the jury's superior ability to evaluate the credibility of the People's witnesses' " (*People v Baker*, 30 AD3d 1102, 1103, *lv denied* 7 NY3d 846). Finally, the sentence is not unduly harsh or severe; the three-year determinate sentence of incarceration is at the lower end of the legal sentencing range and thus indicates that the sentencing court considered defendant's mitigating circumstances (Penal Law §§ 70.80 [4] [a] [iii]; 130.80).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

738

KA 08-02208

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMIE R. TACKLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Teresa D. Johnson, A.J.), rendered August 15, 2008. The judgment convicted defendant, upon a nonjury verdict, of criminal mischief in the second degree, driving while intoxicated, a misdemeanor (two counts), resisting arrest and reckless endangerment in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of, inter alia, criminal mischief in the second degree (Penal Law § 145.10), defendant contends that the verdict with respect to that crime is against the weight of the evidence. We reject that contention. Based on our independent review of the evidence, we conclude that a different verdict would have been unreasonable (*see People v Peters*, 90 AD3d 1507, 1508, *lv denied* 18 NY3d 996; *see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we further conclude that "[County Court] was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the [court] failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801; *see People v Clarke*, 101 AD3d 1646, 1647, *lv denied* 20 NY3d 1097).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

742

CAF 12-01425

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

IN THE MATTER OF STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF CAROL M. HOVER, PETITIONER-RESPONDENT,

V ORDER

MORRIS J. SARFATY, RESPONDENT-APPELLANT.

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

MICHELLE A. COOKE, BATH, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered July 6, 2012 in a proceeding pursuant to Family Court Act article 4. The order denied in part respondent's objections to an order of the Support Magistrate entered March 8, 2012.

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

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

743

CA 12-01956

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

IN THE MATTER OF THE HERTZ CORPORATION AND
HERTZ VEHICLES LLC, PETITIONERS-RESPONDENTS,

V ORDER

CITY OF SYRACUSE, ET AL., RESPONDENTS,
AND JOHN'S AUTO BODY SERVICE, LLC,
RESPONDENT-APPELLANT.

JOHN W. BRANDT, PHOENIX, FOR RESPONDENT-APPELLANT.

GOLDBERG SEGALLA, LLP, SYRACUSE (CORY A. DECRESENZA OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered July 5, 2012 in a proceeding pursuant to CPLR article 78. The order, inter alia, granted the motion of respondent John's Auto Body Service, LLC for leave to renew and, upon renewal, adhered to an order entered April 17, 2012.

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

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

745

CA 12-01573

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

JOSEPH A. VARLARO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DEBORA VARLARO, DEFENDANT-RESPONDENT.

LORRAINE H. LEWANDROWSKI, HERKIMER, FOR PLAINTIFF-APPELLANT.

MCLANE, SMITH AND LASCURETTES, L.L.P., UTICA (TOD M. LASCURETTES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Patrick L. Kirk, A.J.), entered December 15, 2011. The order granted the motion of defendant to amend the Qualified Domestic Relations Order dated July 11, 2003.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We add only that, regardless of the potential merit to plaintiff's contention in opposition to defendant's motion to amend the Qualified Domestic Relations Order dated July 11, 2003 (*see e.g. Lemesis v Lemesis*, 38 AD3d 1331, 1332; *Hoke v Hoke*, 27 AD3d 1055, 1056; *see generally Kazel v Kazel*, 3 NY3d 331, 332-335), the court properly refused to consider the relief requested by plaintiff inasmuch as he did not file or serve a notice of cross motion (*see* CPLR 2215; *see e.g. Free in Christ Pentecostal Church v Julian*, 64 AD3d 1153, 1153-1154; *New York State Div. of Human Rights v Oceanside Cove II Apt. Corp.*, 39 AD3d 608, 609; *Khaolaead v Leisure Video*, 18 AD3d 820, 821; *Torre v Torre* [appeal No. 1], 142 AD2d 942, 942).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

747

CA 12-02171

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

ROBERT J. GROMAN, PLAINTIFF-RESPONDENT,

V ORDER

STANLEY A. GROMAN, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered January 25, 2012. The order directed the property receiver to accept offers for certain real property.

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

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

748

CA 12-02308

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

GROWEST, INC., PLAINTIFF-RESPONDENT,

V ORDER

JOHN S. DENELSBECK, JR., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

MARK WOLBER, UTICA, FOR DEFENDANT-APPELLANT.

MARK CURLEY, CORPORATION COUNSEL, UTICA (LAURA R. CAMPION OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered October 16, 2012. The amended order, inter alia, denied the motion of defendant John S. Denelsbeck, Jr., for summary judgment dismissing the complaint.

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

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

750.1

CAE 13-00619

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

IN THE MATTER OF FRANK C. MAX, JR., CANDIDATE AGGRIEVED, AND AS CHAIRMAN OF TOWN OF CHEEKTOWAGA DEMOCRATIC COMMITTEE AND AS AN ENROLLED DEMOCRATIC VOTER IN TOWN OF CHEEKTOWAGA 35TH ELECTION DISTRICT, DANIEL S. MCPARLANE, CHAIRMAN OF TOWN OF WEST SENECA DEMOCRATIC COMMITTEE, AND AS DEMOCRATIC COMMITTEEMAN IN TOWN OF WEST SENECA ELECTION DISTRICT 7 AND AS AN ENROLLED DEMOCRATIC VOTER IN WEST SENECA 7TH ELECTION DISTRICT, AND JOHN F. FRACOS, AS CITY OF BUFFALO DEMOCRATIC ZONE CHAIRMAN ZONE 21, AND AS CITY OF BUFFALO DEMOCRATIC COMMITTEE COMMITTEEMAN NORTH 18 AND AS AN ENROLLED VOTER BUFFALO NORTH DISTRICT 18, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DENNIS E. WARD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ERIE COUNTY BOARD OF ELECTIONS COMMISSIONER AND AS SECRETARY OF ERIE COUNTY DEMOCRATIC COMMITTEE AND AS FORMER CHAIRMAN OF TOWN OF AMHERST DEMOCRATIC COMMITTEE, RALPH M. MOHR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ERIE COUNTY BOARD OF ELECTIONS COMMISSIONER, LEONARD LENIHAN, IN HIS CAPACITY AS FORMER CHAIRMAN OF ERIE COUNTY DEMOCRATIC COMMITTEE, ALSO KNOWN AS DEMOCRATIC COUNTY COMMITTEE OF ERIE COUNTY, ERIE COUNTY DEMOCRATIC COMMITTEE, ALSO KNOWN AS DEMOCRATIC COUNTY COMMITTEE OF ERIE COUNTY, JEREMY ZELLNER, IN HIS OFFICIAL CAPACITY AS PURPORTED CHAIRMAN OF ERIE COUNTY DEMOCRATIC COMMITTEE, ALSO KNOWN AS DEMOCRATIC COUNTY COMMITTEE OF ERIE COUNTY, AND DAVID A. RIVERA, BETTY JEAN GRANT, JAMES CONNOLLY, ROBERT E. BROWN, MOLLY MCLAUGHLIN, GAYLE SYPOSS, DENNIS WARD AND IVORY L. PAYNE, JR., IN THEIR OFFICIAL CAPACITIES AS OFFICERS OF ERIE COUNTY DEMOCRATIC COMMITTEE, ALSO KNOWN AS DEMOCRATIC COUNTY COMMITTEE OF ERIE COUNTY, RESPONDENTS-DEFENDANTS-RESPONDENTS.

DENNIS E. WARD, AS CANDIDATE FOR RECOMMENDATION AS DEMOCRATIC COMMISSIONER OF ELECTIONS, RESPONDENT.

JAMES OSTROWSKI, BUFFALO, FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS DENNIS E. WARD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ERIE COUNTY BOARD OF ELECTIONS COMMISSIONER AND AS SECRETARY OF ERIE COUNTY DEMOCRATIC COMMITTEE AND AS FORMER CHAIRMAN OF TOWN OF AMHERST DEMOCRATIC COMMITTEE, AND RALPH M. MOHR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ERIE COUNTY BOARD OF ELECTIONS COMMISSIONER.

RICHARDS & KRUGER, BUFFALO (JULIE KRUGER OF COUNSEL), FOR RESPONDENT DENNIS E. WARD, AS CANDIDATE FOR RECOMMENDATION AS DEMOCRATIC COMMISSIONER OF ELECTIONS.

DEAN E. LILAC, JR., TONAWANDA, FOR RESPONDENT-DEFENDANT-RESPONDENT LEONARD LENIHAN, IN HIS CAPACITY AS FORMER CHAIRMAN OF ERIE COUNTY DEMOCRATIC COMMITTEE, ALSO KNOWN AS DEMOCRATIC COUNTY COMMITTEE OF ERIE COUNTY.

JEROME D. SCHAD, WILLIAMSVILLE, FOR RESPONDENTS-DEFENDANTS-RESPONDENTS ERIE COUNTY DEMOCRATIC COMMITTEE, ALSO KNOWN AS DEMOCRATIC COUNTY COMMITTEE OF ERIE COUNTY, JEREMY ZELLNER, IN HIS OFFICIAL CAPACITY AS PURPORTED CHAIRMAN OF ERIE COUNTY DEMOCRATIC COMMITTEE, ALSO KNOWN AS DEMOCRATIC COUNTY COMMITTEE OF ERIE COUNTY.

LAW OFFICES OF JEFFREY MARION, WILLIAMSVILLE (JEFFREY E. MARION OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS DAVID A. RIVERA, BETTY JEAN GRANT, JAMES CONNOLLY, ROBERT E. BROWN, MOLLY MCLAUGHLIN, GAYLE SYPOSS, DENNIS WARD AND IVORY L. PAYNE, JR., IN THEIR OFFICIAL CAPACITIES AS OFFICERS OF ERIE COUNTY DEMOCRATIC COMMITTEE, ALSO KNOWN AS DEMOCRATIC COUNTY COMMITTEE OF ERIE COUNTY.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Deborah A. Chimes, J.), granted February 21, 2013 in a proceeding/action pursuant to, inter alia, CPLR article 78, CPLR 3001 and Election Law article 16. The judgment, inter alia, granted the motions of respondents-defendants to dismiss the petition/complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motions of respondents-defendants to the extent that they sought dismissal of the third, fifth, and sixth causes of action, reinstating those causes of action, and granting judgment in favor of respondents-defendants as follows:

> It is ADJUDGED and DECLARED that Election Law § 2-104 has not been shown to be unconstitutional as applied to petitioners-plaintiffs,

and as modified the judgment is affirmed without costs.

Memorandum: Petitioners-plaintiffs (petitioners) commenced this proceeding/action (proceeding) pursuant to, inter alia, CPLR article 78, CPLR 3001, and Election Law article 16 seeking various forms of relief, including a judgment setting aside the election of officers at a September 29, 2012 reorganization meeting of respondent-defendant

Erie County Democratic Committee, also known as Democratic County Committee of Erie County (hereafter, committee). We note as background that county party committees in Erie County (County) are composed of two members elected from each election district. Election Law § 2-104 (1) provides that the voting power of each member of a party committee generally is proportional to that party's vote in the district in the last gubernatorial election, but that the voting power of a member from a district created or changed since the last gubernatorial election and State Assembly election is proportional to the number of enrolled voters of such party in the district. Throughout the County, the number of people who voted for the Democratic candidate in the 2010 gubernatorial election was less than the number of enrolled voters in the Democratic party. Consequently, committee members from districts created or changed since 2010 had more voting power than committee members from other districts in the election of committee officers at the September 2012 reorganization meeting. The creation or consolidation of election districts is the responsibility of the Board of Elections (*see* § 4-100 [2]), and petitioners allege that respondents-defendants Dennis E. Ward and Ralph M. Mohr, in their capacity as Commissioners of the Erie County Board of Elections (hereafter, Board), attempted to ensure that Ward and his political allies were elected to the various offices of the committee by redrawing districts in areas favorable to Ward and declining to do so in areas favorable to petitioner-plaintiff Frank C. Max, Jr. (redistricting plan).

At the reorganization meeting, respondent-defendant Jeremy Zellner was elected chairman of the committee over Max. According to petitioners, although Max received the majority of the votes cast for that office from members who attended the reorganization meeting, Zellner was announced the winner because he received 152,098 weighted votes, while Max received 113,528 weighted votes. Additionally, Ward was reelected secretary of the committee and recommended for another term as commissioner of the Board, and respondents-defendants David A. Rivera, Betty Jean Grant, James Connolly, Robert E. Brown, Molly McLaughlin, Gayle Syposs, and Ivory L. Payne, Jr. were elected committee officers.

Petitioners commenced this proceeding on October 5, 2012, asserting as a first cause of action that the redistricting plan was arbitrary and capricious and an abuse of discretion, and that the election should therefore be declared invalid and a new election should be held (*see* CPLR 7803 [3]); as a second cause of action that the redistricting plan was enacted in violation of the Open Meetings Law (*see* Public Officers Law § 107 [1]); as third, fifth and sixth causes of action that Election Law § 2-104 as applied to them violated various constitutional rights and thus should be declared unconstitutional; and as fourth and seventh causes of action that, as a result of those various constitutional violations, they were entitled to damages. Respondents-defendants (respondents) moved to dismiss the petition, Supreme Court granted the motions, and petitioners appeal.

Contrary to petitioners' contention, we conclude that the court

properly dismissed as time-barred the first cause of action insofar as it sought relief pursuant to CPLR article 78. The record establishes that the redistricting plan was enacted on June 1, 2012. Thus, the statute of limitations was triggered on that date (*see generally Matter of Young v Board of Trustees of Vil. of Blasdell*, 89 NY2d 846, 848-849), and this proceeding was commenced more than four months thereafter (*see* CPLR 217 [1]; *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; *Matter of Cohen v Suffolk County Bd. of Elections*, 83 AD3d 1063, 1063).

To the extent that the first cause of action sought relief pursuant to the Election Law, it was timely inasmuch as this proceeding was commenced within 10 days of the reorganization meeting (*see* Election Law § 16-102 [2]; *Matter of Kosowski v Donovan*, 18 NY3d 686, 688-689). Further, we agree with petitioners that the court erred in determining that they failed to name "the State Democratic Committee, the County Board of Elections and the elected district committee members" as necessary parties (*see generally* CPLR 1001 [a]; 1003; *Matter of Delmont v Kelly*, 172 AD2d 1067, 1067, *lv denied* 77 NY2d 809). Although the Board is indeed a necessary party, its interests are "adequately represented" by Ward and Mohr (*Matter of Snell v Young*, 88 AD3d 1149, 1150-1151, *lv denied* 17 NY3d 715 [internal quotation marks omitted]; *see Gagliardo v Colascione*, 153 AD2d 710, 710, *lv denied* 74 NY2d 609). The elected committee members, as opposed to committee officers, are not necessary parties with respect to the first cause of action. The first cause of action seeks to compel a new election at which the voting power of each elected committee member is based on Democratic enrollment, and that relief can be granted without removing the elected committee members from their positions or otherwise inequitably affecting them (*cf. Matter of Masich v Ward*, 65 AD3d 817, 817, *lv denied* 13 NY3d 701; *see generally Matter of Messina v Albany County Bd. of Elections*, 66 AD3d 1111, 1113-1114, *lv denied* 13 NY3d 710). The State Democratic Committee is not a necessary party because petitioners do not challenge any of its actions or rules (*see Matter of Master v Pohanka*, 44 AD3d 1050, 1052-1053; *cf. Matter of Dixon v Reynolds*, 65 AD3d 819, 820, *lv denied* 13 NY3d 701).

We further conclude, however, that the first cause of action fails to state a viable cause of action contesting the election of committee officers at the reorganization meeting (*see generally* Election Law § 16-102 [1]). The weighted voting procedure used at the meeting was required by statute (*see* § 2-104 [1]; *see generally Cohen*, 83 AD3d at 1063-1064), and the proper procedural vehicle to challenge the redistricting plan was a CPLR article 78 proceeding, not a proceeding pursuant to article 16 of the Election Law (*see generally Matter of Munnelly v Newkirk*, 262 AD2d 781, 782, *affd* 93 NY2d 960; *Matter of Essenberg v Kresky*, 265 AD2d 664, 666-667). Petitioners may not use the Election Law to advance an otherwise time-barred CPLR article 78 claim (*see generally Gress v Brown*, 20 NY3d 957, 959-960).

The court properly dismissed the second cause of action, alleging

the violation of the Open Meetings Law. "[N]ot every breach of the 'Open Meetings Law' automatically triggers its enforcement sanctions" (*Matter of New York Univ. v Whalen*, 46 NY2d 734, 735; *see* Public Officers Law § 107 [1]), and petitioners failed "to show good cause why, as a sanction, we should exercise our discretion to void" the redistricting plan (*Matter of Griswald v Village of Penn Yan*, 244 AD2d 950, 951; *see generally Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 686).

Even accepting the allegations in the petition as true with respect to the causes of action seeking damages and declaratory relief (*see Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150-1151; *see generally Leon v Martinez*, 84 NY2d 83, 87-88), we conclude that petitioners are not entitled to such relief. The harm alleged in support of those causes of action arises out of the election of officers to positions within a political party, and the constitutional provisions relied upon do not apply to the internal affairs of political parties (*see Davis v Sullivan County Democratic Comm.*, 58 AD2d 169, 171-173, *affd* 43 NY2d 964; *Seergy v Kings County Republican County Comm.*, 459 F2d 308, 313-314; *Lynch v Torquato*, 343 F2d 370, 372-373; *see generally Matter of Master v Pohanka*, 10 NY3d 620, 624). Thus, the fourth and seventh causes of action, seeking damages based on the alleged violation of constitutional rights, were properly dismissed inasmuch as petitioners failed to establish the violation of such rights (*see Ruggiero v Phillips*, 292 AD2d 41, 45). We note that petitioners have cited no authority to support any contention that the state constitution affords greater protection than the federal constitution in these matters (*see generally Matter of Walsh v Katz*, 17 NY3d 336, 343-344; *Golden v Clark*, 76 NY2d 618, 624).

Because the third, fifth, and sixth causes of action sought declaratory relief as a consequence of the alleged violation of their constitutional rights, however, the proper remedy was a declaration in respondents' favor rather than the dismissal of those causes of action (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954). We note that a declaration is appropriate in the context of these preanswer motions to dismiss in the absence of issues of fact (*see Tilcon N.Y., Inc.*, 87 AD3d at 1150). We therefore modify the judgment by denying respondents' motions to the extent that they sought dismissal of the third, fifth, and sixth causes of action, reinstating those causes of action, and declaring that Election Law § 2-104 has not been shown to be unconstitutional as applied to petitioners (*see generally Mead Sq. Commons, LLC v Village of Victor*, 97 AD3d 1162, 1164; *Matter of DaimlerChrysler Co., LLC v Billet*, 51 AD3d 1284, 1289).

In view of our determination, we need not address the remaining issues raised on appeal.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

751

KA 12-02251

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM O'HARROW, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered October 5, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree and burglary in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence on the conviction of burglary in the third degree is unanimously dismissed and the judgment is otherwise affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), and burglary in the third degree (§ 140.20). In appeal No. 2, he appeals from a resentence with respect to the conviction of burglary in the third degree. 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 in each appeal (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

752

KA 12-00366

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM O'HARROW, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Niagara County Court (Sara S. Farkas, J.), rendered December 7, 2011. Defendant was resentenced upon his conviction of burglary in the third degree.

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

Same Memorandum as in *People v O'Harrow* ([appeal No. 1] ___ AD3d ___ [June 14, 2013]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

753

KA 03-01616

PRESENT: CENTRA, J.P., SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES PENNINGTON, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Joseph S. Forma, J.), dated June 11, 2003. The order denied the motion of defendant pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order denying his pro se motion pursuant to CPL article 440 seeking to vacate the judgment convicting him of two counts of murder in the second degree (Penal Law § 125.25 [1], [2]). We previously affirmed that judgment of conviction (*People v Pennington*, 217 AD2d 919, *lv denied* 87 NY2d 906), and we now conclude that Supreme Court properly denied defendant's motion without conducting a hearing. Defendant contends that the People abused the grand jury process by serving a subpoena after the indictment had been issued. The court properly determined that, although the People abused the grand jury process (*see Matter of Hynes v Lerner*, 44 NY2d 329, 333, *rearg denied* 44 NY2d 950, *cert denied* 439 US 888; *see generally People v Natal*, 75 NY2d 379, 385, *cert denied* 498 US 862), defendant has not established any prejudice resulting therefrom (*see* CPL 440.10 [1] [f]; *see generally People v Jackson*, 78 NY2d 638, 646; *People v McNeill*, 204 AD2d 975, 976, *lv denied* 84 NY2d 829). Defendant further contends that the People committed *Rosario* and *Brady* violations by failing to turn over certain notes of the prosecutor concerning interviews with various police witnesses. We conclude, however, that defendant's contention is based on an incorrect reading of those notes. Indeed, based upon an accurate reading of the notes, we conclude that they have no exculpatory value, and that there was no "reasonable possibility that the failure to disclose the [notes] contributed to the verdict" (*People v Jackson*, 78

NY2d 638, 649; *see People v Fuentes*, 12 NY3d 259, 263, *rearg denied* 13 NY3d 766).

Defendant's challenge to the admission of the testimony of the Associate Chief Medical Examiner (hereafter, Medical Examiner) at trial could have been raised on direct appeal, and thus the court properly denied that part of his motion challenging that testimony (*see* CPL 440.10 [2] [c]). In addition, the court properly determined that defendant failed to establish that there was any discovery violation with respect to autopsy notes and a death certification (*see* CPL 440.30 [4] [b]; *People v Vigliotti*, 24 AD3d 1216, 1216). Likewise, the court properly determined that defendant failed to substantiate his allegation that a prosecution witness entered into an unlawful agreement with defendant's insurers (*see* CPL 440.30 [3] [b]; *Vigliotti*, 24 AD3d at 1216).

We reject defendant's contention that he received ineffective assistance of counsel at trial. To the extent that defendant relies on records that were introduced in evidence at trial in support of his contention, we conclude that defendant could have raised that contention on his prior appeal (*see* CPL 440.10 [2] [c]; *People v Mastowski*, 63 AD3d 1589, 1590, *lv denied* 12 NY3d 927, *reconsideration denied* 13 NY3d 837). To the extent that defendant relies on records that defense counsel had in his possession but failed to use when questioning the Medical Examiner, we conclude that his contention is without merit. Specifically, the Medical Examiner testified at trial that the victim was shot once in the abdomen and twice in the back. Defendant contends that certain records not introduced in evidence at trial raise a question whether the victim was shot more than once in the front, rather than the back, and that defense counsel should have used those records to challenge the testimony of the Medical Examiner in order to support his justification defense. Defendant's own expert at trial, however, agreed with the Medical Examiner that there were two entrance wounds to the victim's back. Thus, if defense counsel had attacked the findings of the Medical Examiner regarding the entrance wounds to the back, he would also have been attacking the credibility of defendant's own expert. Defendant has therefore failed to establish the absence of a strategic reason for defense counsel's failure to challenge the testimony of the Medical Examiner based on records in defense counsel's possession (*see People v Rosado*, 13 AD3d 902, 903-904, *lv denied* 4 NY3d 835).

Defendant's contention that the court erred in failing to submit the two murder charges, i.e., for intentional murder and depraved indifference murder, in the alternative was not raised in his CPL 440.10 motion and therefore is not properly before us (*see generally People v Brown*, 217 AD2d 797, 798, *lv denied* 86 NY2d 872; *People v Green*, 111 AD2d 349, 349). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

754

KA 12-00255

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL S. SMREK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

LORI P. RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered December 20, 2011. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]), and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of felony driving while intoxicated (§§ 1192 [3]; 1193 [1] [c] [ii]), and aggravated unlicensed operation of a motor vehicle in the second degree (§ 511 [2]). Contrary to defendant's contention in each appeal, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). Defendant's valid waiver forecloses any challenge by defendant to the severity of the sentence in each appeal (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

755

KA 12-00256

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL S. SMREK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

LORI P. RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered December 20, 2011. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony and aggravated unlicensed operation of a motor vehicle in the second degree.

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

Same Memorandum as in *People v Smrek* ([appeal No. 1] ___ AD3d ___ [June 14, 2013]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

758

KA 12-00533

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ORVIS WARD, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO, FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Spencer J. Ludington, A.J.), rendered June 28, 2011. The judgment convicted defendant, upon a jury verdict, of rape in the second degree, criminal sexual act in the second degree, sexual abuse in the first degree, sexual abuse 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: Defendant appeals 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]), sexual abuse in the first degree (§ 130.65 [2]), sexual abuse in the second degree (§ 130.60 [2]), and endangering the welfare of a child (§ 260.10 [1]). Defendant contends that County Court erred in denying his motion to preclude the People from presenting his statement to the police in evidence at trial because it constituted prior bad act evidence offered solely to establish his propensity to commit sexual crimes. We reject that contention. "In a criminal prosecution, any act or declaration of the accused inconsistent with innocence is admissible as an admission" (Prince, Richardson on Evidence § 8-204 [Farrell 11th ed]; *see People v Jackson*, 29 AD3d 409, 411-412, *affd* 8 NY3d 869; *People v Caban*, 5 NY3d 143, 151 n; *People v Howard*, 101 AD3d 1749, 1751). Here, defendant's statement was properly admitted in evidence because it contained admissions concerning the crimes charged in the indictment (*see Jackson*, 29 AD3d at 411-412; *People v Knox*, 232 AD2d 811, 812, *lv denied* 89 NY2d 943; *People v Ragin*, 224 AD2d 642, 642, *lv denied* 88 NY2d 883). We reject the further contention of defendant that the admission of his statement in evidence rendered the second, fourth, and seventh counts of the indictment duplicitous (*see People v Ramirez*, 99 AD3d 1241, 1242, *lv denied* 20 NY3d 988; *People v Casado*, 99 AD3d 1208, 1210, *lv denied* 20 NY3d 985).

We conclude that, contrary to the contention of defendant, the court did not abuse its discretion in denying his motion for a mistrial based upon the misconduct of two prosecution witnesses (*see People v Ortiz*, 54 NY2d 288, 292; *People v Robinson*, 309 AD2d 1228, 1229, *lv denied* 1 NY3d 579). Upon the motion of a defendant, the court "must declare a mistrial and order a new trial of the indictment . . . when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives him [or her] of a fair trial" (CPL 280.10 [1]). Here, the record establishes that defendant was neither prejudiced nor deprived of a fair trial by the misconduct of the witnesses (*see People v Donald*, 6 AD3d 1177, 1177, *lv denied* 3 NY3d 639; *see generally* CPL 280.10 [1]; *Ortiz*, 54 NY2d at 292; *Robinson*, 309 AD2d at 1229). Defendant failed to preserve for our review his contention with respect to the court's curative instruction concerning the misconduct of the witnesses or his contention that the court should have permitted defense counsel to elicit hearsay testimony from a witness on the subject of the misconduct, and we decline to exercise our power to reach those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant likewise failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct during summation inasmuch as he failed to object to the two challenged comments (*see People v Madera*, 103 AD3d 1197, 1199; *People v Foster*, 101 AD3d 1668, 1670, *lv denied* 20 NY3d 1098; *People v Wright*, 85 AD3d 1642, 1643, *lv denied* 17 NY3d 863). In any event, the prosecutor's characterization of defendant's statement was a fair response to defense counsel's summation and/or a fair comment on the evidence (*see People v Goupil*, 104 AD3d 1215, 1216*).* Although the prosecutor's characterization of the trial as a "search for the truth" was indeed improper (*see People v Maye*, 206 AD2d 846, 846; *People v Smith*, 184 AD2d 326, 326, *lv denied* 80 NY2d 910), we conclude that the prosecutor's "single improper comment was not so egregious that defendant was thereby deprived of a fair trial" (*People v Willson*, 272 AD2d 959, 960, *lv denied* 95 NY2d 873; *see Smith*, 184 AD2d at 326). Nor can it be said that defendant received ineffective assistance of counsel due to the failure of defense counsel to object to that single improper remark (*see People v Wiley*, 104 AD3d 1314, 1314; *People v Tolliver*, 93 AD3d 1150, 1151, *lv denied* 19 NY3d 968). Rather, defense counsel provided defendant with meaningful representation throughout the proceedings (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, the sentence is not unduly harsh or severe, particularly in light of the severity of the crimes and their impact on the victim.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

760

KA 12-00879

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID BOTINDARI, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (HEATHER M. DESTEFANO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), entered November 14, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court's upward departure from his presumptive classification as a level two risk is not supported by clear and convincing evidence. We reject that contention. "A court may make an upward departure from a presumptive risk level when, after consideration of the indicated factors . . . [,] there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines" (*People v Grady*, 81 AD3d 1464, 1464 [internal quotation marks omitted]; *see People v Wheeler*, 59 AD3d 1007, 1008, *lv denied* 12 NY3d 711). Here, there is clear and convincing evidence that defendant committed a series of sexual offenses against his girlfriend's daughter over the course of more than seven years, beginning when the victim was five years old. Contrary to defendant's contention, the court properly concluded that the risk assessment instrument prepared by the Board of Examiners of Sex Offenders did not adequately take into account the nature and duration of the sexual abuse, including the victim's young age when the abuse began and defendant's exploitation of his relationship of trust with the victim's family (*see People v May*, 77 AD3d 1388, 1388; *People v Mantilla*, 70 AD3d 477, 478, *lv denied* 15 NY3d 706; *see generally People v Harris*, 50 AD3d 1556, 1557, *lv denied* 10 NY3d 716;

People v Leibach, 39 AD3d 1093, 1094, *lv denied* 9 NY3d 806).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

761

KA 11-02602

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES H. STEEN, DEFENDANT-APPELLANT.

AMY L. HALLENBECK, JOHNSTOWN, FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO, FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered June 23, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the first degree and murder in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]) and two counts of murder in the second degree (§ 125.25 [3] [felony murder]). Defendant failed to preserve for our review his contention that County Court's charge with respect to the affirmative defense of extreme emotional disturbance was erroneous (*see* CPL 470.05 [2]; *People v Orta*, 12 AD3d 1147, 1148, *lv denied* 4 NY3d 801), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention that the alleged error in the charge constitutes a mode of proceedings error that does not require preservation (*see People v Thomas*, 50 NY2d 467, 470-472).

Contrary to defendant's further contention, we conclude that the jury's rejection of the affirmative defense of extreme emotional disturbance was not against the weight of the evidence (*see People v Reynart*, 71 AD3d 1057, 1057-1058, *lv denied* 14 NY3d 891; *People v Butera*, 23 AD3d 1066, 1067, *lv denied* 6 NY3d 774, *reconsideration denied* 6 NY3d 832). "[T]he jury was entitled to consider the conduct of defendant before and after the homicide[s] and to reject his explanation for his conduct" (*People v Domblewski*, 238 AD2d 916, 916, *lv denied* 90 NY2d 904). Additionally, although "an acquittal would not have been unreasonable" on the charge of murder in the first degree in light of defendant's testimony that he did not intend to shoot the second victim (*People v Danielson*, 9 NY3d 342, 348), we

conclude that the weight of the credible evidence nevertheless supports the jury's implicit finding that defendant intended to cause serious physical injury or death to the second victim (*see People v Switzer*, 15 AD3d 913, 914, *lv denied* 5 NY3d 770). Viewing the evidence in light of the elements of murder in the first degree as charged to the jury (*see Danielson*, 9 NY3d at 348), we thus conclude that the verdict is not against the weight of the evidence with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495).

With respect to the conviction of two counts of felony murder, we reject defendant's contention that he "may not be convicted of felony murder when burglary is the predicate felony and his . . . intent at the time of the entry [was] to commit murder" (*People v Couser*, 12 AD3d 1040, 1041, *lv denied* 4 NY3d 762; *see People v Miller*, 32 NY2d 157, 161). Viewing the evidence in light of the elements of felony murder as charged to the jury (*see Danielson*, 9 NY3d at 348), we reject defendant's further contention, premised on the above intent argument, that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Viewing the evidence of the two counts of felony murder in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we similarly reject defendant's contention, premised on the same intent argument, that the conviction is not supported by legally sufficient evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, we conclude that the sentence of life without parole for the first degree murder conviction is not unduly harsh or severe.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

762

KA 11-01645

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE THOMPSON, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 15, 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.

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of burglary in the second degree (Penal Law § 140.25 [2]). Contrary to defendant's contention, Supreme Court properly refused to suppress physical evidence seized from him and his statements to a police officer. Defendant contends that the police had only a common-law right of inquiry under level two of *People v De Bour* (40 NY2d 210, 223), but we conclude that level three applies here, thus authorizing the police officer's forcible stop and detention of defendant (*see generally People v Moore*, 6 NY3d 496, 498-499). A retired police lieutenant (hereafter, witness) telephoned the police and gave a description of a man to the dispatcher, after observing the man enter the breezeway of his neighbor's house and then hearing a bang or a thud. An officer responded to the call in less than one minute and observed defendant, who matched the description given by the witness, walking down the driveway and carrying a blue gift bag. The officer told defendant to stop and, when defendant ignored the officer, the officer grabbed his arm and asked him various questions. The officer could see that the blue gift bag contained rolls of coins. Under those circumstances, we conclude that the officer had reasonable suspicion to stop and detain defendant (*see People v Powell*, 101 AD3d 1783, 1785, *lv denied* 20 NY3d 1102).

Contrary to defendant's further contention, the court properly sentenced him as a persistent violent felony offender (*see* Penal Law § 70.08 [1]). Defendant was convicted of attempted burglary in the

second degree (§§ 110.00, 140.25 [2]) in 1997, and two counts of burglary in the second degree (§ 140.25 [2]) in 2004. The adjudication of defendant as a second violent felony offender in 2004 is binding upon defendant (*see* CPL 400.15 [8]; *People v Tocci*, 52 AD3d 541, 542, *lv denied* 11 NY3d 858; *see also* CPL 400.15 [7] [b]). Defendant admitted at the 2004 sentencing hearing that he had a prior violent felony conviction, and he therefore cannot contest the court's use of that predicate violent felony conviction herein for purposes of determining whether he is a persistent violent felony offender (*see Tocci*, 52 AD3d at 542; *People v Wilson*, 231 AD2d 912, 913, *lv denied* 89 NY2d 868). In any event, the People established defendant's conviction of the prior violent felonies beyond a reasonable doubt (*see* CPL 400.15 [7] [a]; *People v Clyde*, 90 AD3d 1594, 1596, *lv denied* 19 NY3d 971), and further established a period of incarceration that tolled the 10-year limitation (*see* Penal Law § 70.04 [1] [b] [iv], [v]; *cf. People v Hamilton*, 49 AD3d 1163, 1164), and defendant failed to meet his burden of establishing that either the 1997 or the 2004 conviction was unconstitutionally obtained (*see generally People v Konstantinides*, 14 NY3d 1, 14-15).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

763

KA 11-02171

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH L. JONES, 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 Erie County Court (Michael F. Pietruszka, J.), rendered October 17, 2011. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256; *People v Luper*, 101 AD3d 1668, 1668, *lv denied* 20 NY3d 1101). The valid waiver of the right to appeal, however, does not encompass defendant's contention regarding the denial of his request for youthful offender status because "[n]o mention of youthful offender status was made before defendant waived his right to appeal during the plea colloquy" (*People v Anderson*, 90 AD3d 1475, 1476, *lv denied* 18 NY3d 991). We nevertheless reject defendant's contention that County Court abused its discretion in denying his request for youthful offender status (*see People v Guppy*, 92 AD3d 1243, 1243, *lv denied* 19 NY3d 961; *People v Session*, 38 AD3d 1300, 1301, *lv denied* 8 NY3d 990). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

764

KA 11-02374

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE F. LUCIEER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO, FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered March 24, 2011. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of grand larceny in the fourth degree (Penal Law § 155.30 [1]). In appeal No. 2, defendant appeals from a judgment entered the same day as the judgment in appeal No. 1, revoking the sentence of probation imposed upon a previous conviction of grand larceny in the fourth degree (*id.*), based upon his admitted violation of probation, and sentencing him to a term of incarceration. We reject defendant's contention that the waiver of the right to appeal is invalid. County Court "made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was 'separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Graham*, 77 AD3d 1439, 1439, *lv denied* 15 NY3d 920, quoting *People v Lopez*, 6 NY3d 248, 256).

The contention of defendant in appeal No. 1 that he was denied effective assistance of counsel because his attorney failed to pursue an allegedly meritorious speedy trial motion does not survive his plea and valid waiver of the right to appeal inasmuch as defendant "failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v Paduano*, 84 AD3d 1730, 1731 [internal quotation marks omitted]; *see People v Slingerland*, 101 AD3d 1265, 1267, *lv denied* 20 NY3d 1104;

People v Speranza, 96 AD3d 1164, 1165). In any event, defendant did not have a meritorious speedy trial claim inasmuch as the People demonstrated "sufficient excludable time" to establish compliance with CPL 30.30 (*People v Kendzia*, 64 NY2d 331, 338; *see People v Walker*, 27 AD3d 899, 900, *lv denied* 7 NY3d 764; *see generally People v Sweet*, 79 AD3d 1772). Defense counsel therefore "was not ineffective in failing to pursue a motion that had no chance of success" (*People v Rivers*, 67 AD3d 1435, 1436, *lv denied* 14 NY3d 773, *reconsideration denied* 14 NY3d 892; *see People v Caban*, 5 NY3d 143, 152).

Defendant further contends that the court erred in ordering restitution based in part on the replacement cost, rather than the fair market value, of the stolen property. Although "[d]efendant's challenge to the amount of restitution is not foreclosed by his waiver of the right to appeal because the amount of restitution was not included in the terms of the plea agreement" (*People v Tessitore*, 101 AD3d 1621, 1622, *lv denied* 20 NY3d 1104 [internal quotation marks omitted]; *see People v Miller*, 87 AD3d 1303, 1304, *lv denied* 18 NY3d 926), that contention is unpreserved for our review inasmuch as defendant did not object to the victim's valuation testimony or otherwise alert the sentencing court to his objection (*see* CPL 470.05 [2]). In any event, we conclude that the People established the amount of restitution by a preponderance of the evidence, and there is no basis to disturb the restitution award (*see* CPL 400.30 [4]; *People v Tzitzikalakis*, 8 NY3d 217, 221-222; *People v LaVilla*, 87 AD3d 1369, 1369-1370; *see generally People v Periard*, 15 AD3d 693, 694).

Finally, defendant's valid waiver of the right to appeal encompasses his contention in both appeals that the sentence imposed pursuant to the plea agreement is unduly harsh and severe (*see People v Rodman*, 104 AD3d 1186, 1188; *Tessitore*, 101 AD3d at 1621-1622; *see generally Lopez*, 6 NY3d at 255-256).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

765

KA 12-00940

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE F. LUCIEER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO, FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered March 24, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Same Memorandum as in *People v Lucieer* ([appeal No. 1] ___ AD3d ___ [June 14, 2013]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

766

KA 11-01769

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTIAN L. FLAGG, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a resentence of the Erie County Court (Michael F. Pietruszka, J.), rendered July 27, 2011. Defendant was resentenced upon his conviction of driving while intoxicated, a misdemeanor, and vehicular manslaughter in the second degree.

It is hereby ORDERED that the resentence so appealed from is unanimously modified on the law by vacating the term of probation imposed on count four of the indictment and as modified the resentence is affirmed.

Memorandum: Defendant was convicted upon his plea of guilty of vehicular manslaughter in the second degree (Penal Law § 125.12 [1]) and driving while intoxicated (Vehicle and Traffic Law § 1192 [3]). In appeal No. 1, he appeals from a resentence that added a term of probation with respect to each count requiring defendant to equip with an ignition interlock device (IID) any vehicle owned or operated by him. In appeal No. 2, defendant appeals from the judgment of conviction.

As the People correctly concede in appeal No. 1, the resentence is illegal insofar as County Court directed that defendant serve a term of five years of probation following the indeterminate term of imprisonment of 2 to 6 years on the conviction of vehicular manslaughter in the second degree (*see* Penal Law § 60.01 [2] [d]). Contrary to defendant's contention that the term of imprisonment therefore must be reduced, however, we agree with the People that the proper remedy is to vacate the term of probation imposed on the vehicular manslaughter count. We therefore modify the resentence accordingly. Section 60.21 requires a court to sentence a defendant convicted of a violation of Vehicle and Traffic Law § 1192 (2), (2-a), or (3) to a period of probation or conditional discharge and to order

the installation and maintenance of a functioning IID. Section 60.21 does not apply, however, to vehicular manslaughter in the second degree (*see* Penal Law § 125.12; William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Penal Law § 60.21; *compare* Vehicle and Traffic Law § 1198 [2] [a]).

Contrary to defendant's contention in appeal No. 2, we conclude that he knowingly, intelligently and voluntarily waived his right to appeal as a condition of the plea (*see generally People v Lopez*, 6 NY3d 248, 256). The court "engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v James*, 71 AD3d 1465, 1465 [internal quotation marks omitted]), and the record establishes that he "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Lopez*, 6 NY3d at 256). That valid waiver forecloses any challenge by defendant to the court's suppression ruling (*see People v Davis*, 64 AD3d 1190, 1190, *lv denied* 13 NY3d 859), or to the severity of the sentence (*see People v Harris*, 94 AD3d 1484, 1485, *lv denied* 19 NY3d 961; *see generally People v Lococo*, 92 NY2d 825, 827).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

767

KA 13-00058

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTIAN L. FLAGG, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS 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 F. Pietruszka, J.), rendered June 6, 2011. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a misdemeanor, and vehicular manslaughter in the second degree.

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

Same Memorandum as in *People v Flagg* ([appeal No. 1] ___ AD3d ___ [June 14, 2013]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

770

CAF 12-00825

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF WILLIAM PERRY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MELVIN RENDER, RESPONDENT-RESPONDENT.

MINDY L. MARRANCA, BUFFALO, FOR PETITIONER-APPELLANT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered April 24, 2012 in a proceeding pursuant to Family Court Act article 6. The order denied the objection of petitioner and confirmed the report of the referee.

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

Memorandum: Pursuant to a stipulated order, petitioner father has sole custody of his 12-year-old daughter, and respondent, the child's half-brother, has "access" to the child every weekend. The father filed a petition seeking to terminate respondent's "access" on the alleged grounds that, inter alia, respondent is a drug dealer and exposes the child to domestic violence. Respondent failed to answer the petition. Following a hearing, the Referee issued a report recommending dismissal of the petition, and Family Court confirmed the Referee's report. We affirm. Even assuming, arguendo, that there was a change of circumstances (*see generally Black v Watson*, 81 AD3d 1316, 1316, *lv dismissed in part and denied in part* 17 NY3d 747), we conclude that the court's determination that it is in the best interests of the child to continue having scheduled visitation with respondent has a sound and substantial basis in the record (*see Matter of Chery v Richardson*, 88 AD3d 788, 788-789; *see generally Eschbach v Eschbach*, 56 NY2d 167, 173-174). It is undisputed that the child and respondent have a close relationship, which the child wishes to continue. Although the express wishes of the child are not controlling, they are entitled to great weight where, as here, the child's age and maturity render her input particularly meaningful (*see Matter of Dingledey v Dingledey*, 93 AD3d 1325, 1326).

Finally, we reject the father's contention that he was denied effective assistance of counsel. The father failed to demonstrate that he was prejudiced by the alleged deficiencies in his attorney's

performance, and the record reflects that his attorney provided meaningful representation (*see Matter of Nagi T. v Magdia T.*, 48 AD3d 1061, 1062).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

771

CAF 12-01065

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF LAURA M. SCHULTZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KARL F. SCHULTZ, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

PETER P. VASILION, WILLIAMSVILLE, FOR PETITIONER-APPELLANT.

THOMAS A. DEUSCHLE, ATTORNEY FOR THE CHILD, WEST SENECA.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 19, 2012. The order dismissed the petition.

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

Same Memorandum as in *Matter of Schultz v Schultz* ([appeal No. 2] ___ AD3d ___ [June 14, 2013]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

772

CAF 12-01066

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF LAURA M. SCHULTZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KARL F. SCHULTZ, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

PETER P. VASILION, WILLIAMSVILLE, FOR PETITIONER-APPELLANT.

THOMAS A. DEUSCHLE, ATTORNEY FOR THE CHILD, WEST SENECA.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 19, 2012. The order granted the motion of respondent to dismiss the amended petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion to dismiss the amended petition is denied, the amended petition is reinstated and the matter is remitted to Family Court, Erie County, for a hearing on the amended petition.

Memorandum: Petitioner mother appeals from orders dismissing her violation petition (appeal No. 1), granting the motion of respondent father to dismiss the amended violation petition (appeal No. 2), and dismissing the amended violation petition (appeal No. 3). We dismiss the appeal from the order in appeal No. 1 because the amended petition superseded the original petition (*see Matter of Stewart v Zigmant* [appeal No. 1], 198 AD2d 883, 883; *see also Preston v APCH, Inc.*, 89 AD3d 65, 69). With respect to appeals No. 2 and 3, we agree with the mother that Family Court erred in dismissing her amended petition without a hearing "inasmuch as the [amended] petition alleges sufficient factual and legal grounds to establish a violation of [a] prior order" (*Matter of Warrior v Beatman*, 79 AD3d 1770, 1770-1771, *lv denied* 16 NY3d 819; *see Matter of Lisa B.I. v Carl D.I.*, 46 AD3d 1451, 1451; *Matter of Zelodius C. v Danny L.*, 39 AD3d 320, 320). Moreover, we note that the father's submissions in support of his motion to dismiss do not address all of the allegations in the mother's amended petition. In light of our determination, we do not consider the mother's remaining contention.

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court

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

773

CAF 12-01067

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF LAURA M. SCHULTZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KARL F. SCHULTZ, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

PETER P. VASILION, WILLIAMSVILLE, FOR PETITIONER-APPELLANT.

THOMAS A. DEUSCHLE, ATTORNEY FOR THE CHILD, WEST SENECA.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 19, 2012. The order dismissed the amended petition.

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

Same Memorandum as in *Matter of Schultz v Schultz* ([appeal No. 2] ___ AD3d ___ [June 14, 2013]).

Entered: June 14, 2013

Frances E. Cafarell
Clerk of the Court