SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 20, 2014

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. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

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KA 12-02042

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL WADE, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (MELVIN BRESSLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered September 19, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree (two counts), grand larceny in the fourth degree, burglary in the third degree and petit larceny (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of petit larceny under count five of the indictment and dismissing that count of the indictment, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, two counts of burglary in the second degree (Penal Law § 140.25 [2]) and three counts of petit larceny (§ 155.25), defendant contends that County Court erred in denying that part of his omnibus motion seeking to suppress the showup identification testimony of one of the victims on the ground that the showup procedure was unduly suggestive. Although we agree with defendant that the People "failed in their threshold responsibility to call any witness who could testify to the circumstances under which defendant was actually identified" by that victim (*People v Ortiz*, 90 NY2d 533, 538), we conclude that the court's error in refusing to suppress that identification testimony is harmless beyond a reasonable doubt (*see People v Siler*, 45 AD3d 1403, 1403, *lv denied* 10 NY3d 771; *People v Davis*, 15 AD3d 930, 931, *lv denied* 5 NY3d 761). That victim did not identify defendant at trial and, moreover, defense counsel conceded during summation that defendant was the person who was present at the scene and spoke with the victims, and thus that victim's identification of defendant was not at issue at trial (*see Siler*, 45 AD3d at 1403; *Davis*, 15 AD3d at 931).

Contrary to defendant's further contention, the counts of the indictment charging him with burglary in the second degree are not multiplicitous. Although an indictment may be multiplicitous where " 'two separate counts of the indictment charge the same crime' " (*People v Brandel*, 306 AD2d 860, 860; *see People v Kindlon*, 217 AD2d 793, 795, *lv denied* 86 NY2d 844), an indictment may include separate counts charging the same crime provided that each crime "constitutes a separate and distinct offense" (*Brandel*, 306 AD2d at 860). Here, there was evidence, albeit circumstantial, from which the jury could have concluded that defendant entered the victims' home, stole property including sunglasses and a wallet, and then exited the home. The circumstantial evidence also permitted the jury to conclude that, at another point in time, defendant entered a different part of that home and stole other property. Thus, defendant was properly charged with two separate counts of burglary in the second degree (*see People v Felder*, 2 AD3d 365, 365, *lv denied* 2 NY3d 799; *see generally People v Brown*, 255 AD2d 686, 687, *lv denied* 92 NY2d 1029).

We agree with defendant's further contention, however, that count five of the indictment, charging him with petit larceny, was rendered duplicitous by the trial evidence. We therefore modify the judgment accordingly. "Because defendant's right to be tried and convicted of only those crimes charged in the indictment is fundamental and nonwaivable" (*People v McNab*, 167 AD2d 858, 858; *see People v Filer*, 97 AD3d 1095, 1096, *lv denied* 19 NY3d 1025), we review defendant's contention despite his failure to preserve it. CPL 200.30 (1) provides that "[e]ach count of an indictment may charge one offense only." Count five of the indictment charged defendant with stealing a bicycle and thus was not facially defective. At trial, however, the evidence established that two bicycles were stolen. Consequently, " '[r]eversal is required because the jury may have convicted defendant of an unindicted [petit larceny], resulting in the usurpation by the prosecutor of the exclusive power of the [g]rand [j]ury to determine the charges' . . . , as well as the 'danger that . . . different jurors convicted defendant based on different acts' " (*People v Jacobs*, 52 AD3d 1182, 1183, *lv denied* 11 NY3d 926). Under the circumstances presented here, we dismiss that count of the indictment with prejudice.

Defendant's remaining contentions are not preserved for our review, and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 09-02089

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN L. MULLIGAN, DEFENDANT-APPELLANT.

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

EDWIN L. MULLIGAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Brian M. McCarthy, J.), rendered September 4, 2009. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third 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, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b], [3]). During the trial, County Court admitted in evidence a 911 recording containing several statements that were made approximately two minutes after the shooting that resulted in the charges herein. During the recording, a witness stated that he had found the victim after she had been shot, and that the victim was conscious but did not know where she had been shot. The 911 operator asked the witness who had shot the victim, and the witness initially responded, “I guess her boyfriend.” The witness then asked the victim to identify the shooter, the victim responded by identifying defendant, and the witness repeated that response to the 911 operator.

We reject defendant’s contention that the court erred in admitting in evidence the victim’s statements on the 911 recording under the excited utterance exception to the hearsay rule. In determining whether to admit such statements in evidence, “it is necessary to review the facts of the case to consider the atmosphere

surrounding the statements and thus determine whether they were precipitated by the subject event" (*People v Norton*, 164 AD2d 343, 353, *affd* 79 NY2d 808). The fact "[t]hat statements were made in response to an inquiry does not disqualify them as excited utterances but rather is a fact to be considered by the trial court" (*People v Cotto*, 92 NY2d 68, 79). Here, the evidence in the record establishes that the victim was shot four times in front of her 14-month-old toddler, and the statements at issue were made within minutes of that incident. Moreover, during the medical treatment administered at the scene shortly after the 911 call, the victim "was crying out that she didn't want to die." We agree with the People that such evidence establishes that the victim " 'spoke while under the stress or influence of the excitement caused by the event, so that [her] reflective capacity was stilled' . . . The spontaneity of the declaration guarantee[d] its trustworthiness and reliability" (*People v Cantave*, 21 NY3d 374, 381).

We agree with defendant, however, that the court erred in admitting in evidence the statement of the witness identifying defendant as the shooter under the present sense impression exception to the hearsay rule. It is well settled that, in order "[t]o qualify as a present sense impression, the out-of-court statement must be (1) made by a person perceiving the event as it is unfolding or immediately afterward . . . , and (2) corroborated by independent evidence establishing the reliability of the contents of the statement" (*id.* at 382). Here, the witness did not see the shooting, and he confirmed defendant's identity as the shooter only after questioning the victim (*see People v Vasquez*, 88 NY2d 561, 580; *see also People v Brown*, 104 AD3d 1203, 1204, *lv denied* 21 NY3d 1014). Therefore, the witness's statement was not admissible as a present sense impression, and we conclude that the admission of that statement in evidence improperly bolstered the victim's identification of defendant as the shooter (*see People v Spencer*, 96 AD3d 1552, 1553, *lv denied* 19 NY3d 1029, *reconsideration denied* 20 NY3d 989; *see generally People v Smith*, 22 NY3d 462, 465-467). We conclude, however, that the court's error "is harmless because the 'proof of [defendant's] guilt was overwhelming . . . and . . . there was no significant probability that the jury would have acquitted [him] had the proscribed evidence not been introduced' " (*Spencer*, 96 AD3d at 1553, quoting *People v Kello*, 96 NY2d 740, 744; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Defendant's further contention that the court erred in admitting in evidence the testimony of a police officer that bolstered the victim's identification of defendant lacks merit inasmuch as that testimony provided a narrative of the events leading to defendant's arrest (*see e.g. People v Perry*, 62 AD3d 1260, 1261, *lv denied* 12 NY3d 919; *People v Mendoza*, 35 AD3d 507, 507, *lv denied* 8 NY3d 987; *People v Smalls*, 293 AD2d 500, 501, *lv denied* 98 NY2d 681). In any event, any such error is harmless (*see generally Crimmins*, 36 NY2d at 241-242), particularly in view "of the 'clear and strong' identification of defendant by the victim and the other evidence of defendant's guilt" (*People v Simms*, 244 AD2d 920, 920-921, *lv denied* 91 NY2d 897;

see People v McCullen, 63 AD3d 1708, 1709, *lv denied* 13 NY3d 747; *People v Cunningham*, 233 AD2d 845, 846, *lv denied* 89 NY2d 1091).

Defendant's contention that he was denied a fair trial by prosecutorial misconduct because the prosecutor attempted to mislead the jury on the issue whether the victim was wearing a winter coat when she was shot is not preserved for our review (*see People v Golson*, 93 AD3d 1218, 1219-1220, *lv denied* 19 NY3d 864; *see generally People v Rogers*, 103 AD3d 1150, 1154, *lv denied* 21 NY3d 946) and, in any event, that contention lacks merit. Although a " 'prosecutor has a duty to correct trial testimony if he or she knows that it is false' " (*People v McDuffie*, 77 AD3d 1360, 1361, *lv denied* 16 NY3d 833; *see People v Savvides*, 1 NY2d 554, 556-557), the record does not establish that the prosecutor elicited false testimony or misled the jury (*see generally People v Kirk*, 96 AD3d 1354, 1359, *lv denied* 20 NY3d 1012).

Defendant contends that the prosecutor also engaged in misconduct by cross-examining him regarding his failure to contact the police after the shooting, thereby infringing upon his right to remain silent, and then engaged in further misconduct by commenting on that failure during summation. Those contentions are preserved for our review only to the extent that defendant objected to parts of the prosecutor's summation. In any event, contrary to defendant's contention regarding cross-examination, "[t]he People's primary focus was on defendant's conduct, to wit, his flight and his failure to seek aid for the victim [and their child], rather than [defendant's] silence . . . Moreover, defendant's failure to contact the police was admissible as inconsistent with his defense" (*People v Guzman*, 259 AD2d 364, 365, *lv denied* 93 NY2d 925; *see generally People v Rothschild*, 35 NY2d 355, 360-361). We further conclude that the disputed parts of the People's summation were fair comment upon the evidence (*see People v Ashwal*, 39 NY2d 105, 109-110). We reject defendant's related contention that he was denied meaningful representation based on defense counsel's failure to preserve for our review the issue of prosecutorial misconduct in its entirety. An attorney's "failure to 'make a motion or argument that has little or no chance of success' " does not amount to ineffective assistance (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287). For the reasons discussed above, the prosecutor's cross-examination of defendant on the subject of his failure to contact police was proper and thus any argument to the contrary had "little or no chance of success" (*id.*). We further conclude that defendant was not deprived of a fair trial by the cumulative effect of the errors alleged herein (*see People v Snyder*, 100 AD3d 1367, 1370, *lv denied* 21 NY3d 1010; *People v McKnight*, 55 AD3d 1315, 1317, *lv denied* 11 NY3d 927).

Defendant further contends in his main and pro se supplemental briefs that the conviction is not supported by legally sufficient evidence and that the verdict is contrary to the weight of the evidence, basing both contentions primarily on his challenge to the victim's credibility. We reject those contentions. The victim "did

not provide internally inconsistent testimony, and she was not the source of all of the evidence of [defendant's] guilt" (*People v Hampton*, 21 NY3d 277, 288 [internal quotation marks omitted]). Viewing the evidence in the light most favorable to the People (*see People v Williams*, 84 NY2d 925, 926), we conclude that it is legally sufficient to support the conviction of the crimes charged (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, 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 also 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]), and we see no basis for disturbing the jury's resolution of those issues.

Defendant further contends that the court erred in failing to issue a decision on those parts of his omnibus motion seeking suppression of evidence found by the police during searches of his house and vehicle pursuant to a search warrant. In his motion, defendant contended that his constitutional rights were violated by the searches because the court lacked probable cause to issue the warrant. On the initial date that the court set for argument of the motions, the court indicated that it would review the search warrant application and the search warrants. At the start of the trial, defense counsel argued other motions and obtained rulings on other applications such as his *Sandoval* request, but he did not seek to argue the suppression motion. In addition, defense counsel did not respond when the court inquired whether there were "any other issues we may need to talk about before we bring the jury up," nor did he object when the evidence seized as a result of those searches was admitted in evidence at trial. "Because defendant failed to seek a ruling on those parts of his omnibus motion concerning the alleged [constitutional] violation . . . or to object to the admission of [that] evidence at trial, we conclude that defendant abandoned his contention[] that [the court] erred in refusing to suppress [the evidence] on those grounds" (*People v Nix*, 78 AD3d 1698, 1699, *lv denied* 16 NY3d 799, *cert denied* ___ US ___, 132 S Ct 157; *see People v Anderson*, 52 AD3d 1320, 1320-1321, *lv denied* 11 NY3d 733).

We have considered defendant's remaining contentions in both his main and pro se supplemental briefs, and we conclude that they are without merit.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01368

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

CHARLES COONEY, JR., EVELINE COONEY ELKERTON,
PLAINTIFFS-APPELLANTS,
FAY THIBEAULT AND JUDE PRIEST, PLAINTIFFS,

V MEMORANDUM AND ORDER

PHILIP SHEPARD, DEFENDANT-RESPONDENT.

CARROLL & CARROLL LAWYERS, P.C., SYRACUSE (JOHN BENJAMIN CARROLL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Charles C. Merrell, J.), entered April 30, 2013. The order, among other things, denied in part the cross motion of plaintiffs Charles Cooney, Jr. and Eveline Cooney Elkerton for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking partition and sale of real property on Skaneateles Lake, as well as past rent and interest covering time that defendant occupied the property. The property, which includes a seasonal residence and a garage, is owned by plaintiffs and defendant as tenants in common. Defendant owns a 50% interest, and each plaintiff owns a 12.5% interest, in the property. In his answer, defendant asserted three counterclaims, the third of which was based on unjust enrichment, seeking reimbursement for money he expended on the property, including but not limited to money for taxes, repairs, maintenance and renovation expenses. As relevant to this appeal, plaintiffs-appellants (hereafter, plaintiffs) cross-moved for summary judgment seeking an order dismissing defendant’s counterclaims against them, determining that defendant is liable to them for rent “for his sole use and occupation of the jointly owned premises” and directing partition and sale of the property.

Supreme Court granted the cross motion in part, dismissing the first and second counterclaims, and directing partition and sale of the property. In denying that part of the cross motion seeking summary judgment for past rent, the court determined that defendant was not liable to plaintiffs for rent because he did not exclude

plaintiffs, i.e., tenants in common, from the property. In denying that part of the cross motion seeking summary judgment dismissing the third counterclaim, for unjust enrichment, the court determined that defendant was entitled to an increased percentage of the proceeds of the sale of the property as an offset for "property taxes and repairs," and stated that it would schedule an inquest to determine the amount of that offset.

Contrary to plaintiffs' contention, the court properly determined that defendant was not liable to them for the value of defendant's use and occupancy. "[P]artition is an equitable remedy in nature and [the court] has the authority to adjust the rights of the parties so [that] each receives his or her proper share of the property and its benefits" (*Hunt v Hunt*, 13 AD3d 1041, 1042). A tenant in common "has the right to take and occupy the whole of the premises and preserve them from waste or injury, so long as he or she does not interfere with the right of [the other tenants] to also occupy the premises" (*Jemzura v Jemzura*, 36 NY2d 496, 503). "Mere occupancy alone by one of the tenants does not make that tenant liable to the other tenant[s] for use and occupancy absent an agreement to that effect or an ouster" (*McIntosh v McIntosh*, 58 AD3d 814, 814; *see Misk v Moss*, 41 AD3d 672, 673, *lv dismissed* 9 NY3d 946, *lv denied* 10 NY3d 704), both of which are absent here.

Contrary to plaintiffs' further contention, the court properly determined that defendant was entitled to be reimbursed for payments that he made for property taxes and repairs. It is well settled that a tenant in common is entitled to be reimbursed for the share of the taxes paid by him for the benefit of other tenants in common (*see Worthing v Cossar*, 93 AD2d 515, 518). Additionally, a tenant in common is entitled to be reimbursed for money expended in maintaining, repairing and improving the property, if such maintenance, repairs, and improvements were undertaken in good faith and were necessary to protect or preserve the property (*see Degliuomini v Degliuomini*, 45 AD3d 626, 628; *Worthing*, 93 AD2d at 518). Under the circumstances here, we conclude that the court properly determined that plaintiffs were liable for the cost of repairs, with the amount to be determined at the inquest (*see Kwang Hee Lee v Adjmi 936 Realty Assoc.*, 34 AD3d 646, 648).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01657

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

IN THE MATTER OF JEANNE M. JOHNSTONE,
FORMERLY KNOWN AS JEANNE M. CAMP,
INDIVIDUALLY AND AS EXECUTRIX OF THE
ESTATE OF WILLIAM F. JOHNSTONE, DECEASED,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TREASURER OF WAYNE COUNTY, BOARD OF SUPERVISORS
OF WAYNE COUNTY, RESPONDENTS-APPELLANTS,
KENNY FELTON AND LATASHA FELTON, RESPONDENTS.

DANIEL C. CONNORS, COUNTY ATTORNEY, LYONS (ERIN M. HAMMOND OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LELAND T. WILLIAMS, ROCHESTER, FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered January 7, 2013 in a CPLR article 78 proceeding. The judgment conditionally restored title to the subject properties to petitioner.

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

Memorandum: Respondents Treasurer of Wayne County (Treasurer) and the Board of Supervisors of Wayne County (Board of Supervisors) appeal from a judgment that, inter alia, converted petitioner's CPLR article 78 proceeding to a declaratory judgment action and restored title to two adjoining parcels of real property located in Wayne County, New York (County) to petitioner and her late husband, William F. Johnstone, upon certain conditions. We note at the outset that we disregard the error in the notice of appeal to the effect that "Wayne County" is the appellant, and treat the appeal as taken by respondents the Treasurer and the Board of Supervisors (*see Green v Associated Med. Professionals of NY, PLLC*, 111 AD3d 1430, 1432; *see also Matter of Tagliaferri v Weiler*, 1 NY3d 605, 606). We further note that Supreme Court erred in converting the CPLR article 78 proceeding to a declaratory judgment action (*cf. Potter v Berlin* [appeal No. 2], 21 AD3d 1310, 1311, *lv denied* 6 NY3d 750). We therefore treat this as a CPLR article 78 proceeding for the purposes of this appeal (*see generally* CPLR 103 [c]).

Prior to June 18, 2012, petitioner owned one parcel and her husband owned the second adjoining parcel. On October 10, 2008, following the death of her husband, petitioner was issued letters of administration for her husband's estate. Starting in 2010, petitioner failed to pay taxes on the parcels. In 2011, the Treasurer executed and filed a petition of tax foreclosure pursuant to Real Property Tax Law § 1123 for the delinquent parcels and an ensuing in rem tax foreclosure action was commenced. On April 25, 2012, the Treasurer had the subject parcels posted with a tax enforcement notification. Petitioner did not answer the petition, exercise the right to redeem the parcels, or otherwise appear in the foreclosure action. Judgment was entered and a deed was recorded on June 18, 2012 conveying title of both parcels to the County. On June 20, 2012, the properties were sold at tax auction. Respondents Kenny Felton and Latasha Felton were the successful bidders at the auction for the two parcels.

However, in an attempt to reacquire title to the parcels, on or about July 2, 2012, the attorney for the estate of petitioner's deceased husband submitted a purchase offer and certified check to the Board of Supervisors, and petitioner's sister submitted a letter to the Treasurer's office explaining the circumstances causing petitioner's tax delinquencies. We note that, at all times relevant herein, the County had not enacted any formal "release option" or "hardship sell back" process (*cf. Matter of Smerecki v Keough*, 101 AD3d 1338, 1339; *Staller v County of Suffolk*, 139 AD2d 726, 726, *lv denied* 73 NY2d 701). On July 17, 2012, the Board of Supervisors voted to accept all successful bids from the auction of June 20, 2012, including the bids for the subject parcels.

Petitioner commenced this CPLR article 78 proceeding in her individual and representative capacities seeking a judgment setting aside the tax foreclosure, determining that petitioner is the owner of the two parcels and setting aside the vote of the Board of Supervisors on the ground that it was arbitrary and capricious. Supreme Court determined, inter alia, that petitioner had adequate notice of the in rem tax foreclosure proceeding; the last date to pay delinquent taxes was June 15, 2012; and the vote of the Board of Supervisors was arbitrary and capricious. As noted, the court converted the proceeding to a declaratory judgment action pursuant to CPLR 103 (c), and the court restored title to the subject parcels to petitioner and her late husband upon condition that petitioner pay the delinquent taxes, interest and charges within 21 days of entry of judgment.

On appeal, respondents contend that the determination that petitioner's right to redeem each parcel did not extend beyond May 25, 2012 was neither made in violation of lawful procedure nor affected by an error of law (*see* CPLR 7803 [3]). We agree. The Treasurer's posting of the tax enforcement notification at petitioner's residence on April 25, 2012 extended the right of redemption until May 25, 2012 (*see* RPTL 1125 [1] [b] [iii]). Only a local law could extend the cut-off date for redemption (*see* RPTL 1111 [2]) and, thus, contrary to petitioner's contention, the published notice of the tax auction could not extend that date of redemption. Where a valid tax lien exists, and the taxing authority followed all proper procedures in foreclosing

the lien, the taxpayer's property interests are "lawfully extinguished as of the expiration of the[ ] right to redemption and the entry of the judgment of foreclosure" (*Matter of Orange County Commr. of Fin. [Helseth]*, 18 NY3d 634, 640; *see Smerecki*, 101 AD3d at 1339). Thus, all of petitioner's right, title and interest in the parcels, in her individual and representative capacities, was extinguished when the default judgment was entered in the tax foreclosure action on June 18, 2012 (*see* RPTL 1123 [8]).

We also agree with respondents that the court erred in concluding that the Board of Supervisors acted in an arbitrary and capricious manner in voting to accept all successful auction bids and in rejecting petitioner's purchase offer without articulating a factual basis therefor. When petitioner submitted her offer to repurchase, she had no right, title or interest in the parcels. "An offer to [repurchase] does not confer upon the offeror a constitutional right" (*Matter of Davis v City of Syracuse*, 158 AD2d 976, 977). In the absence of a duly enacted administrative "release option" or "hardship sell back" procedure, petitioner has no basis to assert that the Board of Supervisors acted without reference to any articulated standards in accepting an auction bid or rejecting an offer to repurchase. We note that the governing body of a tax district, such as the Board of Supervisors, is not required to approve by majority vote the sale of real property sold at auction to the highest bidder, which is the case here (*see* RPTL 1166 [2]). Moreover, the Board of Supervisors has retained complete discretion with respect to the sale of tax-delinquent parcels. No ordinance or state law places any limitation upon such discretion (*see* RPTL 1166 [1]). Absent a showing of fraud or illegality, its determination will not be disturbed (*see Witter v New York City Bd. of Estimate*, 156 AD2d 285, 286). Further, "[a] legislative body cannot be required to set general standards for areas in which it has discretion to act as long as it retains the authority to make individual decisions" (*Davis*, 158 AD2d at 977; *see also Cummings v Town Bd. of N. Castle*, 62 NY2d 833, 834). Thus, we conclude that the court erred in determining that the Board of Supervisors acted in an arbitrary and capricious manner because it uniformly accepted all auction bids and rejected all offers to repurchase without reference to any articulated standards or specific factual criteria. We therefore reverse the judgment that restored title to petitioner and her late husband and dismiss the petition.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01416

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

IN THE MATTER OF U.S. ENERGY DEVELOPMENT CORP.,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, JOSEPH MARTENS, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL CONSERVATION, MAUREEN A. BRADY, IN HER OFFICIAL CAPACITY AS REGIONAL ATTORNEY FOR DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AND ERIC SCHNEIDERMAN, IN HIS CAPACITY AS NEW YORK STATE ATTORNEY GENERAL, RESPONDENTS-DEFENDANTS-RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PHILIP BEIN OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 26, 2012 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment granted respondents-defendants' motion to dismiss.

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

Memorandum: In this combined CPLR article 78 proceeding in the nature of prohibition and action for a declaratory judgment (hereafter, proceeding), petitioner-plaintiff (petitioner) appeals from a judgment granting the motion of respondents-defendants (respondents) to dismiss the petition/complaint. As a preliminary matter, we note that petitioner on appeal has abandoned its action for a declaratory judgment (*see Katz 737 Corp. v Cohen*, 104 AD3d 144, 148, *lv denied* 21 NY3d 864; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Petitioner, a New York corporation with its headquarters in Erie County, conducts oil and gas operations in Pennsylvania, in the Allegheny National Forest, near the border of New York State and New York's Allegany State Park, on land owned by the United States Government/Forest Service. Beginning in 2010, personnel of the New York State Office of Parks, Recreation, and Historic Preservation reported pollution, including turbidity, color change, and suspended

sediment, in New York's Yeager Brook, downstream from and caused by petitioner's operations in Pennsylvania, in contravention of New York's water quality standards. Subsequently, the New York State Department of Environmental Conservation (DEC) entered into two consent orders with petitioner concerning the aforementioned pollution. Because of alleged continued and ongoing violations, the DEC commenced an administrative proceeding in New York seeking to enforce the consent orders and the penalties for the violations thereof. Petitioner commenced the instant proceeding contending, inter alia, that the DEC is acting in excess of its jurisdiction because the federal Clean Water Act ([CWA] 33 USC § 1251 *et seq.*) preempts the application of an affected state's laws and regulations to an out-of-state point source (*see International Paper Co. v Ouellette*, 479 US 481, 497).

As the party seeking a writ of prohibition, petitioner bears a "heavy burden" of establishing a "clear legal right to relief or that prohibition would provide a more complete and efficacious remedy than the administrative proceeding and resulting judicial review" (*Matter of Chasm Hydro, Inc. v New York State Dept. of Envtl. Conservation*, 14 NY3d 27, 31 [internal quotation marks omitted]; *see Matter of City of Newburgh v Public Empl. Relations Bd. of State of N.Y.*, 63 NY2d 793, 795; *Matter of Doorley v DeMarco*, 106 AD3d 27, 34). We conclude that respondents in support of their motion to dismiss established as a matter of law that petitioner could not meet that burden, and Supreme Court therefore properly granted the motion. The DEC had the statutory authority and jurisdiction to enter into the consent orders at issue and to commence the administrative proceeding to enforce those orders (*see* ECL 17-0303 [2], [4] [a], [b]; [5] [a]; *see also* ECL 17-0105 [1]; ECL 17-0501). Petitioner has failed to establish in this proceeding that the DEC's exercise of such authority and jurisdiction is clearly preempted by the CWA, inasmuch as it has not shown that enforcement of the consent orders would "stand[] as an obstacle to the full implementation of the CWA" (*International Paper Co.*, 479 US at 494 [internal quotation marks omitted]). Moreover, the preemptive effect of the CWA "should be determined, in the first instance, through the administrative process" (*Chasm Hydro, Inc.*, 14 NY3d at 32). "[E]ven as to a clearly ultra vires act, prohibition does not lie against an administrative agency if another avenue of judicial review is available, absent a demonstration of irreparable injury to the applicant if [it] is relegated to such other course" (*City of Newburgh*, 63 NY2d at 795; *see Matter of Town of Huntington v New York State Div. of Human Rights*, 82 NY2d 783, 786). No such irreparable injury has been demonstrated here.

Finally, petitioner's contention that the DEC is proceeding in excess of its jurisdiction based on federalism principles is unpreserved for our review (*see generally Matter of Attorney Gen. of State of N.Y. v Firetog*, 94 NY2d 477, 484; *Cepeda v Coughlin*, 128 AD2d 995, 997, *lv denied* 70 NY2d 602), and we therefore do not address it (*see Mazurek v Home Depot U.S.A*, 303 AD2d 960, 961).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

383

KA 13-00670

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GORDON GROSS, DEFENDANT-APPELLANT.

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

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (MELVIN BRESSLER 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 Wayne County Court (John B. Nesbitt, J.), dated March 27, 2013. The order denied the motion of defendant pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL 440.10 seeking to vacate the judgment convicting him of, inter alia, course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), which we previously affirmed (*People v Gross*, 79 AD3d 1660, *lv denied* 16 NY3d 895). In support of his motion, defendant contended that he was denied effective assistance of counsel based on defense counsel's failure to object to the testimony of certain non-expert witnesses on the ground that the testimony bolstered the testimony of the victim. Defendant submitted the affirmation of his present attorney, who stated that, when he spoke to trial counsel, she informed him that she did not have a strategic basis for her failure to object to the testimony or to the prosecutor's reference to the testimony during summation. County Court determined that the testimony, which did not reveal the nature of the conversation that the victim had with the respective witnesses (*cf. People v Rosario*, 17 NY3d 501, 507-508; *People v McDaniel*, 81 NY2d 10, 14), "was not prejudicial so as to make defense counsel's failure to object tantamount to ineffective assistance of counsel." Prior to the court's decision in this matter, however, we determined in *People v Ludwig* (104 AD3d 1162, 1163, *lv granted* 21 NY3d 1043) that the testimony "to explain how the victim eventually disclosed the abuse and how the investigation started" did not constitute improper bolstering because it was not admitted for its truth and thus that defense counsel's failure to object to the testimony did not constitute ineffective assistance of counsel. We therefore conclude

that defendant's contention lacks merit.

Although not specifically contended by defendant, our dissenting colleagues conclude that defense counsel was ineffective by failing to object to the testimony of the victim that she reported to her mother at age six that defendant had touched her in a sexual manner; that she reported to her sister at age 14 that defendant had raped her; and that she told a police witness and the grand jury what she told the jury during her testimony. We respectfully disagree with that conclusion. Although the dissent correctly notes that the repetition of prior consistent statements may "give to a jury an exaggerated idea of the probative force of a party's case" (*People v Smith*, 22 NY3d 462, 466), here, the victim's testimony constituted a narrative of events. Indeed, she did not repeat the specific allegations of her testimony, i.e., that defendant had engaged in anal penetration (*cf. People v McNeill*, 107 AD3d 1430, 1431, *lv denied* 22 NY3d 957). In light of defense counsel's opening statement that the relationship between defendant, the victim and the victim's mother was such that it could "cause someone to make fake allegations," the narrative of events was relevant. We also disagree with our dissenting colleagues that defense counsel's failure to object to the prosecutor's remarks during summation referencing that testimony constitutes ineffective assistance of counsel. Because the remarks were a fair response to defense counsel's summation challenging the credibility of the victim and her motivation for making the accusations (*see People v Martinez*, 114 AD3d 1173, 1173), we conclude that the failure of defense counsel to object to those comments does not constitute ineffective assistance of counsel (*see id.* at 1174).

We also reject defendant's contention that defense counsel's failure to consult with a medical expert constitutes ineffective assistance of counsel (*see People v Flores*, 83 AD3d 1460, 1461, *affd* 19 NY3d 881*; People v Burgos*, 90 AD3d 1670, 1670-1671, *lv denied* 19 NY3d 862; *cf. People v Okongwu*, 71 AD3d 1393, 1395-1396). The victim was examined by the prosecution expert nearly four years following the last incident of anal penetration, and the expert testified that the exam was normal. The expert further explained that, although the victim reported occasional bleeding following the incidents of anal penetration, she would not expect to see scarring four years later because the area heals quickly. On cross-examination, the expert confirmed that a normal exam would also be consistent with the examination of a child who had not been subjected to anal penetration. We therefore conclude that trial counsel effectively cross-examined the People's expert and raised an area of possible doubt arising from her testimony (*see Flores*, 83 AD3d at 1461). Defendant's attorney stated in his affirmation that trial counsel explained to him that she did not expect that the prosecution expert, who was not a treating physician but only conducted a forensic examination of the victim, would be permitted to repeat the allegations (*see People v Ballerstein*, 52 AD3d 1192, 1193), and that she did not consult an expert inasmuch as the victim's examination was normal (*cf. Okongwu*, 71 AD3d at 1395). We therefore conclude that defendant failed to establish the lack of a legitimate explanation for trial counsel's failure to call a medical witness (*see Burgos*, 90 AD3d at 1670). We

conclude that trial counsel's explanations for the alleged deficiencies in her representation of defendant did not warrant a hearing on whether defendant was deprived of meaningful representation (*cf. People v Zeh*, 22 NY3d 1144, 1145-1146). We note in addition that, in his affirmation, defendant's attorney provided citations to medical literature, which purportedly explain that there are a variety of physical manifestations that may be detected upon the exam of a child who was subjected to anal penetration and that only a small percentage of children do not have any such physical manifestation. He contends, therefore, that trial counsel was ineffective in failing to consult with, or call as a witness, an expert with respect to those potential physical manifestations of anal penetration. Defendant failed, however, to provide an expert affidavit indicating that those physical manifestations may be present several years following the last incident of abuse (*cf. Gersten v Senkowski*, 426 F3d 588, 599-600, *cert denied* 547 US 1191; *see generally Burgos*, 90 AD3d at 1670-1671).

We conclude that the court properly denied the motion inasmuch as the record establishes that defendant was provided with meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Although we agree with defendant that defense counsel lacked any strategic or reasonable basis for her failure to object when the expert witness repeated the specific allegations that defendant had anally penetrated her (*cf. People v Spicola*, 16 NY3d 441, 451, *cert denied* ___ US ___, 132 S Ct 400; *see generally People v Ortega*, 15 NY3d 610, 618), we nevertheless conclude that the single error in an otherwise competent representation was not so "egregious and prejudicial as to compromise [the] defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152; *cf. People v Turner*, 5 NY3d 476, 480-481). Defense counsel made effective opening and closing statements challenging the motivation and credibility of the victim; effectively cross-examined the prosecution witnesses; and presented the testimony of several witnesses, including defendant, who contradicted specific details of the victim's testimony.

All concur except CARNI and LINDLEY, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent. In our view, defendant was deprived of his right to effective assistance of counsel as a result of his trial attorney's failure to object to inadmissible testimony regarding numerous prior consistent statements made by the victim. One of the prosecution witnesses who offered inadmissible testimony was a pediatrician who examined the victim at the People's request in October 2008, when the victim was 14 years old and after defendant had been indicted. The pediatrician testified that the victim told her that defendant "anally penetrated" her with his penis when she was six and seven years old. Defendant challenged the admissibility of that testimony on his direct appeal from the judgment of conviction, but we concluded that his contention was not preserved for our review (*People v Gross*, 79 AD3d 1660, 1662, *lv denied* 16 NY3d 895).

In our view, the pediatrician's testimony impermissibly bolstered the victim's trial testimony. The victim's statement to the pediatrician obviously does not constitute a prompt outcry, and the

evidence was not offered by the People to rebut a claim of recent fabrication (*see generally People v Rosario*, 17 NY3d 501, 512-513). Moreover, and contrary to the People's contention, the victim's statements to the pediatrician were not necessary for diagnosis and treatment inasmuch as the pediatrician provided no treatment to the victim (*cf. People v Spicola*, 16 NY3d 441, 451, *cert denied* ___ US ___, 132 S Ct 400).

If defense counsel's failure to object to the pediatrician's testimony on the proper grounds were her only failing, perhaps it could be said that this single error was not so "egregious and prejudicial as to compromise [the] defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152; *see People v Turner*, 5 NY3d 476, 480). But defense counsel also failed to object to (1) the victim's testimony that, when she was five or six years old, she told her mother that defendant was touching her sexually; (2) the victim's testimony that, on May 15, 2008, she told her sister that defendant raped her; (3) the victim's testimony that, while in her principal's office on May 16, 2008, she told a detective the same thing that she told the jury, and that she then showed an investigator the location of the field where the "sexual abuse" occurred; and (4) the victim's testimony that she told the aforementioned pediatrician what happened with defendant, and that the pediatrician then examined her vagina and anus.

It is well settled that "the testimony of a witness may not be corroborated or bolstered by evidence of prior consistent statements made before trial" (*People v McClean*, 69 NY2d 426, 428; *see People v Buie*, 86 NY2d 501, 509-511; *People v McDaniel*, 81 NY2d 10, 16). The reason for the rule against the admission of prior consistent statements is that "an untrustworthy statement is not made more trustworthy by repetition" (*McClean*, 69 NY2d at 428; *see People v Seit*, 86 NY2d 92, 95). As the Court of Appeals has reiterated, "the admission of prior consistent statements may, by simple force of repetition, give to a jury an exaggerated idea of the probative force of a party's case" (*People v Smith*, 22 NY3d 462, 466). As noted, evidence of prior consistent statements alleging sexual abuse may be admitted under the prompt outcry rule or to rebut a claim of recent fabrication (*see Rosario*, 17 NY3d at 512-513), but neither exception to the general rule applies to any of the above testimony, and we can discern no strategic reason for defense counsel's failure to object to the inadmissible evidence.

We note in addition that the victim's prior consistent statements — to her mother, her sister, the police, and the pediatrician — were relied upon heavily by the prosecutor during his summation, without objection by defense counsel. After recounting each prior consistent statement, the prosecutor argued in sum and substance that, because the victim had told so many people on so many occasions that defendant had raped her, she must be telling the truth. It is clear from the summation that the victim's prior consistent statements were used by the People to establish the truth of the matters asserted therein, and not for any ancillary purpose.

We cannot agree with the majority that defendant has not specifically contended on appeal that defense counsel was ineffective for failing to object to the victim's testimony regarding her prior consistent statements. In the factual portion of his brief, defendant sets forth each instance where the victim testified about consistent statements she made prior to trial, noting that defense counsel did not object to any of the testimony. In the argument portion of his brief, defendant contends that the "failure of defense counsel to timely object to the repeated bolstering and testimony as to prior consistent statements of the complainant by seven of the eight prosecution witnesses" deprived defendant of his right to effective assistance of counsel. Defendant then identifies by name the seven prosecution witnesses who provided inadmissible bolstering testimony, and one of those witnesses is the victim. We thus conclude that the issue whether defense counsel was ineffective for failing to object to the victim's bolstering testimony is properly before us.

We also respectfully disagree with the majority that the prior consistent testimony offered by the victim was admissible because it constituted a narrative of events. We found no cases that recognize a narrative exception to the rule against the admission of prior consistent statements, and such an exception, if created, would swallow the rule altogether. Although testimony regarding out of court statements that complete the narrative by "provid[ing] background information" does not constitute inadmissible hearsay on the theory that such testimony is not offered for the truth of the matters asserted (*People v Tosca*, 98 NY2d 660, 661), the testimony at issue here did not complete the narrative; instead, the testimony merely repeated the narrative, which was that defendant sexually molested the victim.

In any event, the motion court, in denying defendant's CPL 440.10 motion, did not rule that the prior consistent statements in question were admissible to explain the narrative of events. The court determined that any "error was harmless" because the jurors "would expect that a witness alleging to be a victim in a sex abuse case would have made some disclosures prior to trial," and because there may have been a strategic reason for defense counsel's failure to object to the testimony. Thus, in our view, we cannot affirm the instant order on the ground that the evidence was admissible in the first instance (*see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 196; *People v LaFontaine*, 92 NY2d 470, 474).

We would therefore reverse the order denying defendant's CPL 440.10 motion and grant him a new trial.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

390

CA 13-01737

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

HECTOR ORTIZ AND MARIA SANTOS, FORMERLY KNOWN AS MARIA ORTIZ, AS PARENT AND NATURAL GUARDIAN OF JAZMINE CASADO, AN INFANT UNDER THE AGE OF EIGHTEEN, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GARY P. LEHMANN, INDIVIDUALLY AND DOING BUSINESS AS HERITAGE DEVELOPMENT CORPORATION, DEFENDANT-RESPONDENT, GENESEE VALLEY GROUP, LTD., DEFENDANT-APPELLANT, AND HERITAGE DEVELOPMENT CORPORATION, DEFENDANT.

SCHNITTER CICCARELLI MILLS PLLC, EAST AMHERST (PATRICIA S. CICCARELLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ & PONTERIO, LLC, BUFFALO (ZACHARY JAMES WOODS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered January 11, 2013. The order denied the motion of defendant Genesee Valley Group, Ltd. for summary judgment seeking dismissal of the plaintiffs' claims against it and dismissal of the cross claim asserted by defendant Gary P. Lehmann, individually and doing business as Heritage Development Corporation.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by plaintiff Hector Ortiz and Jazmine Casado, an infant under the age of 18, between 1994 and 1997 as a result of exposure to lead paint while residing in a rental unit in Rochester that was owned by defendant Heritage Development Corporation (Heritage) and managed by defendant Genesee Valley Group, Ltd. (GVG). At all times relevant, defendant Gary P. Lehmann was the president of Heritage and one of two shareholders. During the occupancy of the rental unit by Hector and Jazmine, Heritage retained GVG to provide real property management services. In April 1994, the Monroe County Department of Health (DOH) issued a lead paint violation notice to Heritage and GVG. On June 23, 1994, following abatement by GVG in May

1994, DOH confirmed that lead paint violations at the unit had been "corrected." However, blood lead level tests performed on Hector and Jazmine on June 7, 1994 indicated increases from tests conducted prior to the abatement process performed by GVG.

In a single cause of action, plaintiffs asserted claims for negligent ownership and maintenance of the premises, as well as negligent abatement of the lead paint hazard. GVG moved for summary judgment dismissing the complaint and Lehmann's cross claim for contribution and/or indemnification on the ground that it did not own or exclusively control the rental unit or perform any affirmative act of negligence with respect thereto. Supreme Court denied the motion.

Contrary to GVG's contention, the court properly denied that part of its motion for summary judgment dismissing plaintiffs' claim based on nonfeasance and Lehmann's cross claim. There are issues of fact concerning the scope and extent of GVG's control over the property, which if "complete and exclusive" could render GVG liable for nonfeasance in abating the lead-based paint condition (*see Ortiz v Gun Hill Mgt., Inc.*, 81 AD3d 512, 513; *German v Bronx United in Leveraging Dollars*, 258 AD2d 251, 252).

Also contrary to GVG's contention, the court properly denied that part of its motion seeking summary judgment dismissing the claim for negligent abatement of the lead-based paint hazard. A managing agent may be liable for affirmative acts of negligence, such as negligent lead paint abatement, notwithstanding a lack of ownership or exclusive control (*see Jones v Park Realty*, 168 AD2d 945, 946, *affd* 79 NY2d 795), and GVG failed to meet its initial burden of establishing that it performed no affirmative acts of negligence in its paint abatement efforts. Even assuming, arguendo, that GVG met its initial burden with respect to that claim, we conclude that the evidence submitted by plaintiffs raised triable issues of fact whether GVG took reasonable measures to abate the lead paint hazard after it received actual notice thereof and whether plaintiffs sustained additional injuries after GVG received such notice (*see Pagan v Rafter*, 107 AD3d 1505, 1506-1507). We therefore conclude that the court properly denied GVG's motion in its entirety.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

409

KA 13-01925

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NHAM HO, DEFENDANT-APPELLANT.

MARK M. BAKER, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (John T. Buckley, J.), rendered March 1, 1993. The judgment convicted defendant, upon a jury verdict, of attempted bribing a witness (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of attempted bribing a witness (Penal Law §§ 110.00, 215.00 [a]) with respect to two victims of a robbery at a house party hosted by one of the two victims. Six men were charged in the robbery after those two victims (hereafter, witnesses) identified the robbers in a showup identification procedure. Defendant knew the robbers, met with them as they planned the robbery, provided them with a diagram of the residence of the host witness, and told them to use the back door when entering the residence to commit the robbery. Following the arrest of the robbers, defendant assured one of the robbers during a jail visit that he would "pay off" the two witnesses so that they would not testify against that robber.

Defendant contends that the evidence is legally insufficient because the People failed to prove a "benefit" as defined in Penal Law § 10.00 (17) (*see* § 215.00) inasmuch as he offered to return only that amount of money that had been taken from the two witnesses, and thus he was offering mere restitution. We reject that contention (*cf. People v Kathan*, 136 App Div 303, 309-310). Even if defendant had offered to return only the amount of money that had been stolen, we note that the restoration of that amount would still constitute a benefit to the witnesses (*see People v Feerick*, 93 NY2d 433, 448-449). In any event, the record establishes that defendant offered one of the witnesses significantly more money than had been stolen from him.

We conclude that defendant's contentions concerning ineffective assistance of counsel lack merit. Defendant has not demonstrated " 'the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712). We conclude that the evidence, the law and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant's remaining contentions are not preserved for our review, and we decline to exercise our power to address them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

413

CA 13-01763

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

MARITZA RACHLIN AND DENNIS R. RACHLIN,
PLAINTIFFS,

V ORDER

MICHAELS STORES, INC., ET AL., DEFENDANTS.

MICHAELS STORES, INC. AND MICHAELS ARTS &
CRAFTS, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

BOULEVARD MALL EXPANSION, LLC, THIRD-PARTY
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, BUFFALO (MICHAEL GLASCOTT OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered August 13, 2013. The order denied the motion of Boulevard Mall Expansion, LLC, for leave to amend the third-party answer.

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

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

419

CA 13-01289

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

MARITZA RACHLIN AND DENNIS R. RACHLIN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MICHAELS ARTS & CRAFTS, MICHAELS STORES, INC.
AND BOULEVARD MALL EXPANSION, LLC,
DEFENDANTS-APPELLANTS.

MICHAELS STORES, INC. AND MICHAELS ARTS &
CRAFTS, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

BOULEVARD MALL EXPANSION, LLC, THIRD-PARTY
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, BUFFALO (MICHAEL GLASCOTT OF COUNSEL), FOR DEFENDANT-APPELLANT BOULEVARD MALL EXPANSION, LLC AND THIRD-PARTY DEFENDANT-APPELLANT.

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-APPELLANTS MICHAELS ARTS & CRAFTS AND MICHAELS STORES, INC. AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered October 12, 2012. The order, among other things, denied that part of the cross motion of Michaels Arts & Crafts and Michaels Stores, Inc. seeking summary judgment dismissing the complaint against them and denied the cross motion of Boulevard Mall Expansion, LLC, seeking summary judgment dismissing the complaint against it and the third-party complaint.

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

Memorandum: Plaintiffs commenced this personal injury action seeking to recover damages resulting from injuries sustained by Maritza Rachlin (plaintiff) when she slipped and fell on a puddle of water inside a retail store. Plaintiffs allege, inter alia, that the

puddle was the result of a persistently leaky roof at the subject premises. Defendant-third-party defendant Boulevard Mall Expansion, LLC (Boulevard) is the owner of the property and defendants-third-party plaintiffs, Michaels Arts & Crafts and Michaels Stores, Inc. (collectively, Michaels defendants) are the tenants that operate the retail store thereon. Boulevard appeals from an order that, inter alia, denied its cross motion for summary judgment dismissing the complaint and third-party complaint. The Michaels defendants appeal from the same order insofar as it denied that part of their cross motion for summary judgment dismissing the complaint against them. We reject the contentions of Boulevard and the Michaels defendants (hereafter, defendants) that they did not have actual or constructive notice of the alleged dangerous condition that caused plaintiff's fall, and thus that Supreme Court erred in denying those parts of their respective cross motions seeking summary judgment dismissing plaintiffs' complaint.

"It is well settled that defendant[s] cannot establish [their] entitlement to judgment as a matter of law simply by pointing to gaps in plaintiffs[']' proof" (*Route 104 & Rte. 21 Dev., Inc. v Chevron U.S.A., Inc.*, 96 AD3d 1491, 1492; *see Baity v General Elec. Co.*, 86 AD3d 948, 950; *Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980). Rather, each defendant had the initial burden on its respective cross motion of establishing as a matter of law that it did not have actual or constructive notice of the alleged dangerous condition inside the store (*see Murphy v County of Westchester*, 228 AD2d 970, 971; *see generally Conti v Town of Constantia*, 96 AD3d 1461, 1462). We conclude that defendants failed to meet their initial burden with respect to actual or constructive notice (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The evidence in the record establishes that the building's roof had leaked on multiple occasions in the past and had leaked on the day of the subject accident, which resulted in water entering the area of the store open to the public. Given that evidence, we conclude that " 'a trier of fact could reasonably infer that the defendant[s] had actual notice of such a recurring condition' " (*Batista v KFC Nat. Mgt. Co.*, 21 AD3d 917, 918; *see Garcia v U-Haul Co.*, 303 AD2d 453, 454). Moreover, "[a] defendant who has actual notice of a recurring dangerous condition can be charged with constructive notice of each specific recurrence of the condition" (*Batista*, 21 AD3d at 917; *see Phillips v Henry B'S, Inc.*, 85 AD3d 1665, 1666). Contrary to defendants' contention, the testimony of a manager for the Michaels defendants with respect to causation, i.e., that the accident was caused by melting snow or slush from plaintiff's boots, is speculative, and that testimony is therefore insufficient to establish defendants' entitlement to judgment as a matter of law. Finally, given Boulevard's failure to establish that it did not have actual or constructive notice of the alleged dangerous condition, we conclude that the court properly denied Boulevard's cross motion insofar as it sought dismissal of the third-party complaint against it.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

420

CA 13-01620

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

JARED A. HOFFERT, PLAINTIFF,

V MEMORANDUM AND ORDER

JEFFREY M. KATZ, DEFENDANT-APPELLANT-RESPONDENT, CROYLE, INC., DEFENDANT-RESPONDENT-APPELLANT, SEN BROS. ENTERPRISES, INC., DOING BUSINESS AS GNS CONSTRUCTION, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, WHITE PLAINS (CARY MAYNARD OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (EDWARD J. SMITH, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

RICHARD P. PLOCHOCKI, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered November 21, 2012. The order and judgment denied and dismissed all cross claims between and among defendants Jeffrey M. Katz, Croyle, Inc., and Sen Bros. Enterprises, Inc., doing business as GNS Construction.

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

Memorandum: Defendant Jeffrey M. Katz appeals and defendant Croyle, Inc. (Croyle) cross-appeals from an order and judgment rendered after a nonjury trial that denied and dismissed all of the cross claims. We affirm for reasons stated in the decision at Supreme Court. We add only that we agree with Croyle that the court erred in concluding that Croyle was not entitled to indemnification from Katz for its defense costs, including attorneys' fees, absent a contractual or statutory basis, but we nevertheless affirm. The "common-law right of indemnification against the party actually at fault encompasses the right to recover attorneys' fees, costs, and disbursements incurred in connection with defending the suit brought by the injured party" (*Chapel v Mitchell*, 84 NY2d 345, 347). It is well settled, however, that common-law indemnification may be imposed against only those parties, i.e., indemnitors, who "actually directed and supervised the work" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378). Here, the record establishes that plaintiff's employer exclusively directed and

supervised the injury-producing work, and Croyle is therefore not entitled to common-law indemnification from Katz (*see generally Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850-851, *lv dismissed* 8 NY3d 841).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

428

KA 12-02199

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON L. LOPER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered July 16, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence imposed and as modified the judgment is affirmed, and the matter is remitted to Steuben County Court for the filing of a predicate felony offender statement and resentencing.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20) and, in appeal No. 2, he appeals from a judgment convicting him upon a nonjury verdict of attempted burglary in the third degree (§§ 110.00, 140.20). Defendant's contention in appeal No. 1 that his plea was not knowingly, voluntarily, or intelligently entered because his factual recitation did not specify when or where he committed the alleged crime is actually a challenge to the factual sufficiency of the plea allocution, and that contention is not preserved for our review because he did not move to withdraw his plea or to vacate the judgment of conviction on that ground. In any event, we note that defendant's " 'monosyllabic responses to [County Court's] questions did not render the plea invalid' " (*People v Gordon*, 98 AD3d 1230, 1230, *lv denied* 20 NY3d 932).

With respect to defendant's contention in appeal No. 1 that the court erred in failing to permit him to withdraw his guilty plea, defendant abandoned that contention inasmuch as he withdrew his pro se motion to withdraw his plea (*see People v Mower*, 97 NY2d 239, 246; *People v Robbins*, 83 AD3d 1531, 1531, *lv denied* 17 NY3d 821).

Defendant's further contention in appeal No. 1 that he was denied effective assistance of counsel " 'does not survive his guilty plea . . . because there was no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance' " (*People v Russell*, 55 AD3d 1314, 1314, *lv denied* 11 NY3d 930; *see People v Lugg*, 108 AD3d 1074, 1075). In any event, defendant received "an advantageous plea and nothing in the record casts doubt upon the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404; *see People v Davis*, 99 AD3d 1228, 1229, *lv denied* 20 NY3d 1010). We reject defendant's contention in appeal No. 2 that he was denied effective assistance of counsel. We conclude that defendant did not " 'demonstrate the absence of strategic or other legitimate explanations' " for defense counsel's failure to introduce facts in opposition to the People's recitation of the facts at the nonjury trial on stipulated facts (*People v Benevento*, 91 NY2d 708, 712; *see People v Howard*, 101 AD3d 1749, 1750-1751, *lv denied* 21 NY3d 944).

Defendant failed to preserve for our review his contention in each appeal that the People failed to comply with the procedural requirements of CPL 400.21 when he was sentenced as a second felony offender (*see People v Pellegrino*, 60 NY2d 636, 637; *People v Butler*, 96 AD3d 1367, 1368, *lv denied* 20 NY3d 931). We nevertheless exercise our power to reach that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). The People concede that they did not file a statement as required by CPL 400.21 (2), and the record does not reflect that defendant admitted the prior felony in open court (*see People v Butler*, 105 AD3d 1408, 1409, *lv denied* 21 NY3d 1072; *cf. Butler*, 96 AD3d at 1368). We therefore modify the judgment in each appeal by vacating the sentence, and we remit the matter to County Court for the filing of a predicate felony offender statement pursuant to CPL 400.21 prior to resentencing (*see Butler*, 105 AD3d at 1409-1410).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

429

KA 12-02200

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON L. LOPER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered July 16, 2012. The judgment convicted defendant, upon a nonjury verdict, of attempted burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence imposed and as modified the judgment is affirmed, and the matter is remitted to Steuben County Court for the filing of a predicate felony offender statement and resentencing.

Same Memorandum as in *People v Loper* ([appeal No. 1] ___ AD3d ___ [June 20, 2014]).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

442

CA 13-00762

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

LOTFI BELKHIR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SOUAD AMRANE-BELKHIR, DEFENDANT-APPELLANT.

LEONARD A. ROSNER, ROCHESTER, FOR DEFENDANT-APPELLANT.

LOTFI BELKHIR, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an amended judgment of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered August 10, 2012 in a divorce action. The amended judgment, among other things, distributed the marital property.

It is hereby ORDERED that the amended judgment so appealed from is unanimously modified on the law by reducing the credit given to plaintiff for various payments he made by $12,112.95 and by increasing plaintiff's child support obligation in an amount to be determined upon the calculation of the appropriate FICA deductions from plaintiff's actual and imputed income, and the matter is remitted to Supreme Court, Ontario County, for that purpose.

Memorandum: Defendant wife appeals from an amended judgment of divorce entered, in part, upon a referee's amended report that decided issues of child support, maintenance and equitable distribution. We note at the outset that defendant's notice of appeal recites that she is appealing from the judgment of divorce and that the notice of appeal was filed prior to entry of the amended judgment. "We nevertheless exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the amended [judgment]" (*Matter of Mikia H. [Monique K.]*, 78 AD3d 1575, 1575, *lv dismissed in part and denied in part* 16 NY3d 760; *see* CPLR 5520 [c]; *Adams v Daughtery*, 110 AD3d 1454, 1455).

We agree with defendant that Supreme Court erred insofar as it credited plaintiff with 100% of the payments he made for the mortgage, utilities and other household expenses for the period between the commencement of this divorce action and the date on which plaintiff moved out of the marital residence. During the pendency of a divorce action, when "a party has paid the other party's share of what proves to be marital debt, such as the mortgage, taxes, and insurance on the marital residence, reimbursement is required" (*Le v Le*, 82 AD3d 845, 846; *see Myers v Myers*, 87 AD3d 1393, 1394-1395). Because plaintiff

lived in the marital residence after this action was commenced, he "is [only] entitled to a credit in the amount of one half of his household expenditures during the period he occupied the marital residence" (*Southwick v Southwick*, 214 AD2d 987, 988). As a result, the mortgage payments and other household expenses plaintiff paid, totaling $24,225.90, should be reduced by 50% to reflect plaintiff's enjoyment of the benefits of those payments, and thus the amount credited to him should be reduced by $12,112.95. We therefore modify the amended judgment accordingly.

We reject defendant's further contention that the court erred in denying her request for maintenance. In deciding whether to award maintenance, the court "must consider the payee spouse's reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors" (*Hartog v Hartog*, 85 NY2d 36, 52; *see* Domestic Relations Law § 236 [B] [6] [a]). On this record, it cannot be said that the court abused its discretion in denying defendant's request for maintenance (*see Smith v Winter*, 64 AD3d 1218, 1220, *lv denied* 13 NY3d 709).

Contrary to defendant's further contentions, the court did not abuse its discretion in either failing to impute income to plaintiff for the first six months after he was terminated by his company or in thereafter imputing income to plaintiff of only $140,000 per year. "[I]n determining a party's child support obligation, a court need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential" (*Filiaci v Filiaci*, 68 AD3d 1810, 1811 [internal quotation marks omitted]; *see Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1180). " 'Trial courts . . . possess considerable discretion to impute income in fashioning a child support award' . . . , and a court is not required to find that a parent deliberately reduced his or her income to avoid a child support obligation before imputing income to that parent" (*Irene*, 41 AD3d at 1180; *see Sharlow v Sharlow*, 77 AD3d 1430, 1431). "[A] court's imputation of income will not be disturbed so long as there is record support for its determination" (*Lauzonis v Lauzonis*, 105 AD3d 1351, 1351). Here, the record supports the court's determination that plaintiff's termination was not his fault, and thus it was reasonable to thereby allow him six months in which to find other employment. Moreover, when considering plaintiff's education, experience and long-term earning history, it cannot be said that the court abused its discretion by refusing to impute income to plaintiff that was greater than $140,000 per year.

We agree with defendant, however, that the court erred in two respects in the manner in which plaintiff's child support obligation was calculated. Pursuant to Domestic Relations Law § 240 (1-b) (b) (5) (vii) (H), "federal insurance contributions act (FICA) taxes actually paid" shall be deducted from income prior to determining the combined parental income (*see Manno v Manno*, 196 AD2d 488, 490-491). The social security part of FICA is paid by taxpayers up to a specific income cap, and the amount of that cap generally increases year to year. Here, the court erred in its FICA calculation for 2011 because, after the court had imputed income of $140,000 to plaintiff for 2011,

it calculated plaintiff's FICA deduction as if he would have paid the social security portion of FICA on the full amount of his imputed income, which was considerably higher than the social security wage limit in 2011. We also conclude that the court erred in deducting FICA from plaintiff's Canadian income before calculating child support given that those taxes were not paid on the income he earns in Canada. "Since FICA taxes should be deducted only from income upon which FICA taxes are 'actually paid' prior to applying the provisions of Domestic Relations Law § 240 (1-b) (c)" (*Kaufman v Kaufman*, 102 AD3d 925, 927), the child support calculations based on plaintiff's Canadian income were erroneous. Plaintiff argues that deducting FICA from his Canadian income is appropriate because he pays taxes in Canada that are the equivalent of FICA. Even assuming, arguendo, that he is correct, we cannot determine on this record what those taxes are and whether or how much of those taxes would properly be deducted from his Canadian income. We therefore further modify the amended judgment by increasing the amount of plaintiff's child support obligation based on the court's FICA errors with respect to plaintiff's 2011 imputed income and the income he earns in Canada, in a sum to be determined upon remittal of the matter to Supreme Court for recalculation in accordance with our decision herein.

We reject defendant's further contention that the award of attorney's fees of $20,000 was inadequate. "The evaluation of what constitutes reasonable [attorney's] fees is a matter within the sound discretion of the trial court" (*Rooney v Rooney* [appeal No. 3], 92 AD3d 1294, 1296, *lv denied* 19 NY3d 810 [internal quotation marks omitted]), and there is nothing in this record that would suggest that the court abused its discretion in awarding attorney's fees. We have reviewed defendant's remaining contentions and conclude that none require further modification of the amended judgment of divorce.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

457

CA 13-00907

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

LINCOLN TRUST, AS CUSTODIAN FOR DANIEL ELSTEIN, M.D., ROLLOVER IRA AND DANIEL ELSTEIN, INDIVIDUALLY AND AS BENEFICIAL OWNER OF LINCOLN TRUST, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ALFRED D. SPAZIANO, DEFENDANT, ALBERT M. MERCURY AND PHILLIPS, LYTLE, HITCHCOCK, BLAINE AND HUBER, LLP, DEFENDANTS-RESPONDENTS.

DAVIDSON FINK LLP, ROCHESTER (DAVID L. RASMUSSEN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (LAWRENCE J. VILARDO OF COUNSEL), AND HARRIS BEACH PLLC, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered March 8, 2013. The order, among other things, granted the motion of defendants Albert M. Mercury and Phillips, Lytle, Hitchcock, Blaine and Huber, LLP, for summary judgment dismissing plaintiffs' complaint against them.

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

Memorandum: Plaintiffs commenced this legal malpractice action seeking damages arising from the alleged negligence of Albert M. Mercury, Esq. (defendant), who represented Daniel Elstein (plaintiff) at the closing of a $750,000 loan that plaintiff made to defendant Alfred D. Spaziano. The closing occurred on September 12, 2001, and the loan was secured by Spaziano's stock in Westview Commons Apartments, Inc. (WCA), which owned and operated an apartment complex (subject property) in the Town of Gates. John Hancock Mutual Insurance Company (John Hancock) held a first mortgage on the subject property while, unbeknownst to plaintiff, Monroe Funding held secondary mortgages, one of which was filed eight days before plaintiff closed on his loan to Spaziano.

The complaint alleges that defendant and his law firm (hereafter, defendants) were negligent in, among other things, failing to notify plaintiff that John Hancock had commenced a foreclosure action in

December 2001 with respect to the subject property because Spaziano had failed to make his mortgage payments in October and November of that year. Plaintiff did not learn of Spaziano's default on the John Hancock mortgage until January 2003, when Spaziano defaulted on the promissory note to plaintiff and WCA filed for bankruptcy. Based on Spaziano's default on the $750,000 promissory note, plaintiff enforced his security interest in the WCA stock. Plaintiff thereafter partnered with David Reidman, a real estate developer in Rochester, to purchase and manage the subject property.

Plaintiff and Reidman formed Trason Westview, LLC (Trason), with plaintiff owning 75% and Reidman owning 25% of the company. Together, plaintiff and Reidman secured financing from First Niagara Bank (First Niagara), purchased the subject property with the approval of Bankruptcy Court, and satisfied the John Hancock and Monroe Funding mortgages. Specifically, John Hancock received approximately $11 million to satisfy its mortgage, and Monroe Funding received $970,000 to satisfy its secondary mortgages. As plaintiff explained at his deposition, Monroe Funding, as holder of the secondary mortgages, accepted a significantly lower amount of money than the amount owed due to the risk of receiving even less money after a foreclosure sale.

Prior to closing title, plaintiff obtained an appraisal of the subject property, which was valued at approximately $14 million, some $2 million less than plaintiff and Reidman were expending to acquire the property. At the closing, plaintiff signed a general release in favor of Spaziano with respect to the unpaid promissory note. Plaintiff and Reidman thereafter sold the property for a profit, and plaintiffs commenced this legal malpractice action.

The complaint requested damages of $750,000 plus interest as calculated in the promissory note, and $3,000,000 in punitive damages. More than six years after the action was commenced, plaintiffs alleged another theory of damages in their bill of particulars. Specifically, plaintiffs alleged that, if defendants had notified plaintiff in a timely fashion of Spaziano's default on the John Hancock mortgage, plaintiff would have been able to satisfy the John Hancock mortgage for $809,941.97 less than he had to pay John Hancock 14 months later, and that defendants' negligence therefore cost plaintiffs $809,941.97. That figure was later reduced by plaintiffs to $703,435.80.

Defendants moved for summary judgment dismissing the complaint against them, contending, inter alia, that, because plaintiffs had profited from the purchase and sale of the subject property, they had sustained no damages as a result of defendants' alleged malpractice. Defendants also asserted that plaintiffs are not entitled to damages arising from the unpaid promissory note because plaintiff had released Spaziano from liability on that loan. Plaintiffs opposed the motion and cross-moved for partial summary judgment with respect to several causes of action. Supreme Court granted the motion and denied the cross motion. We now affirm.

To succeed on a claim of legal malpractice, a plaintiff must prove, inter alia, that the attorney's negligence was a proximate

cause of a loss that resulted in actual and ascertainable damages (*see Leder v Spiegel*, 9 NY3d 836, 837, *cert denied* 552 US 1257; *see also Hotaling v Sprock* [appeal No. 2], 107 AD3d 1446, 1446-1447). Here, defendants met their initial burden of establishing that plaintiffs were not entitled to damages based on the unpaid promissory note inasmuch as the release given to Spaziano by plaintiff is valid and enforceable (*see Appel v Ford Motor Co.*, 111 AD2d 731, 732-733; *see also Gubitz v Security Mut. Life Ins. Co. of N.Y.*, 262 AD2d 451, 451; *Matter of Garvin*, 210 AD2d 332, 333) and, in opposition, plaintiffs failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

With respect to plaintiffs' alternate theory of damages—that defendants' failure to notify plaintiff of Spaziano's default on the John Hancock mortgage cost plaintiff $703,435.80 in lost profits—we agree with the court that the theory is too speculative to survive defendants' motion for summary judgment (*see Bua v Purcelli & Ingrao, P.C.*, 99 AD3d 843, 847-848, *lv denied* 20 NY3d 857; *Perkins v Norwick*, 257 AD2d 48, 51; *Sherwood Group v Dornbush, Mensch, Mandelstam & Silverman*, 191 AD2d 292, 294-295; *Brown v Samalin & Bock*, 168 AD2d 531, 531-532). As defendants point out, it is not clear that plaintiff could have obtained the necessary funding from First Niagara or any other lender to purchase the property in November 2001, 14 months earlier than the actual purchase date. Moreover, it was not certain that Monroe Funding at that time would have accepted a steep reduction in the amount that it was owed on the secondary mortgages, or that plaintiff and Reidman would have been able to sell the subject property for the same price as they later did. In addition, plaintiff acknowledged at his deposition that he would not have purchased the subject property without Reidman, who, according to plaintiff, was vital to the success of the venture. Plaintiff did not meet Reidman until after he learned of Spaziano's default on the John Hancock mortgage. As the court stated in its decision, there is no evidence that plaintiff "would have found an investor similar to Reidman at that time, or acceptable to Monroe Funding as the junior mortgage holder."

Finally, because plaintiffs sustained no actual damages and, in fact, profited from the sale of the subject property, we conclude that they are not entitled to an award of punitive damages.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

458

CA 13-01930

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

JD&K ASSOCIATES, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SELECTIVE INSURANCE GROUP, INC., DEFENDANT,
SELECTIVE INSURANCE COMPANY OF AMERICA AND
SELECTIVE WAY INSURANCE COMPANY,
DEFENDANTS-APPELLANTS.

GALBO & ASSOCIATES, BUFFALO (RICHARD A. GALBO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered January 25, 2013. The judgment, among other things, denied that part of the motion of defendants seeking summary judgment dismissing the complaint against defendants Selective Insurance Company of America and Selective Way Insurance Company.

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

Memorandum: Plaintiff obtained a commercial insurance policy from defendant Selective Way Insurance Company (Selective Way) that provided coverage for, among other things, a building that plaintiff owned and leased to a limousine service. Defendant Selective Insurance Company of America (Selective Insurance) is an affiliate of Selective Way and serves as its claims administrator. After two large depressions appeared in the concrete slab floor of the building insured under the policy, plaintiff submitted a claim for that loss. Selective Insurance hired Peter Vallas Associates (Vallas) to investigate the loss and, relying upon the findings in the resulting "Investigative Engineering Analysis Report" (Vallas Report), Selective Way disclaimed coverage. The disclaimer letter contained a number of grounds for the disclaimer, but only the earth movement exclusion in the policy remains at issue.

Plaintiff commenced this action against Selective Way and Selective Insurance (defendants) and another company that is no longer

a party. Plaintiff alleged four causes of action seeking, among other things, a declaration that defendants are obligated to provide coverage for its loss, an award of compensatory damages for breach of contract, and an award of compensatory and punitive damages for bad faith, misrepresentation and fraud, and deceptive acts and practices under General Business Law § 349.

Supreme Court properly denied those parts of defendants' motion seeking summary judgment dismissing the declaratory judgment and breach of contract causes of action and granted plaintiff's cross motion seeking partial summary judgment on those two causes of action. Defendants failed to meet the heavy burden on their motion of establishing that the earth movement exclusion negates coverage (*see Lee v State Farm Fire & Cas. Co.*, 32 AD3d 902, 904; *Oot v Home Ins. Co. of Ind.*, 244 AD2d 62, 70). Even assuming, arguendo, that the earth movement exclusion applies, we conclude that the court properly determined that the endorsement containing the "Broadened Water-Direct Damage" extension of coverage unambiguously provides coverage for plaintiff's loss. Any ambiguity arising from the conflict between the exclusion and the extension of coverage was properly resolved in favor of plaintiff and against defendants (*see generally Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 307-308; *Oot*, 244 AD2d at 66).

The court also properly denied that part of defendants' motion seeking summary judgment dismissing the fourth cause of action, alleging deceptive acts and practices under General Business Law § 349. Plaintiff alleged that the Vallas employee who investigated the loss and prepared the Vallas Report was not an engineer, and that defendants misrepresented his credentials to plaintiff. Plaintiff further alleges that defendants' conduct was deceptive and part of a pattern of conduct that was not unique to plaintiff, but was directed at their policyholders generally. Certain discovery relevant to the General Business Law § 349 cause of action remains outstanding, and thus the court properly concluded that summary judgment with respect to that cause of action would be premature (*see Skibinsky v State Farm Fire & Cas. Co.*, 6 AD3d 975, 976; *see generally Colombini v Westchester County Healthcare Corp.*, 24 AD3d 712, 715). Inasmuch as punitive damages may be available under General Business Law § 349 (*see Ural v Encompass Ins. Co. of Am.*, 97 AD3d 562, 565; *Wilner v Allstate Ins. Co.*, 71 AD3d 155, 167), the court properly concluded that dismissal of plaintiff's claim for punitive damages would also be premature.

We agree with defendants, however, that the court erred in denying that part of their motion seeking summary judgment dismissing the third cause of action, alleging bad faith, misrepresentation and fraud, and we therefore modify the judgment accordingly. The conduct alleged by plaintiff does not amount to bad faith (*see Cooper v New York Cent. Mut. Fire Ins. Co.*, 72 AD2d 1556, 1557). Further, defendants established their entitlement to judgment dismissing the claim of misrepresentation and fraud by submitting evidence that plaintiff made further inquiry into the accuracy of their alleged representations and discovered that they were false, thereby negating

the element of detrimental reliance necessary to support that claim (*see Daly v Kochanowicz*, 67 AD3d 78, 91; *Ross v Gidwani*, 47 AD3d 912, 913; *Barrett v Huff*, 6 AD3d 1164, 1167).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

463

CA 13-01375

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

VITAL CRANE SERVICES, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES MICUCCI AND POLLOCK RESEARCH &
DESIGN, INC., DOING BUSINESS AS SIMMERS
CRANE & DESIGN SERVICES, CO.,
DEFENDANTS-RESPONDENTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA, LLC, BUFFALO (RYAN A. LEMA OF COUNSEL), AND MATTHEW P. PYNN, LOCKPORT, FOR PLAINTIFF-APPELLANT.

NIXON PEABODY LLP, BUFFALO (BENJAMIN R. DWYER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered April 16, 2013. The order, among other things, granted in part defendants' motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking summary judgment dismissing the first cause of action in the amended complaint with respect to 23 of the 47 "at issue" customers and reinstating that cause of action to that extent, and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiff and defendant Pollock Research & Design, Inc., doing business as Simmers Crane & Design Services, Co. (Simmers Crane), are in the business of inspecting, servicing and installing overhead cranes. During his employment by plaintiff as a salesman and service technician, defendant James Micucci signed an "Employee Agreement Not to Compete" (Agreement). Micucci agreed, among other things, not to engage in a business similar to, or in competition with, plaintiff's business for a period of two years from the date of termination of his employment with plaintiff, within a 400-mile radius of plaintiff's office or Micucci's home address. Shortly after signing the Agreement, Micucci left plaintiff's employ and began working for Simmers Crane, whereupon plaintiff commenced the instant action. Defendants thereafter moved for summary judgment dismissing the amended complaint.

We conclude that Supreme Court properly granted those parts of the motion concerning the fifth cause of action, alleging that Micucci

breached the Agreement, and the second cause of action, alleging that Simmers Crane tortiously interfered with Micucci's performance of the Agreement. Defendants established that the nonsolicitation provisions in the Agreement are overbroad to the extent that they "seek to bar [Micucci] from soliciting or providing services to [customers] with whom [Micucci] never acquired a relationship through his . . . employment" with plaintiff, or from soliciting customers with whom plaintiff never had an established relationship (*Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina*, 9 AD3d 805, 806, *lv denied* 3 NY3d 612; *see Zinter Handling, Inc. v Britton*, 46 AD3d 998, 1001). Defendants further established that the Agreement is unreasonable with respect to its geographic terms (*see Scalise Indus., Inc. v Murdock*, 21 AD3d 1346, 1346). Defendants thus met their burden of establishing as a matter of law that the Agreement is invalid and unenforceable, and plaintiff failed to raise a triable issue of fact (*see generally Carducci v Bensimon*, 115 AD3d 694, 695). In view of the undisputed evidence that the Agreement was presented to Micucci as a condition of his continued employment with plaintiff, the court properly concluded that partial enforcement of the Agreement is not warranted (*see Scott, Stackrow & Co., C.P.A.'s, P.C.*, 9 AD3d at 807).

The court also properly granted that part of the motion concerning the third cause of action, alleging conversion of plaintiff's files, inasmuch as defendants established that there was no evidence of specific, identifiable files that were taken from plaintiff (*see National Ctr. for Crisis Mgt., Inc. v Lerner*, 91 AD3d 920, 920-921).

We agree with plaintiff, however, that the court erred in granting in its entirety that part of the motion concerning the first cause of action, alleging defendants' tortious interference with plaintiff's prospective contractual relations. During discovery, plaintiff identified 47 companies and governmental entities that are "at issue customers" in this action, i.e., prospective customers whom plaintiff allegedly lost as the result of defendants' tortious conduct. We conclude that defendants met their burden of establishing as a matter of law that they did not cause injury to plaintiff's alleged business relationships with 24 of those "at issue customers" (*see North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 21). Triable issues of fact remain, however, with respect to defendants' alleged use of wrongful means to interfere with plaintiff's prospective contractual relations with the remaining 23 "at issue customers" (*see Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 577), i.e., 174th Fighter Wing, Agri-Mark, Alliance Precision Plastics, American Packaging Corporation, Batavia City Maintenance Bureau, Batavia City Waste Water, Cargill Salt, City of Geneva, Crest Haven Pre Cast, Fairbanks Scale, Graphic Controls LLC, Jamestown Advanced Products, LCI Industrial (Rocon), Litelab Corp., North Lawrence Dairy (Breyers), NYS DOT Hornell, NYS DOT Warsaw, Pro-Lift (a.k.a. Clarklift of Buffalo), Sentry Safe (a.k.a. Sentry Group), U.S. Salt LLC, Village of Penn Yan (a.k.a. Penn Yan Municipal Utilities), Waste Management at High Acres, and Watkins Glen Waste Water. We therefore modify the order by denying that part of defendants' motion seeking summary judgment dismissing the first cause

of action insofar as plaintiff alleges defendants' tortious interference with plaintiff's prospective contractual relations with those 23 "at issue" customers.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

487

CA 13-00512

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

IN THE MATTER OF LAZY ACRES PARK, LLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PAUL FERRETTI, ROBIN FERRETTI AND CLAUDETTE
SHELTON, RESPONDENTS-RESPONDENTS.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR PETITIONER-APPELLANT.

GOETTEL, POPLASKI & DUNN, PLLC, WATERTOWN (MATTHEW A. GOETTEL OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Jefferson County Court (Kim H. Martusewicz, J.), entered May 14, 2012. The order vacated a judgment of eviction of the Town Court of the Town of Cape Vincent.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the judgment is reinstated except to the extent that it provided that petitioner is entitled to the payment of rent following the date of the issuance of the warrant of eviction.

Memorandum: Petitioner appeals from an order of County Court that vacated a judgment of eviction rendered by Town Court and remitted the matter to Town Court for a jury trial, as demanded by respondents, tenants who lease a lot in petitioner's seasonal manufactured home park. Contrary to County Court's conclusion, Town Court properly granted petitioner's motion for summary judgment on the petition. Because there are no triable issues of fact, petitioner was entitled to summary judgment and a warrant of eviction. We note, however, that Town Court improperly determined that petitioner was entitled to summary judgment on the ground that its documentary proof conclusively established that no retaliatory eviction occurred. Neither affirmative defense of retaliatory eviction contained in Real Property Law §§ 223-b or 233 (n) applies to the property at issue. Real Property Law § 223-b applies to "rental residential premises" (§ 223-b [6]). Here, respondents leased only a lot from petitioner, and we conclude that a mobile home, owned outright and placed on a lot rented for seasonal use and occupancy, is not a "rental residential premises" within the meaning of section 223-b. That statute was directed at landlords, to ensure that they comply with housing codes and the State's warranty of habitability statute (*see* Executive Dept

Mem, Bill Jacket, L 1979, ch 693), both of which are inapplicable to the rental of the lot at issue here. Furthermore, we agree with petitioner that County Court erred in concluding that petitioner commenced this proceeding pursuant to Real Property Law § 233 (d) and that petitioner is a "manufactured home park" subject to the requirements of Real Property Law § 233. The petition did not invoke section 233 (d). Moreover, subdivision (a) (3) of that statute defines the term "manufactured home park" as "a contiguous parcel of privately owned land which is used for the accommodation of three or more manufactured homes occupied for year-round living." The record establishes that petitioner's tenants and respondents occupy their manufactured homes only from May 1 to October 15, i.e., seasonally rather than year-round.

Finally, although not raised on this appeal, we note that Town Court erred in directing that the judgment include payment of any outstanding amount of rent due "as of the date of [r]espondents[']departure from the premises." The issuance of a warrant of eviction terminated any landlord-tenant relationship as a matter of law, and no rent can be collected after the date of the issuance of the warrant as a matter of law (*see* RPAPL 749 [3]), i.e., June 18, 2011. We further note that the record reflects that respondents paid rent through March 2011.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

495

KA 09-00388

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT D. BREWER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered January 9, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree ([CPW 2d] Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress his written statement to the police. We reject that contention. Contrary to defendant's contention, he was not in custody before giving his statement.

After being released from jail on unrelated charges, defendant was approached by an investigator from the Elmira Police Department, who asked defendant if he would "come down and talk to" an investigator. Defendant agreed, entered the investigator's vehicle, and was driven half of a block to the police station. At the station, defendant agreed to wait there to speak to members of the Rochester Police Department (RPD). Defendant waited, unrestrained, with his girlfriend in an office. Approximately two hours later, an RPD investigator arrived and took defendant to a separate office. Defendant agreed to waive his *Miranda* rights, and was interviewed for "approximately a little over half an hour" to 45 minutes. During that interview, defendant provided the investigator with a written statement. At no point were any promises or threats made to defendant, and at no time did defendant ask for an attorney, for an end to the interview, or for permission to leave the room. Defendant was unrestrained during the entire period.

It is well settled that the test for determining whether a defendant is in custody or has been subjected to a de facto arrest is "what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position" (*People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851; *see People v Hicks*, 68 NY2d 234, 240; *People v Kelley*, 91 AD3d 1318, 1318, *lv denied* 19 NY3d 963). Here, defendant voluntarily accompanied the police officers to the station, was not handcuffed, was permitted to sit with his girlfriend, and "was not subjected to lengthy, coercive or accusatory questioning" (*People v Brown*, 111 AD3d 1385, 1385, *lv denied* 22 NY3d 1155; *see People v Vargas*, 109 AD3d 1143, 1143, *lv denied* 22 NY3d 1044; *People v Towsley*, 53 AD3d 1083, 1084, *lv denied* 11 NY3d 795). "The mere fact that the police may have suspected defendant of having [been involved in a murder] prior to questioning him at the station does not compel a finding that defendant was in custody" (*People v Smielecki*, 77 AD3d 1420, 1421, *lv denied* 15 NY3d 956). We thus conclude that "a reasonable person, innocent of any crime, would not have thought he or she was in custody if placed in defendant's position" (*id.*).

Defendant further contends that the sentence imposed on the CPW 2d count is unduly harsh and severe. Defendant was acquitted of felony murder and attempted robbery, and the jury was deadlocked on the charge of intentional murder. The court took a partial verdict on the CPW 2d count, sentenced defendant on that count alone, and ordered a new trial on the intentional murder count (*People v Brewer* [appeal No. 2], ___ AD3d ___ [June 20, 2014]). In his written statement, defendant admitted that he had been hired by a codefendant to kill another person and that he had proceeded to the designated location with a loaded and operable firearm with the intent to use that firearm against the victim. Regardless whether defendant changed his mind after arriving at the designated location, the crime of CPW 2d already had been completed. Moreover, a codefendant used defendant's gun to commit the murder. Given those circumstances and the nature of the crime, we see no basis to modify the sentence imposed.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

496

KA 09-01776

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT D. BREWER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered July 10, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that an executed cooperation agreement created a legal impediment to the People's prosecution of him for intentional murder and thus that Supreme Court erred in refusing to dismiss that count of the indictment. We reject that contention. In his written statement, the admissibility of which we upheld in *People v Brewer* ([appeal No. 1] ___ AD3d ___ [June 20, 2014]), defendant admitted that he brought a loaded weapon to a residence with the intent that he and others would commit a murder. He stated, however, that, when the time came to the pull the trigger, he was unable to do so. Defendant further stated that a codefendant grabbed the gun from his hand and used it to kill the victim. Although that codefendant had already implicated defendant as the shooter, the prosecutor entered into a written cooperation agreement with defendant. Pursuant to that agreement, defendant agreed to provide truthful statements and/or testimony against all others involved in the murder. He also agreed that he would take a polygraph examination; truthfully testify at all court proceedings; and "[n]ot engage in any conduct which would constitute any violation of the Penal Law . . . during the pendency of th[e] Agreement." The determination whether defendant "successfully completed performance" of the agreement rested in the sole discretion of the prosecutor. Upon successful completion of the agreement,

defendant would be permitted to plead guilty to attempted conspiracy in the second degree with a sentence recommendation of 4 to 12 years. If the prosecutor concluded, however, that defendant had not successfully completed the agreement, he could be prosecuted for, inter alia, criminal possession of a weapon in the second degree. In addition, the agreement provided that, "[s]hould [d]efendant commit any further criminal offenses or provide false or misleading information or statements, withhold information or violate any provision of th[e] Agreement, he [would] be subject to prosecution for any . . . criminal violations he committed as well as for the crimes encompassed by th[e] Agreement and for which [he] could have been charged initially, had th[e] Agreement not been entered into, and for any perjury, making false statements, or failure to testify." The prosecutor could also "prosecute the defendant to the full extent of the law on the charges which are the subject of th[e] Agreement."

After execution of the agreement, a second codefendant identified defendant as the shooter. As a result, the prosecution terminated the agreement and indicted defendant on charges of, inter alia, intentional murder (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree ([CPW 2d] § 265.03 [3]). In his omnibus motion, defendant sought dismissal of, inter alia, the intentional murder count on the ground that the agreement barred the People's prosecution of him for that crime. While we agree with defendant that the court had the authority to hold a hearing to determine whether a violation occurred (*see People v Jairam*, 10 AD3d 455, 456), we conclude under the circumstances here that the court did not err in denying that part of defendant's omnibus motion without a hearing. The evidence in the record is sufficient to establish as a matter of law that defendant had agreed that the prosecutor would have the discretion to determine whether defendant had successfully completed the agreement or whether he had violated its terms. Inasmuch as the prosecutor's determination that defendant had failed to provide truthful information "was made in good faith," we conclude that the court properly refused to dismiss the intentional murder count of the indictment (*People v Anonymous*, 253 AD2d 709, 710, *lv denied* 92 NY2d 980, *reconsideration denied* 93 NY2d 850; *see People v Anonymous*, 251 AD2d 179, 179). We also reject defendant's contention that he is entitled to specific performance of the agreement because he detrimentally relied on it. At the time defendant entered into the agreement, he had already given his statement to the police, and there is no evidence of defendant's further reliance on the agreement or performance of the agreement in the month between its execution and revocation (*cf. People v Danny G.*, 61 NY2d 169, 175-176; *People v Ross G.*, 163 AD2d 529, 530-531).

Viewing the evidence in light of the elements of the crime of intentional murder as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We conclude, however, that we must reverse the judgment and grant a new trial on the count of the indictment charging defendant with

intentional murder. Defendant was initially tried on the entire indictment. The first trial ended with a conviction of CPW 2d (*Brewer*, ___ AD3d at ___), a hung jury on the intentional murder count and an acquittal on all other counts. The court declared a mistrial on the intentional murder count and ordered a new trial on that count only. At both the first trial and the second trial, the defense theory was that defendant did not have the intent to kill the victim at the time the codefendant shot the victim. By that time, defendant had made a conscious decision against firing the weapon or committing the murder. At the first trial, defense counsel initially requested a charge on the affirmative defense of renunciation. Defense counsel subsequently withdrew that request and argued in summation that defendant could not be liable as an accessory because he had lacked the necessary shared intent to kill. The first jury was deadlocked with respect to the intentional murder count: 10 for acquittal and 2 for conviction.

At the second trial, there was no mention of the affirmative defense of renunciation until the jury requested instruction on a change of intent, i.e., "changing your mind at the last minute." In response to that jury note, the court proposed to instruct the jury on the affirmative defense of renunciation. Defense counsel vigorously objected, noting that he had repeatedly informed the jury that defendant had no burden of proof and that there had been no evidence presented in support of that affirmative defense. Over defense counsel's objection, the court read that instruction to the jury. That was error.

It is well settled that a court cannot instruct a jury on an affirmative defense where the defendant objects to the instruction (*see People v Bradley*, 88 NY2d 901, 902-903; *People v DeGina*, 72 NY2d 768, 776-778; *People v Martin* [appeal No. 1], 66 AD2d 995, 995-996). When a court does so, it impairs a defendant's "unquestionabl[e] . . . right to chart his [or her] own defense" (*DeGina*, 72 NY2d at 776); it may "undermine[] the defense chosen by [the] defendant[,] . . . [and] place[] [the] defendant in the midst of contradictory defenses" (*id.* at 776-777); and it indisputably "impose[s] on [the] defendant an affirmative burden of proof he [or she] had not undertaken by his [or her] defense theory" (*id.* at 777). The imposition of a burden of proof on a defendant who has not elected to pursue an affirmative defense "constitute[s] an abuse of the affirmative defense in deorgation of [a] defendant's right to have the State bear the entire burden of proof" (*id.* at 776). The Third Department has even stated that a court "is without the jurisdiction to, sua sponte, instruct the jury on an affirmative defense or force a defendant to raise such a defense" (*People v Ciborowski*, 302 AD2d 620, 622, *lv denied* 100 NY2d 579).

Where, as here, the defendant has repeatedly advanced only a defense, which carries no burden of proof, "the suggestion that he [or she] had assumed a burden of proof . . . ha[s] the potential to mislead the jury" (*DeGina*, 72 NY2d at 778). The affirmative defense of renunciation requires a defendant to meet an initial burden of establishing, by a preponderance of the evidence (*see generally People*

v Butts, 72 NY2d 746, 749 n 1), that he or she "withdrew from participation in such offense prior to the commission thereof *and made a substantial effort to prevent the commission thereof*" (Penal Law § 40.10 [1] [emphasis added]). There was no evidence presented at trial that defendant made any effort, let alone a substantial one, to prevent the commission of the murder. The only conclusion the jury could have drawn was that defendant had failed to meet his burden of establishing the affirmative defense. Here, as in *Bradley*, "[t]he imposition of an affirmative burden of proof over defense objection and the involuntary undermining of the defendant's chosen defense strategy resulted in serious prejudice that requires reversal" (88 NY2d at 904; *see People v Albright*, 65 NY2d 666, 668; *People v Maldonado*, 175 AD2d 698, 699-700; *Martin*, 66 AD2d at 996; *People v Cofer*, 48 AD2d 818, 818; *cf. People v Green*, 108 AD3d 782, 785, *lv denied* 21 NY3d 1074; *People v Diaz*, 39 AD3d 1244, 1245, *lv denied* 9 NY3d 842). We therefore reverse the judgment and grant a new trial on count one of the indictment.

While we agree with the People that there are limited circumstances where a court may give an instruction on an affirmative defense over a defendant's objection, i.e., when it is the only viable defense raised, we note that the court may not do so where, as here, a defendant has concluded his or her summation (*see People v Crumpler*, 242 AD2d 956, 958, *lv denied* 91 NY2d 871). We further agree with the People that the court was required to provide a meaningful response to the jury's inquiry. The court was thus forced to "perform the delicate operation of fashioning a response which meaningfully answer[ed] the jury's inquiry while at the same time working no prejudice to the defendant" (*People v Williamson*, 267 AD2d 487, 489, *lv denied* 94 NY2d 886). In our view, the courts in *Williamson* and *People v Starr* (213 AD2d 758, 760-761, *lv denied* 85 NY2d 980) gave appropriate responses when faced with similar situations. In each case, the jury inquired about a potentially relevant affirmative defense that the defendant had not pursued, but the court forestalled the jury's consideration of the affirmative defense. In *Williamson*, the court informed the jury that, although the affirmative defense of renunciation existed, it "had no application to the case" and the jury therefore had not been "instructed concerning it" (267 AD2d at 490). In *Starr*, the court instructed the jury that the affirmative defense of entrapment "had not been raised" and that the jury had not been "instructed . . . with respect to such defense" (213 AD2d at 761). The court herein should have taken a similar approach when responding to the jury's note.

Based on our determination, we do not address defendant's remaining contentions.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

498

KA 09-02475

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL L. ROSS, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

LORENZO NAPOLITANO, ROCHESTER, FOR DEFENDANT-APPELLANT.

DANIEL L. ROSS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered August 20, 2009. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (two counts), criminal sexual act in the first degree (two counts) and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of rape in the first degree (Penal Law § 130.35 [1]), two counts of criminal sexual act in the first degree (§ 130.50 [1]), and assault in the second degree (§ 120.05 [2]). The conviction arises out of the forcible rape of the 48-year-old victim by defendant and the codefendant, which culminated in the victim being stabbed three times and left for dead.

We reject defendant's contention in his main brief that the conviction is not supported by legally sufficient evidence inasmuch as his conviction is based solely on DNA evidence obtained from a readily moveable object, i.e., a condom left at the scene (*see People v Person*, 74 AD3d 1239, 1240-1241, *lv denied* 17 NY3d 799). The DNA sample matching defendant's DNA was collected from that condom, and the victim's DNA also matched a sample taken from the condom. Moreover, the victim credibly testified that she was raped by two attackers, one of whom matched defendant's description, and testimony from police officers supported the conclusion that the condom had been recently left at the scene (*see People v Gibson*, 74 AD3d 1700, 1703, *affd* 17 NY3d 757; *People v Dearmus*, 48 AD3d 1226, 1228, *lv denied* 10 NY3d 839; *see also People v Rush*, 242 AD2d 108, 110, *lv denied* 92 NY2d

860, *reconsideration denied* 92 NY2d 905).

Defendant's further contention in his pro se supplemental brief that the conviction otherwise is not supported by legally sufficient evidence is not preserved for our review (*see generally People v Gray*, 86 NY2d 10, 19), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). 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).

Contrary to defendant's contention, the indictment is not multiplicitous. He was charged in count one with raping the victim as a principal and, in count two, for acting as an accomplice in the codefendant's rape of the victim. Those are distinct criminal acts, and the People therefore properly charged them as separate counts (*see generally People v Smith*, 27 AD3d 242, 243-244, *lv denied* 7 NY3d 763; *People v Johnson*, 289 AD2d 1008, 1009, *lv denied* 97 NY2d 756). Contrary to defendant's further contention, the indictment is not duplicitous inasmuch as there was no evidence adduced at trial that he had committed more than one rape or criminal sexual act in his capacity as a principal or as an accomplice (*see People v Keindl*, 68 NY2d 410, 417-418, *rearg denied* 69 NY2d 823; *see also* CPL 200.30 [1]; *People v Alonzo*, 16 NY3d 267, 269). Furthermore, defendant's contention that he prevented the codefendant from continuing to stab the victim is unsupported by the trial testimony and, in any event, is irrelevant to the issue of his guilt of the crimes charged.

Although defendant was subjected to custodial interrogation when he gave his written statement to the police, it is undisputed that he had previously waived his *Miranda* rights, and we therefore conclude that his statement was voluntary (*see generally People v Brooks*, 26 AD3d 739, 740, *lv denied* 6 NY3d 846, *reconsideration denied* 7 NY3d 810). We further conclude that defendant's subsequent refusal to sign the written statement did not render invalid the knowing, intelligent and voluntary nature of the statement (*see People v Barksdale*, 140 AD2d 531, 532, *lv denied* 72 NY2d 915). That conclusion is supported by the testimony of one of the officers at the suppression hearing that defendant had confirmed the accuracy of the statement after the officer had read it back to him. Moreover, the statement was of an exculpatory nature, and thus there is no basis for inferring that defendant did not want his denials to the allegations against him to be documented by the police.

With respect to defendant's contention in both his main and pro se supplemental briefs that he was deprived of effective assistance of counsel, we note as an initial matter that we use only the state standard for ineffective assistance of counsel where a defendant contends that he received ineffective assistance of counsel under both the state and federal standards (*see People v Stultz*, 2 NY3d 277, 282, *rearg denied* 3 NY3d 702; *People v Henry*, 95 NY2d 563, 565-566; *cf. People v McDonald*, 1 NY3d 109, 114-115; *see generally People v Baldi*,

54 NY2d 137, 147). Applying that standard, we conclude that defendant's contention is without merit. First, with respect to defendant's contention that defense counsel failed to call a DNA expert to refute the People's proof, we conclude that he failed to " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712). Indeed, the record suggests that an expert was, in fact, consulted, and that defense counsel deliberately decided not to call him to testify (*see generally People v Sprosta*, 49 AD3d 784, 785, *lv denied* 10 NY3d 871).

Second, contrary to defendant's further contention, defense counsel was not ineffective in failing to request a missing witness charge, inasmuch as such request would have had little or no chance of success (*see People v Savinon*, 100 NY2d 192, 197; *see generally Stultz*, 2 NY3d at 287). Third, defendant's assertion that defense counsel failed to join in the codefendant's discovery motion and failed to advise defendant of the ramifications of rejecting the People's plea offer, involve matters outside the record on appeal, and "the proper procedural vehicle for raising those contentions is a motion pursuant to CPL 440.10" (*People v Archie*, 78 AD3d 1560, 1562, *lv denied* 16 NY3d 856). Defendant's remaining contentions concerning ineffective assistance of counsel lack merit. The evidence, the law, and the circumstances of this particular case, viewed in totality and as of the time of the representation, reveal that defense counsel provided meaningful representation (*see generally Baldi*, 54 NY2d at 147).

Contrary to defendant's contention, the sentence is not unduly harsh and severe. Defendant failed to preserve his further contention that, "in determining the sentence to be imposed, the court penalized him for exercising his right to a jury trial, inasmuch as [he] failed to raise that contention at sentencing" (*People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862). In any event, the "mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial" (*id.*). Furthermore, we conclude that the court did not err in sentencing him to a consecutive term of incarceration for the assault conviction (*see People v Smith*, 269 AD2d 778, 778, *lv denied* 95 NY2d 804).

Finally, defendant's contention that prosecutorial misconduct on summation deprived him of a fair trial is unpreserved for our review (*see People v Klavoon*, 207 AD2d 979, 980, *lv denied* 84 NY2d 908; *see generally People v Thompson*, 59 AD3d 1115, 1117, *lv denied* 12 NY3d 860). In any event, the court sustained the codefendant's objection to one of the contested comments and provided a limiting instruction in that regard (*see People v Hawkes*, 39 AD3d 1209, 1210, *lv denied* 9 NY3d 845), and the other remark constituted "a fair response to defense counsel's summation, and/or a fair comment on the evidence" (*People v Ward*, 107 AD3d 1605, 1606, *lv denied* 21 NY3d 1078; *see*

generally People v Halm, 81 NY2d 819, 821).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

500

KA 11-00352

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IKEEM MITCHELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered October 28, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant contends that he was illegally stopped by the police and, thus, that County Court erred in refusing to suppress the handgun seized by the police from his person and his subsequent statements to the police. We reject that contention. "[T]he police may forcibly stop or pursue an individual if they have information which, although not yielding the probable cause necessary to justify an arrest, provides them with a reasonable suspicion that a crime has been, is being, or is about to be committed" (*People v Martinez*, 80 NY2d 444, 447; *see People v Austin*, 38 AD3d 1246, 1248, *lv denied* 8 NY3d 981). "Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*People v Cantor*, 36 NY2d 106, 112-113; *see People v Woods*, 98 NY2d 627, 628; *Martinez*, 80 NY2d at 448). Here, the evidence before the suppression court established that the police sergeant was entitled to stop defendant forcibly because he had a reasonable suspicion that defendant was involved in the shooting of a man that had been recently reported. Defendant matched the description given by a witness at the crime scene, who described the suspect as a short black male wearing an oversized black hoodie. The witness also indicated that the suspect fled the crime scene on foot in an easterly direction. Within

10 minutes of the report of the shooting, the police sergeant observed defendant walking in that direction from the area of the shooting, and defendant and his clothing matched the description given by the witness. The police sergeant observed that the "voluminous" hoodie worn by defendant hung to his knees and made him appear short. The police sergeant also noted that defendant repeatedly looked behind him to see if he was being followed. We therefore conclude that the police sergeant had the requisite reasonable suspicion that criminal activity was at hand to justify the forcible stop of defendant. In answer to questions from the police sergeant, defendant admitted that he was coming from the area of the shooting and that he had a gun in his pocket, which the police sergeant subsequently lawfully seized (*see People v Jackson*, 72 AD2d 149, 152). Recovery of the gun from defendant's person, in addition to the other information known by the police sergeant, provided probable cause for defendant's arrest. Defendant was thereafter taken to police headquarters, where he waived his *Miranda* rights and made inculpatory statements.

Viewing the evidence in light of the elements of the crime of murder in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence with respect to the element of intent (*see generally People v Bleakley*, 69 NY2d 490, 495). We conclude that a different finding by the jury, i.e., a finding that defendant acted without intent to kill the victim, would have been unreasonable (*see generally id.*; *People v Garrett*, 88 AD3d 1253, 1253-1254, *lv denied* 18 NY3d 883). In his statements to the police, defendant admitted that he shot the victim intentionally in retaliation for the shooting of his friend the previous day. Furthermore, the evidence at trial established that the victim was shot three times at a close range, indicating an intent to kill (*see generally People v Payne*, 3 NY3d 266, 272).

We reject defendant's contention that the imposition of consecutive sentences for the two crimes is illegal inasmuch as the evidence adduced at trial established that his unlawful possession of the gun was a criminal act separate and distinct from his shooting of the victim (*see People v Brown*, 21 NY3d 739, 751). Finally, defendant's sentence is not unduly harsh or severe, and we see no basis for reducing it.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

508

CA 13-01765

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

IN THE MATTER OF CRAIG R. DIETRICH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PLANNING BOARD OF TOWN OF WEST SENECA AND
TOWN OF WEST SENECA, RESPONDENTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (CHRISTOPHER BOPST OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LIPPES MATHIAS WEXLER FRIEDMAN, LLP, BUFFALO (DENNIS C. VACCO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 4, 2012 in a proceeding pursuant to CPLR article 78. The judgment, among other things, vacated and annulled the determination of respondent Planning Board of the Town of West Seneca, which denied petitioner's site plan request.

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

Memorandum: In this proceeding pursuant to CPLR article 78, respondents appeal from a judgment that, inter alia, vacated and annulled the determination denying petitioner's site plan request to construct an all-terrain vehicle (ATV) track on his property. Respondents contend that Supreme Court erred in concluding that respondents proceeded in excess of their jurisdiction by requiring petitioner to submit a site plan, and further erred in vacating and annulling the determination of respondent Planning Board of the Town of West Seneca (Planning Board). We agree, and we therefore reverse the judgment and dismiss the petition.

As a threshold matter, we agree with the Planning Board that its requirement of a site plan was "neither irrational, unreasonable nor inconsistent with the governing [code]" (*Matter of Emmerling v Town of Richmond Zoning Bd. of Appeals*, 67 AD3d 1467, 1467 [internal quotation marks omitted]; *see Matter of New York Botanical Garden v Bd. of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 419). As relevant here, the West Seneca Town Code (Code) excepts from the site plan requirement any "[p]ermitted accessory residential structures and uses" (§ 102-2

[B]; *see generally* Town Law § 274-a [2] [a]). Inasmuch as the proposed site of the ATV track is zoned R-65A, permissible uses of the property include, inter alia, private garages or off-street parking areas, family swimming pools, greenhouses, and horse stables (*see* Code § 120-13 [B] [1-4]; *see also* § 120-14 [B] [1]), as well as "[o]ther customary accessory uses" (§ 120-14 [B] [7]).

We further agree with the Planning Board that it did not act irrationally or unreasonably when it determined that the ATV track, which features six- to eight-foot jumps and "rumble strips," does not fall within the definition of "[o]ther customary accessory uses" (*see generally Matter of Granger Group v Town of Taghkanic*, 77 AD3d 1137, 1138, *lv denied* 16 NY3d 781). Although a separate provision of the Code permits limited use of recreational vehicles on private property (*see* § 117-3), no reference is made therein to the construction of ATV tracks with features similar to those of professional racetracks. Furthermore, we cannot agree with petitioner that this case is similar to cases involving worn paths that developed from the use of recreational vehicles over time (*see Matter of Spinella v Town of Paris Zoning Bd. of Appeals*, 191 Misc 2d 807, 809). We therefore conclude that the Planning Board did not err in requiring petitioner to submit a site plan for approval.

With respect to respondents' contention that the court erred in vacating and annulling the Planning Board's determination, we note that "[t]he authority to approve or deny applications for site development plans is generally vested in local planning boards" (*Matter of Valentine v McLaughlin*, 87 AD3d 1155, 1157, *lv denied* 18 NY3d 804, citing Town Law § 274-a [2] [a]). Thus, "[i]n conducting . . . site plan review, the Planning Board is required to set appropriate conditions and safeguards which are in harmony with the general purpose and intent of the Town's zoning code . . . To this end, a planning board may properly consider criteria such as whether the proposed project is consistent with the use of surrounding properties, whether it would bring about a noticeable change in the visual character of the area, and whether the change would be irreversible" (*id.* [internal quotation marks omitted]).

Judicial review is thus limited to the issue "whether the action taken by the [Planning B]oard was illegal, arbitrary, or an abuse of discretion" (*Matter of Kempisty v Town of Geddes*, 93 AD3d 1167, 1169, *lv denied* 19 NY3d 815, *rearg denied*, 21 NY3d 930 [internal quotation marks omitted]). The Planning Board's determination should therefore be sustained so long as it "has a rational basis and is supported by substantial evidence" (*Matter of Pelican Point LLC v Hoover*, 50 AD3d 1497, 1498 [internal quotation marks omitted]). Indeed, "[a] 'reviewing court may not substitute its judgment for that of the . . . [Planning B]oard, even if there is substantial evidence supporting a contrary determination' " (*Matter of Violet Realty, Inc. v City of Buffalo Planning Bd.*, 20 AD3d 901, 902, *lv denied* 5 NY3d 713).

With those legal principles in mind, we conclude that there is substantial evidence to support the Planning Board's determination that the ATV track is inconsistent with the residential use of

surrounding properties (*see Valentine*, 87 AD3d at 1157). Put simply, the evidence in the record establishes that the track would increase already existing problems, including the noise level in the neighborhood, the number of incidents of physical damage and trespass to neighboring properties, and the potential for neighboring landowners to be held liable for injuries occurring on their properties.

Having concluded that there was a rational basis for the Planning Board's denial of petitioner's request for site plan approval, we turn to petitioner's contention that the matter must be remitted to the Planning Board for the requisite factual findings. We reject that contention. "Generally, findings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination" (*Matter of Livingston Parkway Assn., Inc. v Town of Amherst Zoning Bd. of Appeals*, 114 AD3d 1219, 1219-1220 [internal quotation marks omitted]). Here, despite petitioner's contention to the contrary, the Planning Board adequately set forth specific findings of fact by indicating that its determination was based on concerns about trespassers and liability, property damage, and noise pollution. In any event, even assuming, arguendo, that such findings were inadequate, we conclude that remittal is unnecessary where, as here, the record as a whole addresses the applicable considerations or otherwise provides a basis for concluding that there was a rational basis for the Planning Board's determination (*see generally Matter of Paloma Homes, Inc. v Petrone*, 10 AD3d 612, 614; *Matter of Fischer v Markowitz*, 166 AD2d 444, 445).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

509

CA 13-01778

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

RONALD GRIFFO, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL COLBY, CHERIE ANN COLBY, SAMUEL R. SCIME, KATHLEEN SCIME AND DANIEL C. DEPRIORE, DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

RONALD GRIFFO, JR., PLAINTIFF-APPELLANT,

V

SAMUEL R. SCIME, KATHLEEN SCIME AND DANIEL C. DEPRIORE, DEFENDANTS-RESPONDENTS.
(ACTION NO. 2.)

LAW OFFICE OF WILLIAM MATTAR, P.C., WILLIAMSVILLE (APRIL J. ORLOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MCCABE, COLLINS, MCGEOUGH & FOWLER, LLP, CARLE PLACE (TAMARA M. HARBOLD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DANIEL COLBY AND CHERIE ANN COLBY.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (WILLIAM L. SHERLOCK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SAMUEL R. SCIME, KATHLEEN SCIME AND DANIEL C. DEPRIORE.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 31, 2012. The order granted the motions of defendants for summary judgment and dismissed plaintiff's complaints.

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

Memorandum: Plaintiff commenced these actions seeking damages for injuries he allegedly sustained in two motor vehicle accidents. Plaintiff's bills of particulars alleged that, as a result of each accident, he sustained serious injuries under the permanent loss of use, permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of Insurance Law § 5102 (d). We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint in each action on the ground

that there was no material issue of fact that plaintiff had sustained a serious injury.

Defendants met their respective burdens with regard to the permanent loss of use, permanent consequential limitation of use, and significant limitation of use categories by submitting the affirmed reports of a physician retained jointly by defendants, for both accidents. The physician, who examined plaintiff and his medical records, concluded that plaintiff had sustained only sprains and strains in the accidents, that those injuries had resolved, and that plaintiff's limitations in his range of motion were evidenced solely by subjective complaints of pain (*see Scheer v Koubek*, 70 NY2d 678, 679; *Rabolt v Park*, 50 AD3d 995, 995; *see also O'Brien v Bainbridge*, 89 AD3d 1511, 1512). In opposition, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The affidavit of his chiropractor failed to set forth any objective evidence, including the results of any tests performed, and merely noted that plaintiff's limitations in his range of motion shortly after each accident were accompanied by pain (*see Weaver v Town of Penfield*, 68 AD3d 1782, 1784-1785). The chiropractor's conclusory recitation of statutory language was insufficient to raise a triable issue of fact (*see Carfi v Forget*, 101 AD3d 1616, 1619). With respect to the 90/180-day category, defendants met their respective burdens by submitting plaintiff's deposition testimony, which established that he was not prevented "from performing substantially all of the material acts which constituted his usual daily activities" for at least 90 out of the 180 days following each accident (*Licari v Elliott*, 57 NY2d 230, 238).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

516

KA 09-02341

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER A. NICHOLSON, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

CHRISTOPHER A. NICHOLSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered September 22, 2009. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree.

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

Memorandum: In appeal No. 1, 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 [former (a)]) and, in appeal No. 2, defendant appeals from the resentence. We reject defendant's contention in appeal No. 1 that Supreme Court erred in allowing the victim and her mother to testify that defendant had threatened the victim and physically abused the victim and her brother. That evidence was relevant to explain the victim's delay in reporting the abuse (*see People v Westbrooks*, 90 AD3d 1536, 1537, *lv denied* 18 NY3d 963; *People v Bennett*, 52 AD3d 1185, 1187, *lv denied* 11 NY3d 734; *see also People v Rivers*, 82 AD3d 1623, 1623, *lv denied* 17 NY3d 904). We further conclude that the record establishes that the court balanced the probative value of such evidence against its potential for prejudice (*see People v Holmes*, 104 AD3d 1288, 1290, *lv denied* 22 NY3d 1041). Defendant failed to preserve for our review his contention that the court erred in failing to issue a limiting instruction with respect to that evidence, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see Westbrooks*, 90 AD3d at 1537). We reject defendant's

further contention that the failure to object to the absence of the limiting instruction rendered counsel ineffective (*see People v Williams*, 107 AD3d 1516, 1516-1517, *lv denied* 21 NY3d 1047).

Defendant next contends in appeal No. 1 that the court erred in admitting the testimony of an expert with respect to child sexual abuse accomodation syndrome (CSAAS) because the issue of delayed victim disclosure was not beyond the ken of the jurors in this case. It is well settled that "[e]xpert testimony concerning CSAAS is admissible to assist the jury in understanding the unusual conduct of victims of child sexual abuse where, as here, the testimony is general in nature and does not attempt to impermissibly prove that the charged crimes occurred" (*People v Gayden*, 107 AD3d 1428, 1428, *lv denied* 22 NY3d 1138 [internal quotation marks omitted]; *see People v Spicola*, 16 NY3d 441, 465, *cert denied* ___ US ___, 132 S Ct 400; *People v Ennis*, 107 AD3d 1617, 1619, *lv denied* 22 NY3d 1040). Contrary to defendant's contention, the record of the voir dire does not establish that all the sworn jurors were aware of and understood the reasons for delayed disclosure by victims of sexual abuse and, moreover, the CSAAS expert also testified concerning unusual conduct of victims of child sexual abuse other than delayed disclosure.

Defendant further contends in appeal No. 1 that the court erred in allowing the People to call a rebuttal witness who testified concerning collateral matters. Contrary to defendant's contention, the rebuttal witness was properly called to give testimony that was relevant to the defense witness's bias or motive to fabricate, which is not collateral (*see People v Anonymous*, 96 NY2d 839, 840). The defense witness was defendant's former girlfriend, and the rebuttal witness was defendant's ex-wife, who married defendant after he and the defense witness ended their romantic relationship. In her cross-examination of the defense witness, the prosecutor attempted to show that defendant and the defense witness were romantically involved at the time of the trial, but the defense witness would admit only that she and defendant were friends, and claimed that she and defendant had been friends "all along," i.e., they were friends even when defendant and the rebuttal witness were married. The prosecutor informed the court that she wanted to call the rebuttal witness to rebut the defense witness's testimony that she and defendant were "friends this entire time." We disagree with our dissenting colleagues that the rebuttal witness should not have been allowed to testify. Reading the prosecutor's colloquy with the court on this issue, together with her cross-examination of the defense witness, we conclude that the purpose of calling the rebuttal witness was to show that defendant and the defense witness were romantically involved at the time of the trial, which the prosecutor believed could be inferred if the defense witness and defendant had *not* been friends when he was married to the rebuttal witness.

We also disagree with our dissenting colleagues that our affirmance of the trial court's ruling violates *People v Concepcion* (17 NY3d 192). The Court of Appeals has " 'construed CPL 470.15 (1) as a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled

upon, by the trial court' " (*id.* at 195). Contrary to the position of the dissent, we are not affirming on a ground that is different from that determined by the court. The court allowed the rebuttal witness to testify for the "limited purpose" of whether the defense witness and defendant were friends, and we conclude that the court's determination was proper. We simply differ from the dissent in our interpretation of the meaning of the rebuttal witness's testimony tending to show that the defense witness and defendant were not friends after defendant married the rebuttal witness. The rebuttal witness testified that defendant had contact with the defense witness in 2003 but, after the rebuttal witness indicated to defendant that she was not pleased with that contact between them, she was not aware of any further contact between defendant and the defense witness. Whereas the dissent infers nothing from that testimony other than that defendant and the defense witness were not friends after 2003, we conclude that a permissible inference from that testimony was that, despite her testimony, the defense witness never lost her romantic feelings for defendant, even at the time of trial.

Viewing the evidence in light of the elements of the crime of course of sexual conduct against a child as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention in his pro se supplemental brief that the verdict is against the weight of the evidence in appeal No. 1 (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant also contends in his pro se supplemental brief that he received ineffective assistance of counsel in appeal No. 1. Inasmuch as we conclude that defendant was not denied a fair trial by any alleged instances of prosecutorial misconduct on summation, defense counsel's failure to object to those comments does not constitute ineffective assistance of counsel (*see People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954). In addition, defense counsel was not ineffective in failing to call a witness to rebut the testimony of the CSAAS expert (*see People v Wallace*, 60 AD3d 1268, 1270, *lv denied* 12 NY3d 922). Defendant's contention that defense counsel failed to obtain certain documentary evidence is based on matters outside the record and must be raised by way of a motion pursuant to CPL article 440 (*see People v Gerald*, 103 AD3d 1249, 1250). Finally, defendant's " '[s]peculation that a more vigorous cross-examination might have [undermined the credibility of a witness] does not establish ineffectiveness of counsel' " (*People v Williams*, 110 AD3d 1458, 1459-1460, *lv denied* 22 NY3d 1160).

Contrary to defendant's contention in appeal No. 2, the resentence is not unduly harsh or severe. We agree with defendant, however, that the court erred in failing to modify the duration of the order of protection upon the resentence. Although defendant failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 315-317; *People v Tidd* [appeal No. 2], 81 AD3d 1405, 1406), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We therefore modify the resentence in appeal No. 2 by amending the order of protection, and we remit the matter to Supreme Court to determine the jail time credit to which defendant is entitled and to specify in the

order of protection an expiration date in accordance with the version of CPL 530.12 (former [5] [ii]) in effect when the judgment was rendered on September 22, 2009 (*see People v Jackson*, 85 AD3d 1697, 1699, *lv denied* 17 NY3d 817; *Tidd*, 81 AD3d at 1406; *People v Harris*, 50 AD3d 1608, 1609, *lv denied* 10 NY3d 959).

All concur except CARNI and LINDLEY, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent. We would reverse the judgment of conviction in appeal No. 1 and grant defendant a new trial, and vacate the resentence in appeal No. 2. In our view, Supreme Court erred in allowing the People to call a rebuttal witness whose testimony related solely to collateral matters. "It is well established that the party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility" (*People v Pavao*, 59 NY2d 282, 288-289; *see People v Hanley*, 5 NY3d 108, 112). At the same time, however, "extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground" (*People v Hudy*, 73 NY2d 40, 56). Thus, the People may call a rebuttal witness to provide testimony that is relevant to a defense witness's bias or motive to fabricate, which is not collateral (*see People v Anonymous*, 96 NY2d 839, 840).

Here, the People's rebuttal witness was defendant's ex-wife, who was called to rebut certain testimony offered by defendant's sole witness, a former girlfriend who dated defendant from 1995 to 2003. The defense witness testified that she had a "wonderful" relationship with defendant's children — the victim and her brother — and that she never witnessed defendant engage in any violent acts toward them. On cross-examination, the defense witness acknowledged that she had remained defendant's friend and visited him frequently while he was in jail pending trial. She also acknowledged that she did not want to see anything bad happen to defendant.

Following the defense witness's testimony, the People announced their intention to call the ex-wife as a rebuttal witness. Defense counsel objected and asked for an offer of proof. When the court asked the prosecutor what she expected from the ex-wife's testimony, the prosecutor stated, "The [defense witness] testified specifically that she has been friends with the defendant the entire time, including the time after she broke up with him, and he was with [the rebuttal witness] up to the present date. I am calling the witness to rebut that statement that they were friends this entire time, because that's not correct." The court then asked, "That is the limited purpose, that they were or were not friends during that period; is that what you are saying?" The prosecutor responded, "That's right." The court allowed the rebuttal witness to testify over defendant's objection. She proceeded to testify that she and defendant met in 2003, married in 2005 and separated in 2008. The rebuttal witness further testified that, to her knowledge, defendant did not have any contact with the defense witness after 2003.

We conclude that the court erred in allowing the rebuttal witness to testify because the limited purpose of her testimony, as stated by the prosecutor, was to rebut the defense witness's testimony that she remained friends with defendant after they broke up in 2003. The fact that the defense witness was defendant's friend was relevant to show that she may have had a bias for testifying on his behalf. The defense witness freely acknowledged, however, that she was defendant's friend at the time of trial, and it was that very testimony that the prosecutor sought to rebut. The rebuttal witness's testimony—that the defense witness did not have contact with defendant after 2003—served only to show that the defense witness was not being truthful when she testified that she and defendant remained friends. In our view, that constitutes impermissible impeachment testimony on a collateral matter. The fact that the defense witness was not one of defendant's friends while he was married to the rebuttal witness, as the rebuttal witness testified, does not show that the defense witness was biased in favor of defendant. In fact, it tends to show the opposite.

We cannot agree with the majority that "the purpose of calling the rebuttal witness was to show that defendant and the defense witness were romantically involved at the time of trial." As noted, the prosecutor stated that her purpose in calling the rebuttal witness was to show that the defense witness and defendant were not friends "that entire time," as the defense witness had testified; the prosecutor did not say anything about seeking to show that the defense witness was romantically involved with defendant at the time of trial, and the rebuttal witness did not testify to that effect or even insinuate as much. In any event, the court's ruling in allowing the rebuttal witness to testify was not based on the ground relied upon by the majority, and we therefore may not affirm on that basis (*see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 196; *People v LaFontaine*, 92 NY2d 470, 474).

We agree with the People to the extent that they argue that defendant was not prejudiced by the rebuttal witness's testimony. In fact, we are comfortable concluding that there is no "significant probability . . . that the jury would have acquitted the defendant had it not been for the error" (*People v Crimmins*, 36 NY2d 230, 242; *see People v Arafet*, 13 NY3d 460, 468). In order for the harmless error analysis to apply in the first instance, however, the proof of guilt must be "overwhelming" (*Crimmins*, 36 NY2d at 241; *see Arafet*, 13 NY3d at 468). As the Court wrote in *Crimmins*, "unless the proof of the defendant's guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error. That is, every error of law (save, perhaps, one of sheerest technicality) is, *ipso facto*, deemed to be prejudicial and to require a reversal, unless that error can be found to have been rendered harmless by the weight and the nature of the other proof" (*id.* at 241). In our view, the error here cannot be characterized as "one of sheer technicality" (*id.*). Because this case turned largely on the testimony of the victim, who did not report the crimes until more than eight years after they occurred, it cannot be said that the proof of guilt is overwhelming. We are thus constrained to conclude that defendant is entitled to a new trial notwithstanding that the jury

almost certainly would have convicted him even without the rather innocuous rebuttal testimony.

Finally, we agree with the majority that none of defendant's remaining contentions in appeal No. 1 has merit.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

517

KA 10-00151

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER A. NICHOLSON, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

CHRISTOPHER A. NICHOLSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a resentence of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered November 24, 2009. Defendant was resentenced upon his conviction of course of sexual conduct against a child in the first degree.

It is hereby ORDERED that the resentence is modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the resentence is affirmed, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the same Memorandum as in *People v Nicholson* ([appeal No. 1] ___ AD3d ___ [June 20, 2014]).

All concur except CARNI and LINDLEY, JJ., who dissent and vote to vacate the resentence in the same dissenting Memorandum as in *People v Nicholson* ([appeal No. 1] ___ AD3d ___ [June 20, 2014]).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

562

KA 12-00893

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARRY WILLIAMS, DEFENDANT-APPELLANT.

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

LARRY WILLIAMS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered December 10, 2010. The judgment convicted defendant, upon his plea of guilty, of arson 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 arson in the second degree (Penal Law § 150.15), defendant contends in his main brief on appeal that his statements to the police were not preceded by *Miranda* warnings and thus that Supreme Court erred in refusing to suppress those statements. We reject that contention. " 'Where, as here, the People have initially demonstrated the legality of the police conduct and defendant's waiver, the burden of persuasion on the motion to suppress rests with defendant' " (*People v Dunlap*, 24 AD3d 1318, 1319, *lv denied* 6 NY3d 812). Contrary to defendant's contention, he failed to meet his burden. The minor inconsistencies in the testimony of the police witnesses at the suppression hearing concerning the precise time when the warnings were provided does not undermine the court's determination that those witnesses were credible (*see People v Shaw*, 66 AD3d 1417, 1418, *lv denied* 14 NY3d 773). Defendant's remaining contentions with respect to suppression of items seized as a result of his statements are moot in light of our determination. Defendant failed to preserve for our review his contention in his pro se supplemental brief that the police arrested him without probable cause inasmuch as "he failed to request a probable cause hearing or to raise that contention at the *Huntley* hearing" (*People v Mobley*, 49 AD3d 1343, 1344, *lv denied* 11 NY3d 791; *see People v Watson*, 90 AD3d 1666, 1667, *lv denied* 19 NY3d 868). We

decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant's further contention in his main brief that his plea was not knowing, intelligent and voluntary because he did not recite the underlying facts of the crime "is actually a challenge to the factual sufficiency of the plea allocution" (*People v McCarthy*, 83 AD3d 1533, 1534, *lv denied* 17 NY3d 819 [internal quotation marks omitted]). That challenge is unpreserved for our review because defendant did not move to withdraw the plea or to set aside the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665). In any event, "[t]he record establishes that defendant confirmed the accuracy of Supreme Court's recitation of the facts underlying the crime, and contrary to [his] contention, there is no requirement that [he] personally recite those facts" (*People v Whipple*, 37 AD3d 1148, 1148, *lv denied* 8 NY3d 928; *see People v Simcoe*, 74 AD3d 1858, 1859, *lv denied* 15 NY3d 778).

Defendant also contends in his pro se supplemental brief that he was denied effective assistance of counsel. That contention "involves matters outside the record on appeal, and thus the proper procedural vehicle for raising [it] is by way of a motion pursuant to CPL 440.10" (*People v Wilson*, 49 AD3d 1224, 1225, *lv denied* 10 NY3d 966; *see People v Johnson*, 81 AD3d 1428, 1428, *lv denied* 16 NY3d 896; *People v Cobb*, 72 AD3d 1565, 1567, *lv denied* 15 NY3d 803). He further challenges therein his adjudication as a second felony offender on the ground that the underlying conviction was obtained in violation of his constitutional rights. That challenge is not properly before us. "Defendant did not challenge the predicate felony statement submitted by the People pursuant to CPL 400.21 and may not challenge his second felony offender status for the first time on appeal" (*People v Brown*, 207 AD2d 962, 962, *lv denied* 85 NY2d 860; *see People v Smith*, 73 NY2d 961, 962-963; *People v Fidler*, 28 AD3d 1220, 1221, *lv denied* 7 NY3d 755).

Finally, we reject defendant's challenge in his main brief to the severity of the sentence.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

564

CAF 12-02030

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

IN THE MATTER OF AIRIONNA C., JASMINE E., RONDELL E., JERMONI E., CHENE E., SHAWNELL E., SHAMAR J., SHAMARA J., KANIYAH C., CARNISHA J., AND CARNAISHIA J.

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

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

SHERNELL E., RESPONDENT-APPELLANT.

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

MERIDETH SMITH, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

MARY P. DAVISON, ATTORNEY FOR THE CHILDREN, CANANDAIGUA.

MARGARET MCMULLEN RESTON, ATTORNEY FOR THE CHILD, ROCHESTER.

STEVEN B. LEVITSKY, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Gail A. Donofrio, J.), entered September 13, 2012 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected the subject children.

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

Memorandum: Petitioner commenced this neglect proceeding alleging, inter alia, that one of respondent mother's children severely burned herself with a lighter while the mother's 15-year-old daughter was babysitting seven of the younger children. The mother appeals from an order adjudging the subject children to be neglected. We note at the outset that we agree with the mother and the attorney for four of the children that Family Court failed to comply with CPLR 4213 (b) inasmuch as the court failed to set forth the "facts it deem[ed] essential" to its decision. Nevertheless, we exercise our independent power of factual review, and we agree with the court's neglect determination (*see Matter of Brian C.*, 32 AD3d 1224, 1225, *lv denied* 7 NY3d 717; *Matter of Jill F.P. v Sammie H.*, 305 AD2d 1050, 1051), both with respect to educational neglect for three of the children and inadequate supervision for all of the children.

With respect to the issue of educational neglect for three of the children, it is well settled that " '[p]roof that a minor child is not attending a public or parochial school in the district where the parents reside makes out a prima facie case of educational neglect' " (*Matter of Matthew B.*, 24 AD3d 1183, 1184). " 'Unrebutted evidence of excessive school absences [is] sufficient to establish . . . educational neglect' " (*id.*; *see Matter of Ember R.*, 285 AD2d 757, 758-759, *lv denied* 97 NY2d 604) and, here, petitioner presented unrebutted evidence from the Rochester City School District that, for the 2010-2011 school year three of the children had a combined 97 unexcused absences and 86 unexcused tardies (*see Matthew B.*, 24 AD3d at 1184).

With respect to the issue of inadequate supervision, the mother testified that she had left a lighter in her purse and that she had placed the purse in a "purse bucket" in her bedroom, a container that anyone could open. The mother also testified that she believed that her 15-year-old daughter was "mature and responsible" enough to be left in charge of her siblings and, although she initially testified that she had left the 15-year-old with five children on the date on which one of the children burned herself with the lighter, the mother subsequently testified that her daughter was in fact left in charge of seven children, all under the age of seven. We note that the 15-year-old child admitted to being asleep on the couch when the incident occurred.

Furthermore, even after the subject incident, a caseworker arrived at the mother's house and found a 14-year-old child left in charge of the younger siblings. Moreover, as part of the investigation leading up to the instant neglect petition, it was reported that four of the children had been seen playing unsupervised near a busy city street for at least five hours. We thus conclude on the record before us that the mother neglected the children based upon her failure to provide adequate supervision (*see Matter of Benjamin K.*, 28 AD3d 810, 812; *Matter of William AA.*, 24 AD3d 1125).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

570

CA 13-01728

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

TIMOTHY H. WRIGHT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF JAMESTOWN AND CITY OF JAMESTOWN POLICE DEPARTMENT, DEFENDANTS-APPELLANTS.

MARILYN FIORE-LEHMAN, CORPORATION COUNSEL, JAMESTOWN, FOR DEFENDANTS-APPELLANTS.

TULLY RINCKEY PLLC, ALBANY (MICHAEL W. MACOMBER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered December 21, 2012. The order denied the motion of defendants for summary judgment and granted the cross motion of plaintiff for partial summary judgment on the computation of vacation pay.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's cross motion and granting that part of defendants' motion for summary judgment dismissing the second cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a police officer with defendant City of Jamestown Police Department and a member of the United States Army Reserves, commenced this action alleging that he was discriminated against by defendants based on his status as a member of the reserves in violation of the Uniformed Services Employment and Reemployment Rights Act ([USERRA] 38 USC § 4301 *et seq.*). Defendants appeal from an order that denied their motion for summary judgment dismissing the complaint and granted plaintiff's cross motion for partial summary judgment on his claim that defendants violated USERRA by prorating his vacation and annual compensatory time pay.

We agree with defendants that Supreme Court erred in granting plaintiff's cross motion, thereby concluding that defendants violated USERRA when they prorated plaintiff's vacation and annual compensatory time pay by using the time he actually worked in a prior year as a police officer relative to his absences from work due to his reserve duty. We therefore modify the order accordingly. Pursuant to 38 USC § 4316 (a), a reservist who returns to work "is entitled to the seniority and *other rights and benefits determined by seniority* that

the person had on the date of the commencement of service in the uniformed services[,] plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed" (emphasis added). Based on the relevant collective bargaining agreements, the amount of vacation time to which an employee is entitled in a given year is based on his or her length of continuous service and, based on USERRA, the length of continuous service must include any periods of time in which an employee is on active military duty.

Here, we conclude that plaintiff failed to establish as a matter of law that vacation and compensatory time is awarded annually based solely on seniority, as opposed to being earned based on the amount of time actually worked in a given year. "On [plaintiff]'s theory of the case, [defendants] would be required to provide full vacation benefits to a returning service[person] if he [or she] worked no more than one week in each year; indeed, following this approach to its logical limits, a veteran who served in the Armed Forces for four years would be entitled to accumulated vacation benefits for all four years upon his [or her] return. This result is so sharply inconsistent with the common conception of a vacation as a reward for and respite from a lengthy period of labor that the statute should be applied only where it clearly appears that vacations were intended to accrue automatically as a function of continued association with [defendants]" (*Foster v Dravo Corp.*, 420 US 92, 100-101). It cannot be concluded as a matter of law on this record, in the context of plaintiff's cross motion for partial summary judgment, that vacation and compensatory time accrue automatically based solely on plaintiff's continued association with defendants.

We reject defendants' contention that the court erred in denying that part of their motion for summary judgment dismissing the first cause of action, alleging discrimination based on plaintiff's military status. There are issues of fact whether plaintiff's reservist status was a motivating factor in any adverse employment actions or decisions made by defendants (*see Mock v City of Rome*, 851 F Supp 2d 428, 432-433; *see also Wang v New York State Dept. of Health*, 40 Misc 3d 747, 757). We agree with defendants, however, that the court erred in denying that part of their motion for summary judgment dismissing the second cause of action, alleging retaliation. We therefore further modify the order accordingly. "An adverse employment action must be materially adverse, not merely an inconvenience or a change in job responsibilities" (*Griffin v Potter*, 356 F3d 824, 829). "Materially adverse actions include termination, demotion accompanied by a decrease in pay, or a material loss of benefits or responsibilities, but do not include 'everything that makes an employee unhappy' " (*Crews v City of Mt. Vernon*, 567 F3d 860, 869). Defendants met their initial burden with respect to the retaliation cause of action and, in opposition, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

582

KA 12-01076

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBIN KALINOWSKI, 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 (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered April 5, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting her following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that the evidence is legally insufficient to establish that she intended to kill the victim, and that the verdict is against the weight of the evidence in that regard. We reject those contentions. Defendant was charged with intentionally killing her husband by shooting him in the back of the head with a .22 caliber rifle while he was sleeping in bed. Although defendant admits that she fired the fatal shot, she asserts that the gun discharged accidently when she picked it up off of the bed, and that she did not intend to kill the victim. The evidence at trial established, however, that the victim sustained a contact wound to the back of his head, which is not consistent with defendant's claim that the gun accidently discharged when she picked it up off of the bed. According to defendant's reenactment of the shooting, which was videotaped by the police and played for the jury, defendant was holding the rifle in a manner such that its barrel would not come into direct contact with the victim's head.

Moreover, the medical evidence established that the bullet entered the victim's skull near the middle of his head and traveled downward toward the base of the skull. If the shooting happened as defendant described in her video reenactment and other statements, the bullet would have had an upward trajectory. A firearms expert who test-fired the rifle testified that it was in proper working

condition, which is contrary to defendant's assertion that the gun needed to be fixed and that the victim was fixing it in the bedroom on the night of the shooting. The expert further testified that it took five to seven pounds of pressure to pull the rifle's trigger, which he described as a "substantial trigger pull" and not a "hair trigger." Thus, the expert concluded, the rifle would not fire if a person "just touch[ed] or tap[ped]" the trigger. That testimony undermined defendant's claim that the rifle discharged when it slipped out of her hands.

The People also presented evidence that the victim, an experienced hunter, was very safe with his guns and would not have left a loaded rifle on his bed with the safety in the off position. Defendant's own brother described the victim at trial as "Mr. Safety." In addition, defendant told inconsistent stories about how the shooting occurred, and she made numerous admissions to fellow inmates while in jail awaiting trial. Finally, although defendant told the police that there were no problems with her marriage, the People presented evidence at trial that she was having an affair with another man when the victim was shot, and that after the shooting she told her paramour not to tell the police about their affair. When defendant learned that the paramour intended to testify for the prosecution at trial, defendant conspired with an undercover police officer, who defendant thought was a hit man, to have her paramour murdered. Defendant later pleaded guilty to conspiracy in the second degree as a result of her attempt to murder the witness, and evidence of her plea was entered at trial.

Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial," i.e, that defendant intended to kill the victim (*People v Bleakley*, 69 NY2d 490, 495; *see People v Cooper*, 59 AD3d 1052, 1052-1053, *lv denied* 12 NY3d 852; *People v Tyes*, 30 AD3d 1045, 1046, *lv denied* 7 NY3d 795). Based upon our independent review of the evidence pursuant to CPL 470.15 (5), and 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 further conclude that the verdict is not contrary to the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable in light of defendant's testimony that the shooting was accidental, "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; *see People v Canfield*, 111 AD3d 1396, 1397, *lv denied* 22 NY3d 1087; *People v Woods*, 26 AD3d 818, 819, *lv denied* 7 NY3d 765).

We reject defendant's further contention that Supreme Court erred in allowing the People to present evidence at trial of her conspiracy to murder her former paramour in order to prevent him from testifying at trial. Evidence that defendant attempted to kill a prosecution witness is admissible as evidence of her consciousness of guilt (*see*

People v Pawlowski, 116 AD2d 985, 986, *lv denied* 67 NY2d 948; *see also People v Arguinzoni*, 48 AD3d 1239, 1240, *lv denied* 10 NY3d 859; *People v Maddox*, 272 AD2d 884, 885, *lv denied* 95 NY2d 867), and its prejudicial effect did not outweigh its probative value (*see generally People v Ventimiglia*, 52 NY2d 350, 359-360).

We have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

588

CAF 12-02048

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

IN THE MATTER OF JESUS M.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JAMIE M., RESPONDENT-APPELLANT.

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

GREGORY J. AMOROSO, COUNTY ATTORNEY, UTICA (DEANA D. PREVITE OF COUNSEL), FOR PETITIONER-RESPONDENT.

ROSEMARIE RICHARDS, ATTORNEY FOR THE CHILD, GILBERTSVILLE.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered April 16, 2012 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that adjudged that she neglected the child who is the subject of this proceeding. There was no fact-finding hearing, and the parties agreed that Family Court's determination would be based solely upon a stipulation that, inter alia, the mother had been diagnosed with dysthymic disorder, generalized anxiety disorder, posttraumatic stress disorder, and effective psychosis borderline personality disorder NOS, and the mother was "unable to maintain stable housing" between June and December 2011.

We note at the outset that, although the subject child has been adopted by his foster parents, this appeal is not moot. "A determination of neglect creates 'a permanent and significant stigma which is capable of affecting a parent's status in potential future proceedings' and, thus, an appeal therefrom is not moot even though the subject child has been adopted" (*Matter of Mahogany Z. [Wayne O.]*, 72 AD3d 1171, 1172, *lv denied* 14 NY3d 714; *see Matter of Jamiar W. [Malipeng W.]*, 84 AD3d 1386, 1386-1387).

We agree with the mother that petitioner failed to establish by a preponderance of the evidence that the child was in imminent danger of

becoming impaired as a consequence of the mother's mental condition (*see Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 435-436). "[P]roof of mental illness alone will not support a finding of neglect . . . The evidence must establish a causal connection between the parent's condition, and actual or potential harm to the child[ ]" (*Matter of Joseph A. [Fausat O.]*, 91 AD3d 638, 640; *see generally Matter of Trina Marie H.*, 48 NY2d 742, 743). Here, the stipulation entered into by the parties did not include any information concerning the severity of the mother's diagnosed mental illnesses or any "evidence that the mother's mental illness[es] . . . placed the child[ ] in imminent danger" (*Joseph A.*, 91 AD3d at 640).

Contrary to the mother's contention, however, we conclude that petitioner established by a preponderance of the evidence that she neglected the child. "[A] party seeking to establish neglect must show, by a preponderance of the evidence . . . , first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent . . . to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368; *see* Family Ct Act §§ 1012 [f] [i]; 1046 [b] [i]). Here, the parties stipulated that the mother was unable to maintain stable housing during the period between June and December 2011. Thus, "[t]he finding of neglect based on [the mother's] failure to provide adequate shelter is supported by a preponderance of the evidence and is, by itself, sufficient to support the finding of neglect" (*Matter of Alexander L. [Andrea L.]*, 99 AD3d 599, 599, *lv denied* 20 NY3d 856; *see* § 1012 [f] [i] [A]). We reject the mother's contention that the finding of neglect cannot be based upon the stipulation that she was unable to maintain stable housing because that conduct occurred after the petition was filed. After the parties stipulated that the mother was unable to maintain stable housing, the court granted petitioner's motion for leave to amend the petition to conform to the proof (*see* § 1051 [b]; *Matter of Ariel C.W.-H. [Christine W.]*, 89 AD3d 1438, 1438-1439; *cf. Matter of Elijah NN.*, 66 AD3d 1157, 1159, *lv denied* 13 NY3d 715). Thus, the petition was properly amended to include allegations of "incident[s] that occurred after the filing of the original petition" (*Matter of Brice L.*, 29 AD3d 910, 911; *see Matter of Jewle I.*, 44 AD3d 1105, 1107).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

592

CA 13-00454

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

IN THE MATTER OF DARRYL FREEMAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered February 4, 2013 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 affirmed without costs.

Memorandum: On appeal from a judgment denying his petition seeking to annul the determination denying him parole release, petitioner contends that the Parole Board, in rendering its decision, erred in relying solely on the severity of his offense, which involved the non-fatal shooting of a police officer. Pursuant to Executive Law § 259-i (2) (c) (A), the Parole Board must consider eight enumerated factors in determining whether to release an inmate to parole supervision, and may place "greater emphasis on the severity of the crime[] than on the other statutory factors" (*Matter of MacKenzie v Evans*, 95 AD3d 1613, 1614, *lv denied* 19 NY3d 815; *see Matter of Patterson v Evans*, 106 AD3d 1456, 1457, *lv denied* 22 NY3d 912; *Matter of Huntley v Evans*, 77 AD3d 945, 947). Here, the record establishes that, although the Parole Board placed heavy emphasis on the severity of petitioner's offense, it did not solely consider that factor. Indeed, in its decision, the Parole Board noted petitioner's "educational and program accomplishments," as well as his letters of support, and it cannot be said that the Parole Board's determination that petitioner is not yet suitable for release was "so irrational under the circumstances as to border on impropriety" (*Matter of Friedgood v New York State Bd. of Parole*, 22 AD3d 950, 951; *see Comfort v New York State Div. of Parole*, 68 AD3d 1295, 1297).

Petitioner further contends that Executive Law § 259-c (4) should be applied retroactively to his hearing, which was held in July 2011. It is well settled that "statutes are presumptively prospective in their application absent an express legislative intent to the contrary" (*Morales v Gross*, 230 AD2d 7, 9; *see Matter of Mulligan v Murphy*, 14 NY2d 223, 226). Here, "by specifying an effective date of an amendment to Executive Law § 259-c (4) that postdated [petitioner's] parole hearing, 'the [l]egislature evinced its intent that the provision' only be applied prospectively" (*Matter of Davidson v Evans*, 104 AD3d 1046, 1046; *see Matter of Joyner v New York State Div. of Parole*, 114 AD3d 792, 792-793; *Matter of McCaskell v Evans*, 108 AD3d 926, 927).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

594

CA 13-01591

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

MEADOWLANDS PORTFOLIO, LLC, AS ASSIGNEE OF
FEDERAL DEPOSIT INSURANCE CORPORATION,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GEORGE F. MANTON, SR., DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

SCHWERZMANN & WISE, P.C., WATERTOWN (KEITH B. CAUGHLIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SLYE & BURROWS, WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Jefferson County (James P. McClusky, J.), entered January 29, 2013. The judgment, among other things, determined that defendant George F. Manton, Sr., owed to plaintiff a principal balance of $17,000.

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

Memorandum: Plaintiff commenced this foreclosure action in 2002, seeking the total amount due under a settlement and release agreement (SRA) executed by the parties on May 1, 1997. The SRA combined into one obligation the amounts due on a note secured by two mortgages, the balance of which was $6,542.14, together with a judgment in the amount of $43,997.67. Both obligations were in favor of Jefferson National Bank (bank) and were assigned to plaintiff by the Federal Deposit Insurance Corporation when the bank failed. The SRA provided for an interest rate of 18%, unless George F. Manton, Sr. (defendant) made periodic payments, as set forth in an attached amortization schedule, by 5:00 p.m. on the 15th day of every month, until May 15, 2003. In the event that defendant made the payments on time, plaintiff would apply an interest rate of 7% on a principal balance of $31,500. Although the first scheduled payment was on April 15, 1997, the SRA was not executed until May 1, 1997. Defendant made monthly payments, some of which were made after the 15th day of the month, and plaintiff assessed interest at a rate of 18% from the inception of the payment period, i.e., April 15, 1997, as well as late fees. In June 2001, defendant paid a lump sum of $17,000. The principal, however, had not been reduced after the initial payment of $2,000 on May 1, 1997, and

the lump sum payment was applied entirely to accrued interest and late fees. The parties then executed a lien release agreement (LRA) in July 2001, pursuant to which plaintiff released the lien on one of the secured premises and defendant waived his right to claim that he owed less than an additional $17,000 pursuant to the SRA. Defendant failed to make further payments pursuant to the SRA, and this action was commenced in July 2002. On a prior appeal, we reversed the order granting defendant's motion for summary judgment dismissing the amended complaint (*Meadowlands Portfolio, LLC v Manton*, 11 AD3d 936).

Following a bench trial in 2010, Supreme Court determined liability in favor of plaintiff and referred the matter to a referee to determine the amount due. The Referee who conducted the hearing credited plaintiff's interpretation of the SRA and the LRA and determined, inter alia, that the amount due pursuant to those agreements was $149,926.48, i.e., principal in the amount of $49,155.49, plus accrued interest and late fees. The court, however, rejected the Referee's findings and instead determined that defendant owed a principal balance of $17,000, at a rate of interest of 9%, for a period of five years. We affirm.

"A foreclosure action is equitable in nature and triggers the equitable powers of the court" (*Norwest Bank Minn., NA v E.M.V. Realty Corp.*, 94 AD3d 835, 836, *lv dismissed* 19 NY3d 1085; *see generally Notey v Darien Constr. Corp.*, 41 NY2d 1055, 1055-1056). "[O]nce equity is invoked, the court's power is as broad as equity and justice require" (*Thompson v Naish*, 93 AD3d 1203, 1204 [internal quotation marks omitted]). We conclude that the court properly determined that plaintiff breached its duty of good faith and fair dealing with respect to the SRA and the LRA (*see generally Dalton v Educational Testing Serv.*, 87 NY2d 384, 389). Here, defendant waived his right to claim that he owed less than $17,000 when he executed the LRA, and we conclude that the court properly exercised its equitable powers by reducing the principal owed to $17,000. Furthermore, in an equitable action, the rate and duration of interest are within the discretion of the court (*see* CPLR 5001 [a]; *Norwest Bank Minn., NA*, 94 AD3d at 837; *Dayan v York*, 51 AD3d 964, 965, *lv dismissed* 12 NY3d 839) and, contrary to plaintiff's contention, the court did not abuse its discretion in reducing both the rate of interest and its duration. Indeed, pursuant to the terms of the SRA, "[d]efendant[] enjoyed no power . . . to avoid the payment of excessive interest" (*Eikenberry v Adirondack Spring Water Co.*, 65 NY2d 125, 129; *see generally* General Obligations Law § 5-501 [1], [6] [a]). Moreover, we note that the matter was pending for over 10 years, and much of the delay was attributable to plaintiff.

We further conclude that the court did not abuse its discretion in awarding plaintiff the sum of $10,000 in attorney's fees, rather than the sum of $41,042 that plaintiff requested (*see A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1290; *Pelc v Berg*, 68 AD3d 1672, 1673).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

595

CA 13-01592

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

MEADOWLANDS PORTFOLIO, LLC, AS ASSIGNEE OF
FEDERAL DEPOSIT INSURANCE CORPORATION,
PLAINTIFF-APPELLANT,

V ORDER

GEORGE F. MANTON, SR., DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

SCHWERZMANN & WISE, P.C., WATERTOWN (KEITH B. CAUGHLIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SLYE & BURROWS, WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered May 14, 2013. The order directed plaintiff to file a discharge of mortgage upon a certain payment by defendant George F. Manton, Sr.

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

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

597

CA 13-02009

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

MICHAEL A. PISCITELLO AND NANCY A. PISCITELLO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

FORTRESS TRUCKING, LTD., 781100 ONTARIO, INC.,
CHRISTINA STANKO, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

JAMES A. PARTACZ, WEST SENECA, FOR PLAINTIFFS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MICHAEL T. FEELEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered April 1, 2013. The order, insofar as appealed from, denied in part the motion of plaintiffs for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Michael A. Piscitello (plaintiff) when he fell from the top of a tractor-trailer owned by defendants Fortress Trucking, Ltd. and 781100 Ontario, Inc. and operated by defendant Christina Stanko. Plaintiff was on a platform taking a sample of oil from the tractor-trailer when Stanko, believing that plaintiff had finished, started to drive away. Plaintiffs moved for partial summary judgment on liability. Supreme Court granted the motion only with respect to the issue of serious injury, determining that there are issues of fact with respect to the issue of negligence and thus that plaintiffs are not entitled to partial summary judgment on liability (*see generally Ruzycki v Baker*, 301 AD2d 48, 51). We affirm. Plaintiffs failed to meet their initial burden of establishing that Stanko's alleged negligence was the sole proximate cause of the accident and that plaintiff was free from comparative negligence as a matter of law (*see Thoma v Ronai*, 82 NY2d 736, 737; *Haberman v Burke*, 116 AD3d 921, 922; *Day v MTA Bus Co.*, 94 AD3d 940, 941). In any event, viewing the evidence in the light most favorable to the nonmoving party, we conclude that in opposition to the motion, defendants raised issues of fact with respect to those issues (*see Azeem v Cava*, 92 AD3d 821, 821; *Guzman v Bowen*, 38 AD3d 837, 838).

Contrary to plaintiffs' contention, they are not entitled to summary judgment on the basis of the doctrine of res ipsa loquitur. Here, the evidence submitted by plaintiffs in support of their motion established that the inference of negligence is not inescapable and that this is not "the exceptional case in which no facts are left for determination" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 212; *see Dengler v Posnick*, 83 AD3d 1385, 1386). Even assuming, arguendo, that plaintiffs established that plaintiff's fall would not have occurred in the absence of negligence and that his fall was caused by an instrumentality solely within Stanko's control, we conclude that plaintiffs did not prove that the accident was not caused by any action by plaintiff (*see generally Kambat v St. Francis Hosp.*, 89 NY2d 489, 494; *Dengler*, 83 AD3d at 1386; *Perrin v Chase Equip. Leasing, Inc.*, 9 AD3d 839, 840).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

598

CA 13-01669

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

FAREEDAH A. BARNES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL S. HABUDA, INDIVIDUALLY AND DOING BUSINESS AS DAN'S COLLISION, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

HISCOCK & BARCLAY, LLP, ROCHESTER (SANJEEV DEVABHAKTHUNI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered April 30, 2013. The order, insofar as appealed from, directed plaintiff to produce medical authorizations with respect to Jeff Reinhardt, M.D.

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

Same Memorandum as in *Barnes v Habuda* ([appeal No. 2] ___ AD3d ___ [June 20, 2014]).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

599

CA 13-01926

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

FAREEDAH A. BARNES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL S. HABUDA, INDIVIDUALLY AND DOING BUSINESS AS DAN'S COLLISION, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

HISCOCK & BARCLAY, LLP, ROCHESTER (SANJEEV DEVABHAKTHUNI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered June 10, 2013. The order adjourned trial until plaintiff discloses the records of Jeff Reinhardt, M.D., or provides a copy of those records to Supreme Court for in camera review, or there is a determination of the appeal taken by plaintiff from an order entered April 30, 2013.

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

Memorandum: In this personal injury action arising from a motor vehicle accident, plaintiff appeals from two orders relating to the release of certain of her medical records. The medical records in question are those of a physician whom plaintiff asserts is her gynecologist (hereafter, physician). By the order in appeal No. 1, Supreme Court ordered plaintiff, inter alia, to "produce duly executed medical authorizations permitting defendant to obtain records of and speak with" the physician. When plaintiff failed to comply with that provision of the order, the court, upon defendant's motion to strike plaintiff's pleadings, issued the order in appeal No. 2, affording plaintiff the additional option of providing the physician's records to the court for in camera review.

We note at the outset that plaintiff's appeal from the order in appeal No. 1 must be dismissed because that order was superseded by the order in appeal No. 2 in relevant part, i.e., the order in appeal No. 2 afforded plaintiff the option of either providing the medical authorizations directly to defendant or providing the records to the court for in camera review (*see generally Loafin' Tree Rest. v Pardi*

[appeal No. 1], 162 AD2d 985, 985).

With respect to the merits of appeal No. 2, it is well settled that the trial court " 'is vested with broad discretion to control discovery and that the court's determination of discovery issues should be disturbed only upon a showing of clear abuse of discretion' " (*Eaton v Hungerford*, 79 AD3d 1627, 1628). It is also well settled that, " '[i]n bringing the action, plaintiff waive[s] the physician[-]patient privilege only with respect to the physical and mental conditions affirmatively placed in controversy' " (*Tirado v Koritz*, 77 AD3d 1368, 1369). " 'The waiver of the physician-patient privilege made by a party who affirmatively asserts a physical condition in its pleading does not permit discovery of information involving unrelated illnesses and treatments' " (*id.*; *see Donald v Ahern*, 96 AD3d 1608, 1610).

Here, we conclude that the court, in its superseding order, properly afforded plaintiff the option of providing the records to the court for an in camera review. If, as plaintiff asserts, the physician's medical records contain no information regarding the injuries she allegedly sustained as a result of the subject motor vehicle accident, then the records are irrelevant to this action and should not be disclosed to defendant. Alternatively, the court may redact the records to include only information relevant to this action.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

606

KA 12-02069

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC R. SPANGENBERG, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered April 30, 2012. 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.

Memorandum: On appeal from a judgment revoking the sentence of probation previously imposed upon his conviction of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and imposing a determinate term of imprisonment of two years and 18 months of postrelease supervision, defendant contends that his admission to the violation of probation was involuntary because the transcript of the admission colloquy shows that he was confused with respect to what facts he was admitting. Because defendant did not move on that ground either to withdraw his admission to the violation of probation or to vacate the judgment revoking his sentence of probation, he failed to preserve for our review his challenge to the voluntariness of his admission (*see People v Carncross*, 48 AD3d 1187, 1187, *lv dismissed* 10 NY3d 932, *lv denied* 11 NY3d 830; *People v Barra*, 45 AD3d 1393, 1393-1394, *lv denied* 10 NY3d 761; *People v Fontanez*, 19 AD3d 1070, 1070-1071, *lv denied* 5 NY3d 788). Moreover, the narrow exception to the preservation rule does not apply because defendant did not say anything during the admission colloquy that "cast[] significant doubt upon [his] guilt or otherwise call[ed] into question the voluntariness of the [admission]" (*People v Lopez*, 71 NY2d 662, 666; *see People v Mox*, 84 AD3d 1723, 1724, *affd* 20 NY3d 936). Although defendant refused to admit that he violated the terms and conditions of his probation by committing the new crimes with which he was charged, he admitted without equivocation that he violated such terms and conditions by failing to pay his surcharge and by consuming alcohol

with a friend.

We have examined defendant's remaining contentions and conclude that they lack merit.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

607

KA 13-01432

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH S. VIRGES, DEFENDANT-APPELLANT.

ANTHONY J. LANA, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered July 10, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of marihuana in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of marihuana in the fifth degree (§ 221.10 [2]). County Court properly denied defendant's motion to suppress the evidence seized from his person and vehicle. The police officer had an "objective, credible reason" for approaching defendant's parked vehicle and requesting information based on a tip provided by an anonymous informant, who reported that a man was sitting in a gray car smoking marihuana at a certain address (*People v Ocasio*, 85 NY2d 982, 985; *see People v Boler*, 106 AD3d 1119, 1121). Defendant's vehicle matched that description and was parked at that address. When the police officer smelled marihuana, he had probable cause to search defendant and the vehicle for contraband (*see People v Robinson*, 103 AD3d 421, 421-422, *lv denied* 20 NY3d 1103; *People v Contant*, 90 AD3d 779, 780, *lv denied* 18 NY3d 956; *People v Black*, 59 AD3d 1050, 1051, *lv denied* 12 NY3d 851; *see generally Arizona v Gant*, 556 US 332, 351; *People v Blasich*, 73 NY2d 673, 678).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

608

KA 10-00697

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARIO M. MARTINEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered January 27, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree and criminal mischief in the fourth 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 third degree (Penal Law § 140.20) and criminal mischief in the fourth degree (§ 145.00 [1]), defendant contends that he was improperly convicted of an unindicted count of burglary in the third degree. We reject that contention. Defendant entered two separate buildings on the RIT campus on the night of June 7, 2009—Building 4 and Building 7B—and we agree with defendant that there was evidence before the jury indicating that there were two distinct acts of burglary. We nevertheless conclude that the jury was made aware that defendant was being tried for his actions solely for the burglary of Building 7B, which is also referred to as the Frank Gannett Building, and that there was thus no danger that defendant was convicted with respect to acts that occurred in Building 4 (*see People v Ramirez*, 99 AD3d 1241, 1242, *lv denied* 20 NY3d 988). During his opening statement, the prosecutor informed the jury that he intended to prove that defendant burglarized "the building known as the Frank Gannett building or Building 7B on the Rochester Institute of Technology campus." The prosecutor never mentioned any other buildings during his opening statement, nor did defense counsel. Of the eight prosecution witnesses, only one mentioned Building 4. The remaining testimony focused on Building 7B. During his summation, defense counsel stated, "There's no videotape of what happened in the Gannett Building, which is what he's charged with. You have to be really clear on that. He is charged with, not what happened at the

Student Union building [Building 4], he's charged with what went on in the Gannett building afterward." Defense counsel further stated that what happened in Building 4 was irrelevant to whether defendant entered Building 7B with the intent to commit a crime therein. Under the circumstances, we perceive no danger that defendant was convicted of an unindicted burglary, thereby "resulting in the usurpation by the prosecutor of the exclusive power of the Grand Jury to determine the charges" (*People v McNab*, 167 AD2d 858, 858; *cf. People v Boykins*, 85 AD3d 1554, 1555, *lv denied* 17 NY3d 814; *People v Comfort*, 31 AD3d 1110, 1111, *lv denied* 7 NY3d 847).

Contrary to the further contention of defendant, 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). Here, although it would not have been unreasonable for the jury to find that defendant did not enter Building 7B with the intent to commit a crime therein, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally id.*).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

623

CA 13-02019

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

IN THE MATTER OF NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ASSESSOR, TOWN OF CHEEKTOWAGA, BOARD OF ASSESSMENT REVIEW OF TOWN OF CHEEKTOWAGA AND TOWN OF CHEEKTOWAGA, RESPONDENTS-DEFENDANTS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, ALBANY (KARLA M. CORPUS OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (MAURA C. SEIBOLD OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (John A. Michalek, J.), entered January 18, 2013 in CPLR article 78 proceedings and declaratory judgment actions. The judgment, among other things, denied petitioner-plaintiff's motion for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the provision dismissing the petitions-complaints and granting judgment in favor of respondents-defendants as follows:

> It is ADJUDGED and DECLARED that the imposition of ad valorem levies for sewer services against the subject properties is valid,

and as modified the judgment is affirmed without costs.

Memorandum: Petitioner-plaintiff (petitioner) commenced these consolidated hybrid CPLR article 78 proceedings and declaratory judgment actions seeking to challenge the imposition of special ad valorem sewer taxes on its "mass properties" located in respondent-defendant Town of Cheektowaga (Town). The term "mass properties" herein refers to petitioner's electric and natural gas transmission and distribution facilities, including two substations. According to petitioner, its mass properties are not benefitted by the Town's sewer district because they do not produce sewage. Petitioner thus concludes that it should not have to pay the sewer district's ad

valorem taxes, and that Supreme Court should have granted its motion for summary judgment and denied respondents' "application" for summary judgment.

We conclude that the court properly denied petitioner's motion for summary judgment because petitioner failed to meet its initial burden of establishing as a matter of law that it does not own the land on which its mass properties are located. If petitioner owns the land, it must pay the sewer taxes regardless of whether the properties currently produce sewage inasmuch as it is theoretically possible that the properties could be " 'developed in a manner that will result in the generation of [sewage]' " (*Matter of Niagara Mohawk Power Corp. v Town of Watertown*, 6 NY3d 744, 748, quoting *Matter of Niagara Mohawk Power Corp. v Town of Tonawanda Assessor*, 17 AD3d 1090, 1092), and it is immaterial that the Town taxes the land separately from the improvements thereon and that petitioner challenges only the tax on the improvements.

We further conclude that the court properly granted respondents' application for summary judgment based on the fact that petitioner may still benefit from the sewer district even if it does not own the land on which its mass properties are located. Respondents established that a significant amount of storm water infiltrates the Town's sewer system and that "the sewer district encompasses storm sewers that actually or might potentially safeguard [petitioner]'s transmission and distribution facilities from flooding" (*Town of Watertown*, 6 NY3d at 749). Petitioner failed to raise an issue of fact with respect to that issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562). We note that we considered that identical issue in *Matter of Niagara Mohawk Power Corp. v Town of Niagara* (83 AD3d 1574, *lv denied* 17 NY3d 708), where the court determined that petitioner benefitted from the Town of Niagara's sewer system, which was also infiltrated by storm water, and we affirmed for reasons stated in the court's decision. We perceive no reason to reach a different result here.

Because petitioner sought declaratory relief, however, the court erred in dismissing the petitions/complaints without declaring the rights of the parties (*see New York Tel. Co. v Supervisor of Town of Oyster Bay*, 6 AD3d 511, 512, *affd* 4 NY3d 387; *Restuccio v City of Oswego*, 114 AD3d 1191, 1191), and we therefore modify the judgment accordingly.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

629

KA 13-00884

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN J. CONNOLLY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), dated April 4, 2013. The order determined that the Erie Insurance Company is entitled to restitution of $31,796.69 from defendant.

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

Memorandum: Defendant appeals from an order of restitution that was entered following a hearing. On a prior appeal, we concluded that County Court erred in delegating its responsibility to conduct the restitution hearing to a judicial hearing officer (JHO) (*People v Connolly*, 100 AD3d 1419, 1419). We therefore modified the order by vacating the amount of restitution ordered, and we remitted the matter to County Court for a new hearing to determine the amount of restitution (*id.*). Defendant contends for the first time on this appeal that the court was divested of jurisdiction in this matter on remittal as a result of the delay in imposing restitution and thus failed to preserve that contention for our review (*see People v Marshall*, 228 AD2d 15, 17-18, *lv denied* 89 NY2d 1013). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Defendant further contends that the hearing on remittal was inadequate because the only evidence presented by the People consisted of the transcript and exhibits from the hearing previously conducted by the JHO in December 2009. We reject that contention. "Despite the court's error in delegating its responsibility to the [JHO] in [December 2009], we nevertheless conclude that the transcript of the sworn testimony of the [witnesses] taken [over three] years earlier, which was subject to cross-examination, [together with the exhibits admitted during that hearing,] constitutes 'relevant evidence' . . . [that] may be received 'regardless of its admissibility under the exclusionary rules of

evidence' " (*People v Williams*, 114 AD3d 1140, 1140, quoting CPL 400.30 [4]). We further conclude that, contrary to defendant's contention, the court properly relied upon that evidence in determining that the People established the out-of-pocket losses of the insurance company by the requisite preponderance of the evidence (*see id.*; *see generally People v Tzitzikalakis*, 8 NY3d 217, 221-222).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

633

KA 11-02345

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUCAS WEST, DEFENDANT-APPELLANT.

LUCILLE M. RIGNANESE, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 13, 2011. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, rape in the third degree and 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 first degree (Penal Law § 130.75 [1] [b]), rape in the third degree (§ 130.25 [2]), and course of sexual conduct against a child in the second degree (§ 130.80 [1] [b]). Contrary to defendant's contention, Supreme Court did not err in denying his motion pursuant to CPL 330.30 to set aside the verdict. " 'Pursuant to CPL 330.30 (1), following the issuance of a verdict and before sentencing a court may set aside a verdict on "[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would *require* a reversal or modification of the judgment *as a matter of law* by an appellate court" ' (*People v Benton*, 78 AD3d 1545, 1546 [2010], *lv denied* 16 NY3d 828 [2011]). 'The power granted a Trial Judge is, thus, far more limited than that of an intermediate appellate court, which is authorized to determine not only questions of law but issues of fact . . . , to reverse or modify a judgment when the verdict is against the weight of the evidence . . . , and to reverse "[a]s a matter of discretion in the interest of justice" ' (*People v Carter*, 63 NY2d 530, 536 [1984])" (*People v Rohadfox*, 114 AD3d 1217, 1218).

Defendant contends that the court erred in denying his CPL 330.30 motion because defense counsel's failure to investigate and pursue an alibi defense constituted ineffective assistance of counsel (*see People v Taylor*, 97 AD3d 1139, 1141, *lv denied* 19 NY3d 1029; *see*

generally People v Stultz, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *People v Henry*, 95 NY2d 563, 565-566). An alibi defense is "based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time" (Black's Law Dictionary 84 [9th ed 2009]) and, here, even if the evidence in question had been admitted at trial, it would not have established an alibi for defendant. "A defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*Stultz*, 2 NY3d at 287), and thus the court properly denied defendant's motion insofar as it alleged ineffective assistance of counsel based on the failure to pursue an alibi defense (*see generally Carter*, 63 NY2d at 536).

Defendant also contends that he was denied effective assistance of counsel for a litany of reasons not addressed by the CPL 330.30 motion. To the extent that those instances of alleged ineffective assistance of counsel specified by defendant are based on matters outside the record on appeal, they must be raised by way of a motion pursuant to CPL article 440 (*see generally People v Russell*, 83 AD3d 1463, 1465, *lv denied* 17 NY3d 800). To the extent that those instances of alleged ineffective assistance are based on defense counsel's failure to make a particular motion or argument, we again note that an attorney's failure to "make a motion or argument that has little or no chance of success" does not amount to ineffective assistance (*Stultz*, 2 NY3d at 287). To the extent that defendant contends that defense counsel was ineffective in failing to retain an expert witness, we reject that contention. " 'Defendant has not demonstrated that such testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence' " (*People v Jurgensen*, 288 AD2d 937, 938, *lv denied* 97 NY2d 684; *see People v Aikey*, 94 AD3d 1485, 1487, *lv denied* 19 NY3d 956). Moreover, viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Viewing the evidence in light 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 People v Bleakley*, 69 NY2d 490, 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]). Defendant failed to preserve for our review his contention that the indictment was facially deficient (*see* CPL 470.05 [2]; *see also People v Soto*, 44 NY2d 683, 684), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, the court did not err in admitting in evidence testimony of defendant's abuse of the victims that occurred after each victim turned 13 years old (*cf.* Penal Law §§

130.75 [1] [b]; 130.80 [1] [b]), inasmuch as such evidence " 'complete[d] the narrative of the events charged in the indictment . . . , and it also provided necessary background information' " (*People v Workman*, 56 AD3d 1155, 1156, *lv denied* 12 NY3d 789; *see generally People v Leeson*, 12 NY3d 823, 826-827). Defendant's additional contention that Penal Law §§ 130.75 and 130.80 are unconstitutionally vague is not properly before us. Defendant failed to give the requisite notice to the Attorney General (*see* Executive Law § 71 [3]; *People v Woodard*, 83 AD3d 1440, 1442, *lv denied* 17 NY3d 803), and he failed to preserve that contention for our review (*see Woodard*, 83 AD3d at 1442).

Finally, we reject the contention of defendant that cumulative errors deprived him of a fair trial.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

634

KA 13-00676

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL E. BUCK, JR., DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN 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 (Matthew J. Murphy, III, J.), rendered March 21, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of assault in the second degree (Penal Law § 120.05 [2]). The waiver by defendant of the right to appeal encompasses his challenge to the factual sufficiency of the plea allocution (*see People v Walker*, 111 AD3d 1423, 1424, *lv denied* 22 NY3d 1142) and, in any event, that challenge is unpreserved for our review inasmuch as defendant did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665; *Walker*, 111 AD3d at 1424). The valid waiver by defendant of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

636

CA 13-01675

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

JOHN MAJTAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

URBANKE ASSOCIATES, INC., DEFENDANT-APPELLANT.

KEIDEL, WELDON & CUNNINGHAM, LLP, SYRACUSE (STEPHEN C. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF GUSTAVE J. DETRAGLIA, JR., UTICA (MICHELE E. DETRAGLIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Herkimer County (Norman I. Siegel, J.) , entered June 21, 2013. The judgment awarded plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the order dated December 30, 2011 is reversed on the law without costs, and defendant's motion for summary judgment dismissing the complaint is granted.

Memorandum: On appeal from a judgment that awarded plaintiff damages in the amount of $181,752.79 following a jury trial, defendant contends, inter alia, that Supreme Court erred in denying its pretrial motion for summary judgment dismissing the complaint. We agree. We note at the outset that, contrary to plaintiff's contention, the issue whether the court erred in denying defendant's motion is reviewable on this appeal from the final judgment (*see* CPLR 5501 [a]).

Plaintiff owned residential property in Little Falls, New York and purchased homeowner's insurance for the property through defendant, his insurance broker. Broome Co-Operative Insurance Company (Broome) issued a homeowner's insurance policy to plaintiff for the period from July 1, 2005 to July 1, 2008 and thereafter renewed it for the period from July 1, 2008 to July 1, 2011, but Broome canceled the policy as of November 1, 2008 based on the nonpayment of premiums. Plaintiff filed a claim with Broome in September 2009 when the property was damaged by fire, and Broome denied coverage based on the cancellation of plaintiff's policy on November 1, 2008. Plaintiff then commenced this action, alleging that he relied upon defendant's representation that his homeowner's insurance premium had been paid.

We agree with defendant that the court erred in denying its

motion for summary judgment dismissing the complaint, the gravamen of which is a claim for negligent misrepresentation. An essential element of such a claim is the "duty to use reasonable care to impart correct information due to a special relationship between the parties" (*Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 795). A special relationship may arise from "a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on" (*Murphy v Kuhn*, 90 NY2d 266, 272). According to plaintiff, he had a special relationship with defendant based on a course of dealing. We conclude that defendant met its burden on the motion, and plaintiff failed to raise an issue of fact concerning the existence of a special relationship (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The interactions between plaintiff and defendant on which plaintiff relies " 'would [not] have put [an] objectively reasonable insurance agent[] on notice that [his or her advice] was being sought and specially relied on' " (*Sawyer v Rutecki*, 92 AD3d 1237, 1238, *lv denied* 19 NY3d 804, quoting *Murphy*, 90 NY2d at 272), such that a special relationship was formed based on a course of conduct. Defendant therefore cannot be held liable for negligent misrepresentation based on its agent's response to an inquiry from plaintiff concerning whether his policy premium had been paid. In view of our determination, we do not consider defendant's remaining contentions.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

638

CA 13-01521

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

RESETARITS CONSTRUCTION CORPORATION,
PLAINTIFF-RESPONDENT,

V ORDER

ELIZABETH PIERCE OLMSTED, M.D. CENTER FOR THE VISUALLY IMPAIRED, DEFENDANT-APPELLANT, AND EPO-STOVROFF HOUSING DEVELOPMENT FUND CORP., DEFENDANT.

ELIZABETH PIERCE OLMSTED, M.D. CENTER FOR THE VISUALLY IMPAIRED AND EPO-STOVROFF HOUSING DEVELOPMENT FUND CORP., THIRD-PARTY PLAINTIFFS,

V

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
THIRD-PARTY DEFENDANT.
(APPEAL NO. 1.)

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BEVERLY S. BRAUN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 15, 2013. The order, among other things, granted that part of plaintiff's motion seeking summary judgment against defendant Elizabeth Pierce Olmstead, M.D. Center for the Visually Impaired.

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

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

639

CA 13-01522

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

RESETARITS CONSTRUCTION CORPORATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ELIZABETH PIERCE OLMSTED, M.D. CENTER FOR THE VISUALLY IMPAIRED, DEFENDANT-APPELLANT, AND EPO-STOVROFF HOUSING DEVELOPMENT FUND CORP., DEFENDANT.

ELIZABETH PIERCE OLMSTED, M.D. CENTER FOR THE VISUALLY IMPAIRED AND EPO-STOVROFF HOUSING DEVELOPMENT FUND CORP., THIRD-PARTY PLAINTIFFS,

V

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
THIRD-PARTY DEFENDANT.
(APPEAL NO. 2.)

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BEVERLY S. BRAUN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended interim judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 16, 2013. The amended interim judgment awarded plaintiff the sum of $108,309.61 against defendant Elizabeth Pierce Olmstead, M.D. Center for the Visually Impaired.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, breach of contract based on the alleged failure of defendant Elizabeth Pierce Olmsted, M.D. Center for the Visually Impaired (Olmsted) to pay for work performed by plaintiff pursuant to a construction contract. Plaintiff moved for, inter alia, summary judgment on its breach of contract cause of action, and defendants cross-moved for an order compelling additional discovery pursuant to CPLR 3212 (f) and CPLR 3124. Supreme Court granted that part of plaintiff’s motion seeking summary judgment on the breach of contract

cause of action and denied "as moot" all other requests for relief, and this appeal by Olmsted ensued. We affirm.

"It is well settled that the elements of a breach of contract cause of action are 'the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages' " (*Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376, *lv denied* 22 NY3d 864). " '[W]hile the existence of a contract is a question of fact, the question of whether a certain or undisputed state of facts establishes a contract is one of law for the courts' " (*Gui's Lbr. & Home Ctr., Inc. v Mader Constr. Co., Inc.*, 13 AD3d 1096, 1097, *lv dismissed* 5 NY3d 842; *see Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400). "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (22 NY Jur 2d, Contracts § 9). That meeting of the minds must include agreement on all essential terms (*id.* § 31)" (*Kowalchuk v Stroup*, 61 AD3d 118, 121; *see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589, *rearg denied* 93 NY2d 1042). Here, we conclude that the court properly granted that part of plaintiff's motion for summary judgment on the breach of contract cause of action inasmuch as plaintiff met its initial burden on the motion (*see generally Minelli Constr. Co., Inc. v Volmar Constr., Inc.*, 82 AD3d 720, 721; *Hesse Constr., LLC v Fisher*, 61 AD3d 1143, 1144; *Gui's Lbr. & Home Ctr., Inc.*, 13 AD3d at 1097), and defendants failed to raise an issue of fact in opposition thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We further conclude that the court properly rejected defendants' contention that plaintiff's motion was premature because further discovery was necessary and thus properly denied the cross motion seeking that further discovery. In opposing a summary judgment motion as premature pursuant to CPLR 3212 (f), " 'the opposing party must make an evidentiary showing supporting [the conclusion that facts essential to justify opposition may exist but cannot then be stated, and] mere speculation or conjecture [is] insufficient' " (*Preferred Capital v PBK, Inc.*, 309 AD2d 1168, 1169; *see Newman v Regent Contr. Corp.*, 31 AD3d 1133, 1134-1135). The opposing party must show that the discovery sought would produce evidence sufficient to defeat the motion (*see Dunn v 726 Main & Pine*, 255 AD2d 981, 982), and that " 'facts essential to oppose the motion were in [the movant's] exclusive knowledge and possession and could be obtained by discovery' " (*Wright v Shapiro*, 16 AD3d 1042, 1043; *see Croman v County of Oneida*, 32 AD3d 1186, 1187). Defendants failed to make the requisite showing here (*see generally Welch Foods, Inc. v Wilson*, 277 AD2d 882, 883).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

641

CA 13-02223

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

IN THE MATTER OF JUAN CARLOS PENA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE PUBLIC HIGH SCHOOL ATHLETIC ASSOCIATION, INC., RESPONDENT-APPELLANT, AND SECTION III OF THE NEW YORK STATE PUBLIC HIGH SCHOOL ATHLETIC ASSOCIATION, INC., RESPONDENT.

RENEE L. JAMES, JAMESVILLE, FOR RESPONDENT-APPELLANT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 25, 2013 in a CPLR article 78 proceeding. The judgment granted the amended petition.

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

Memorandum: Respondent New York State Public High School Athletic Association, Inc. (Association) appeals from a judgment granting the amended petition seeking to annul the determination denying petitioner's application to extend his eligibility for athletic competition pursuant to 8 NYCRR 135.4 (c) (7) (ii) (b) (1). We conclude that Supreme Court erred in granting the amended petition. We note at the outset that this appeal is not moot despite the fact that petitioner has graduated and the school year for which he sought extended eligibility has passed, because the issue raised "has public importance, relates to a concern of public interest, and is likely to recur" (*Matter of Gerard v Section III of N.Y. State Pub. High Sch. Athletic Assn.*, 210 AD2d 938, 939).

"[I]t is well settled that '[t]he courts should not interfere with the internal affairs, proceedings, rules and orders of a high school athletic association unless there is evidence of acts which are arbitrary, capricious or an abuse of discretion' . . . Whether the acts are arbitrary and capricious 'relates to whether . . . the committees' actions have a sound basis in reason and have a foundation in fact . . . The test is whether there is a rational basis' " (*id.* at 939-940). We agree with the Association that the determination was not arbitrary, capricious, or an abuse of discretion. The record

establishes that there is a rational basis for the determination denying petitioner's application for extended eligibility, inasmuch as petitioner failed to proffer sufficient evidence that he was precluded from participating in sports due to "illness, accident, or similar circumstances beyond [his] control" (8 NYCRR 135.4 [c] [7] [ii] [b] [1] [i]; *see Pratt v New York State Pub. High Sch. Athletic Assn.*, 133 Misc 2d 679, 682-684).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

644

CA 13-02156

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

CHRISTINA CLAYPOOLE AND JOSEPH CLAYPOOLE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TWIN CITY AMBULANCE CORP., DEFENDANT-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (REGINA A. DELVECCHIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTOPHER A. PRIVATEER, LOCKPORT, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered May 13, 2013 in a personal injury action. The order denied defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action alleging that defendant's employees were negligent in transporting Christina Claypoole (plaintiff) by ambulance from her home to the hospital, causing her to sustain a hip fracture. Defendant moved for summary judgment dismissing the complaint, contending that it was not negligent and that there was no proof to establish that plaintiff sustained any injury or harm while she was in defendant's care. Supreme Court denied the motion, and defendant now appeals.

Defendant contends that it established that it was not negligent and that the doctrine of res ipsa loquitur is not available as a means for plaintiffs to establish negligence. We reject that contention. Defendant's own submissions establish the applicability of the res ipsa loquitur doctrine and thus raise triable issues of fact concerning defendant's negligence (*see generally Kambat v St. Francis Hosp.*, 89 NY2d 489, 494; *Backus v Kaleida Health*, 91 AD3d 1284, 1285). In order for a plaintiff to rely on the doctrine of res ipsa loquitur, three core elements must be present: "[f]irst, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Kambat*, 89 NY2d at 494).

In support of its motion, defendant submitted evidence that, while plaintiff was unconscious and in the exclusive custody of defendant, she sustained a hip fracture. Although defendant submitted an affidavit from an expert who opined that there was no evidence that defendant deviated from the standard of care, and defendant's attorney contended that plaintiff's injury occurred during the seizure that resulted in the need for defendant's services, the evidence submitted by defendant also established "that the likelihood of other possible causes of the injury '[are] so reduced that the greater probability lies at defendant's door' " (*id.* at 495; *see DeCarlo v Eden Park Health Servs., Inc.*, 66 AD3d 1211, 1212-1213; *Roman v Board of Educ. of City of N.Y.*, 9 AD3d 305, 307). Defendant submitted plaintiff's deposition testimony in which she stated that she did not have any pain in her hip before she suffered the seizure. Plaintiff briefly regained consciousness after the seizure but before being placed in the ambulance. At that time, she still did not have any pain in her hip. It was not until plaintiff regained consciousness for a second time inside the ambulance that she felt pain in her hip and felt one of the ambulance workers pressing on her hip. Upon her arrival at the hospital, the pain in her hip continued, and radiographs of her hip established that she had sustained a fracture to her hip. In our view, that evidence establishes the applicability of res ipsa loquitur and, as a result, raises triable issues of fact concerning defendant's negligence (*see States v Lourdes Hosp.*, 100 NY2d 208, 210-213, *rearg denied* 100 NY2d 577; *Backus*, 91 AD3d at 1285-1286; *DeCarlo*, 66 AD3d 1212-1213; *Ceresa v Karakousis*, 210 AD2d 884, 884-885).

Although defendant further contends that plaintiffs cannot establish that defendant's actions were a proximate cause of plaintiff's injury, a defendant seeking summary judgment "must affirmatively establish the merits of its . . . defense and does not meet its burden by noting gaps in its opponent's proof" (*Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980; *see New York Mun. Ins. Reciprocal v Casella Constr., Inc.*, 105 AD3d 1440, 1441). We thus conclude that defendant's motion for summary judgment dismissing the complaint was properly denied.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

645

CA 13-01505

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

SYLVIA F. BRYANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM M. CARTY, DEFENDANT-APPELLANT.

DEGNAN LAW OFFICE, CANISTEO (EDWARD J. DEGNAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVIDSON FINK, LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), dated March 22, 2013 in a divorce action. The order, among other things, denied defendant's motion to vacate the judgment of divorce.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part denying defendant's motion insofar as it sought to vacate the child support provisions of the judgment of divorce and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Allegany County, for further proceedings in accordance with the following Memorandum: We agree with defendant that Supreme Court erred in denying that part of his motion seeking vacatur of the child support provisions of the judgment of divorce without conducting a hearing. It is well settled that, when a "separation agreement is incorporated but not merged into the divorce judgment, vacatur of the divorce judgment has no effect on the enforceability of the agreement; the agreement survives as a separate and enforceable contract" (*Kellman v Kellman*, 162 AD2d 958, 958). Thus, "[a] party seeking to set aside an agreement must do so by commencement of a plenary action, by affirmative defense or by counterclaim; such relief cannot be obtained on motion" (*Gaines v Gaines*, 188 AD2d 1048, 1048).

Here, however, the judgment of divorce specifically provided that the child support provisions of the parties' 2009 Property Settlement and Separation Agreement (Agreement) merged with the judgment of divorce. Although in his motion defendant sought vacatur of the judgment of divorce in its entirety and a determination that the Agreement was unenforceable, defendant conceded at oral argument before this Court that he was seeking to challenge only the child support provisions of the judgment. Inasmuch as the child support provisions of the Agreement merged into the judgment of divorce, those

provisions of the Agreement "cease[d] to exist as a separately enforceable contract" (*Rainbow v Swisher*, 72 NY2d 106, 109). Defendant therefore was not required to commence a plenary action to challenge those provisions but, rather, properly challenged those provisions of the judgment by motion (*see Vinokur v Penny Lane Owners Corp.*, 269 AD2d 226, 226; *cf. Kellman*, 162 AD2d at 958).

Contrary to plaintiff's assertion, the doctrine of res judicata does not bar defendant's motion. Here, "the merits of [defendant's] contention that the [judgment] was procured through fraud have not been previously litigated" (*Van Wie v Van Wie*, 124 AD2d 353, 354; *see generally Matter of Hunter*, 4 NY3d 260, 269-270). We further agree with defendant that he did not seek modification of his future child support obligation but, rather, he sought to vacate the child support provisions that merged with the judgment of divorce. We therefore modify the order by vacating that part denying defendant's motion insofar as it sought to vacate the child support provisions that merged with the judgment of divorce, and we remit the matter to Supreme Court for a hearing on that part of defendant's motion.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

648

CA 13-02240

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

IN THE MATTER OF ROBERT GUESNO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF EAST ROCHESTER,
RESPONDENT-RESPONDENT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR PETITIONER-APPELLANT.

COUGHLIN & GERHART, LLP, BINGHAMTON (PAUL J. SWEENEY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered March 12, 2013 in a CPLR article 78 proceeding. The judgment denied the petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 challenging the determination terminating his General Municipal Law § 207-c benefits on the ground that his current disability is not related to an on-the-job injury. Contrary to petitioner's contention, Supreme Court properly refused to transfer the proceeding pursuant to CPLR 7804 (g) inasmuch as the petition does not raise an issue of substantial evidence (*see Matter of Guillory v Fischer*, 110 AD3d 1426, 1427, *appeal dismissed* 22 NY3d 1111; *Matter of Burns v Carballada*, 101 AD3d 1610, 1611, *appeal dismissed and lv denied* 22 NY3d 926). "Where, as here, a petition does not raise a substantial evidence issue, a court's inquiry is 'limited to whether [the determination] was arbitrary, capricious or affected by error of law' " (*Matter of Koch v Sheehan*, 95 AD3d 82, 89, *affd* 21 NY3d 697). The record supports the court's conclusion that the determination was neither arbitrary and capricious, i.e., "without sound basis in reason and . . . without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231), nor affected by an error of law (*cf. Matter of White v County of Cortland*, 97 NY2d 336, 339).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

650

KA 12-01760

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, SCONIERS, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAITLYN E. SHAW, DEFENDANT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN N. BAUERSFELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered June 26, 2012. The judgment revoked a sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment that, upon her admission to violating a condition of probation, revoked the sentence of probation imposed upon her conviction of assault in the second degree (Penal Law § 120.05 [3]) and sentenced her to a term of imprisonment. Defendant contends that her admission was not knowing, voluntary or intelligent because County Court failed to inform her at any time that she would be subject to postrelease supervision if the court sentenced her to prison. Defendant failed to preserve that contention for our review inasmuch as she failed to move to withdraw her admission on that ground (*see People v Barra*, 45 AD3d 1393, 1393-1394, *lv denied* 10 NY3d 761), 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 [3] [c]).

People v Bolivar (___ AD3d ___ [May 1, 2014]) is distinguishable with respect to the threshold issue of preservation. In that case, in exchange for the defendant's admission to violating probation, the parties agreed that sentencing would be adjourned to allow the defendant to complete an inpatient treatment program, and the parties further agreed that, if the defendant failed to complete the program, she would be sentenced to a term of imprisonment (*id.* at ___). The defendant failed to complete the treatment program and was sentenced to a period of postrelease supervision in addition to a term of imprisonment (*id.* at ___). The court first mentioned the mandatory term of postrelease supervision, however, only moments before imposing

sentence (*id.*). The Third Department therefore held that the defendant was not required to preserve for appellate review her challenge to the voluntariness of her plea of guilty to the probation violation (*id.* at ___). Here, by contrast, before defendant pleaded guilty to the underlying offense, the court informed her of the mandatory period of postrelease supervision that would follow any term of imprisonment. Thus, defendant "was made aware—prior to entering her [admission] to the probation violation—that postrelease supervision would be a component of her sentence" (*id.* at ___), and preservation of defendant's contention is therefore required.

Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

655

KA 11-01136

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, SCONIERS, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

YAQUIN ABDULLA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 25, 2011. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the fourth degree (Penal Law § 155.30 [5]). Viewing the evidence in light of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]). Defendant's contention that Supreme Court erred in admitting testimony with respect to a letter defendant wrote to the District Attorney is not preserved for our review (*see* CPL 470.05 [2]; *People v Woods*, 72 AD3d 1563, 1564, *lv denied* 15 NY3d 811). In any event, even assuming, arguendo, that defendant is correct that the court erred in admitting testimony as to the subject letter, we conclude that any such error is harmless (*see People v Slater*, 61 AD3d 1328, 1329, *lv denied* 13 NY3d 749; *see generally People v Crimmins*, 36 NY2d 230, 241-242). Defendant's further contention that the People violated CPL 190.75 (3) by improperly resubmitting the charge of robbery in the third degree when they sought a superseding indictment lacks merit (*see generally People v Scott*, 283 AD2d 1006, 1006, *lv denied* 96 NY2d 207) and, in any event, that contention was rendered moot when the jury acquitted defendant of that crime. Finally, viewing the evidence, the law and

the circumstances of this case, in totality and as of the time of representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). We note that "claims of ineffective assistance based on [the] choice[] [not to request a lesser included offense] must usually be adjudicated in [a] posttrial motion[], so that evidence may be presented to show why counsel acted as he [or she] did" (*People v Nesbitt*, 20 NY3d 1080, 1082) and, here, defense counsel did not explain on the record why he did not seek that charge (*cf. id.* at 1082; *see generally People v March*, 89 AD3d 1496, 1497, *lv denied* 18 NY3d 926; *People v Calderon*, 66 AD3d 314, 320, *lv denied* 13 NY3d 358).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

671

CA 13-00359

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, SCONIERS, AND DEJOSEPH, JJ.

IN THE MATTER OF NELSON BRITTO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered January 28, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated inmate rules 113.10 (7 NYCRR 270.2 [B] [14] [i] [weapon possession]) and 114.10 (7 NYCRR 270.2 [B] [15] [i] [smuggling]). Petitioner failed to exhaust his administrative remedies with respect to his claim that he was denied his request for a witness, and this Court has no discretionary authority to reach that claim (*see Matter of Stewart v Fischer*, 109 AD3d 1122, 1123, *lv denied* 22 NY3d 858).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

676

KA 12-00760

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMIEN L. MILLER, 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 (DAVID A. HERATY 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 (Penny M. Wolfgang, J.), dated February 29, 2012. The order denied the motion of defendant to set aside his sentence pursuant to CPL 440.20.

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

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL 440.20 seeking to set aside the sentence imposed in 2004 with respect to his conviction of assault in the first degree (Penal Law § 120.10 [1]). The sentence sought to be set aside by defendant is a determinate term of imprisonment of 15 years plus five years of postrelease supervision (PRS), imposed upon him as a second violent felony offender. The predicate offense was a 2000 conviction of burglary in the second degree, for which defendant was sentenced to a determinate term of imprisonment without a term of PRS. Pursuant to Penal Law § 70.85, defendant was resentenced in 2011 on the burglary conviction to correct the sentencing court's failure to impose PRS (*see generally People v Sparber*, 10 NY3d 457, 464-465).

In the instant motion, defendant contended that, because he was not lawfully sentenced on the burglary conviction until 2011, he should not be subject to an enhanced sentence on the previously entered assault conviction. Supreme Court denied defendant's motion, and a Justice of this Court granted defendant permission to appeal (*see* CPL 460.15). We now affirm. In *People v Boyer* (22 NY3d 15), the Court of Appeals made clear that "a resentencing to correct the flawed imposition of PRS does not vacate the original sentence and replace it with an entirely new sentence, but instead merely corrects a clerical error and leaves the original sentence, along with the date of that

sentence, undisturbed" (*id*. at 24; *see People v Gathor*, 115 AD3d 612, 613). "Because the date defendant received a lawful sentence on a valid conviction [of burglary in the second degree] precedes the date of conviction for the instant offense, it qualifies as a prior [violent] felony conviction" (*People v Wood*, 115 AD3d 613, 613, *lv denied* 22 NY3d 1204). We thus conclude that there is no basis upon which to set aside the sentence imposed on defendant as a second violent felony offender.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

680

KA 09-02092

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANNON J. CAMPBELL, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered August 20, 2009. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (two counts), criminal sexual act in the first degree (two counts) and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment that convicted him upon a jury verdict of, inter alia, two counts of rape in the first degree (Penal Law § 130.35 [1]). 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). While the record establishes that the victim was able to provide only a general description of her attackers and her DNA was not detected on the exterior of the condom matching defendant's DNA, the jury was entitled to infer from the circumstances that the condom matching defendant's DNA was left at the scene when the crime was committed (*see generally People v Gibson*, 74 AD3d 1700, 1703, *affd* 17 NY3d 757; *People v Dearmus*, 48 AD3d 1226, 1228, *lv denied* 10 NY3d 839; *People v Rush*, 242 AD2d 108, 110, *lv denied* 92 NY2d 860, *reconsideration denied* 92 NY2d 905).

We further reject defendant's contention that he was unduly prejudiced by a joint trial. Specifically, defendant contends that his "defense was constrained by his codefendant's decision to assert an alibi defense" because the "jury might [have] assume[d] that his defense . . . rises or falls with the co[]defendant's alibi claim," and that defendant was "inhibited from [testifying], since his

codefendant would not be bound by any *Sandoval* ruling." In *People v Cardwell* (78 NY2d 996), the Court of Appeals reiterated its "two-part test for determining whether severance is required, stating that 'severance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt' " (*id*. at 997-998).

Here, the defenses of defendant and his codefendant did not pose an "irreconcilable conflict" (*id.* at 998). Specifically, the codefendant claimed that he did not know defendant, and he and defendant each denied having had sexual contact with anyone near the subject scene at any time, including with the victim on the night in question. Similarly, neither of the codefendant's alibi witnesses implicated defendant in any way. Defendant thus failed to demonstrate that the core of his codefendant's alibi defense was in irreconcilable conflict with his own defense, and that there was a significant danger that the conflict would lead the jury to infer his guilt (*see People v Watkins*, 10 AD3d 665, 665-666, *lv denied* 3 NY3d 761; *see also People v Ortiz*, 262 AD2d 988, 988, *lv denied* 94 NY2d 827).

Contrary to defendant's further contention, "he did not establish his entitlement to severance on the ground that he would have been subjected to prejudicial cross-examination by the attorney for his codefendant had defendant testified" (*People v Clark*, 66 AD3d 1489, 1489, *lv denied* 13 NY3d 906). " 'At no stage of the proceedings [did] defendant establish[ ] that his potential testimony would have given the codefendant an incentive to impeach his credibility' " (*id*.).

Finally, defendant's sentence is not unduly harsh or severe. Defendant failed to preserve for our review his further contention that, in sentencing defendant, Supreme Court penalized him for exercising his right to a jury trial (*see People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862). In any event, " '[t]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial' " (*id*.). Indeed, there is no indication in the record that "the court was motivated by 'retaliation or vindictiveness' in sentencing defendant following the trial" (*People v Flinn*, 98 AD3d 1262, 1264, *affd* 22 NY3d 599, *rearg denied* 23 NY3d 940).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

682

KA 13-01428

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CYNTHIA HOLES, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI 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 (Michael F. Pietruszka, J.), rendered August 16, 2013. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the facts, the indictment is dismissed and the matter is remitted to Erie County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting her following a nonjury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court misapplied the law to the facts and thereby rendered a verdict that is against the weight of the evidence. More specifically, defendant contends that the People failed to prove beyond a reasonable doubt that her possession of the weapon in question was not temporary and innocent. We agree with defendant.

The relevant facts are generally undisputed. Shortly after 6:00 p.m. on August 14, 2011, defendant was walking to a store in Buffalo with her half-brother, among other people. At the time, defendant was 35 years old, gainfully employed, and had no criminal record. In fact, she had not previously been arrested. Before reaching the store, defendant's half-brother became involved in an argument with a man who had waved at him and defendant. Defendant unsuccessfully attempted to persuade her half-brother to walk away from the dispute. Defendant's half-brother then handed her a loaded handgun and assaulted the man and a woman who was with him. Someone called 911 and, when the police arrived minutes later, they reported that the assailant had possessed a handgun. After stopping defendant's half-brother and determining that he did not possess a gun, the police

stopped defendant, who was still in the vicinity, and discovered the weapon in her waistband. She was thereafter arrested and charged with criminal possession of a weapon in the second degree. It is undisputed that the gun in question belonged to defendant's half-brother, who was also charged with criminal possession of a weapon in the second degree.

"Under our law, in certain circumstances, the possession of a weapon may be innocent and not criminal. Innocent possession of a weapon is possession that is temporary and not for an unlawful purpose" (CJI2d[NY] Temporary and Lawful Possession; *see People v Almodovar*, 62 NY2d 126, 130). "This defense of 'temporary and lawful' possession applies because as a matter of policy the conduct is not deemed criminal" (*Almodovar*, 62 NY2d at 130). Furthermore, a "defendant is not required to prove that h[er] possession of the weapon was innocent. Rather, the People are required to prove beyond a reasonable doubt both that the defendant knowingly possessed the weapon and that such possession was not innocent" (CJI2d[NY] Temporary and Lawful Possession). For this defense to be considered by the trier of fact, "there must be proof in the record showing a legal excuse for having the weapon in [one's] possession as well as facts tending to establish that, once possession [was] obtained, the weapon [was] not used in a dangerous manner" (*People v Williams*, 50 NY2d 1043, 1045; *see People v Banks*, 76 NY2d 799, 801).

In determining whether a verdict is contrary to the weight of the evidence, we must "affirmatively review the record; independently assess all of the proof; substitute [our] own credibility determinations for those made by the [factfinder]; determine whether the verdict was factually correct; and acquit a defendant if [we are] not convinced that the [factfinder] was justified in finding that guilt was proven beyond a reasonable doubt" (*People v Delamota*, 18 NY3d 107, 116-117; *see People v Evans*, 104 AD3d 1286, 1287). Here, based on our independent review of the record, and viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the People failed to prove beyond a reasonable doubt that defendant's possession of the weapon was not temporary and lawful.

The evidence established that defendant was the involuntary recipient of the weapon from her half-brother, who was in the process of starting a fight with strangers. Defendant attempted unsuccessfully to persuade her half-brother to withdraw from the altercation, and there is no evidence that she knew that he possessed a weapon or that the gun was real or loaded. Moreover, defendant did not use the weapon in a dangerous manner, and she did not have a sufficient opportunity to dispose of it lawfully. We also note that defendant testified for the prosecution during the trial of her half-brother, a predicate felon, who was convicted of possessing the weapon and sentenced to state prison. Unlike in other cases we have recently decided involving weapons charges, the evidence here is not " 'utterly at odds with [any] claim of innocent possession' " (*People v Robinson*, 63 AD3d 1634, 1635, *lv denied* 13 NY3d 799; *see People v Smith*, 63 AD3d 1655, 1655, *lv denied* 13 NY3d 839). We thus conclude that the verdict

is against the weight of the evidence and that the indictment must be dismissed.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

683

CAF 13-00823

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

IN THE MATTER OF TRISTYN R.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JACQUELINE Z., RESPONDENT-APPELLANT,
AND JOSHUA R., RESPONDENT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR RESPONDENT-APPELLANT.

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

MICHAEL D. BURKE, ATTORNEY FOR THE CHILD, OLEAN.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered April 8, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents neglected the subject child.

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

Memorandum: Respondent mother appeals from an order adjudicating her son to be a neglected child. Contrary to the mother's contention, Family Court's determination that the subject child was derivatively neglected is supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *Matter of Jonathan S.*, 53 AD3d 1089, 1090, *lv denied* 11 NY3d 709). We reject the mother's contention that the evidence is insufficient to support the finding of derivative neglect because the only allegation of misconduct occurred more than two years prior to the subject child's birth and was limited to the abuse of the mother's eldest child by respondent father, the subject child's father. The record reflects that the mother lacked an " 'understanding of the duties and obligations of parenthood and created an atmosphere detrimental to the physical, mental and emotional well-being of [the subject child]' " (*Matter of Kaylene S. [Brauna S.]*, 101 AD3d 1648, 1649, *lv denied* 21 NY3d 852). "[I]nasmuch as the paramount purpose of Family [Court] Act article 10 is the protection of the 'physical, mental, and emotional well-being' of children . . . , and mindful of the particular vulnerability attendant to newborn infants such as the child herein . . . , we conclude that Family Court's finding of derivative neglect is justified on this

record" (*Matter of Evelyn B.*, 30 AD3d 913, 917, *lv denied* 7 NY3d 713).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

685

CAF 12-01880

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

IN THE MATTER OF MIRANDA J., TREVOR J. AND DOMINICK J.

WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JEROMY J., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ELIZABETH A. SAMMONS, WILLIAMSON, FOR RESPONDENT-APPELLANT.

GARY LEE BENNETT, LYONS, FOR PETITIONER-RESPONDENT.

SEAN D. LAIR, ATTORNEY FOR THE CHILDREN, SODUS.

Appeal from an order of the Family Court, Wayne County (John B. Nesbitt, J.), entered September 7, 2012 in proceedings pursuant to Social Services Law § 384-b. The order, among other things, transferred guardianship and custody of the subject children to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing the petition filed on April 12, 2011 and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, respondent father appeals from an order that granted two abandonment petitions, the first filed on April 12, 2011 and the second filed on June 22, 2011, and thereby terminated the father's parental rights on the ground of abandonment. In appeal No. 2, respondent mother appeals from an order that likewise granted two abandonment petitions, also filed on those dates, and thereby terminated her parental rights on the ground of abandonment. The respective abandonment petitions against the father and the mother (collectively, respondents) were considered by Family Court during a single consolidated hearing.

In both appeals, we conclude that the court properly granted the two June 22, 2011 petitions and terminated the parental rights of respondents upon determining that petitioner established by clear and convincing evidence that respondents abandoned their children. Social Services Law § 384-b (5) (a) provides that "a child is 'abandoned' by his parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or [petitioner],

although able to do so and not prevented or discouraged from doing so by [petitioner]." Although respondents were prohibited from contacting their children during the six months prior to the filing of the June 22, 2011 abandonment petitions based on an order of protection, it is well settled that "[t]he parent who has been prohibited from direct contact with the child, in the child's best interest[s], continues to have an obligation to maintain contact with the person having legal custody of the child" (*Matter of Gabrielle HH.*, 306 AD2d 571, 573, *affd* 1 NY3d 549; *see Matter of Lucas B.*, 60 AD3d 1352, 1352). During the six-month period prior to the June 22, 2011 petitions, respondents' sole contact with petitioner was at a uniform case review meeting that had been arranged by petitioner. Contrary to respondents' contentions, that " 'insubstantial contact[]' with petitioner . . . [is] insufficient to preclude a finding of abandonment" (*Matter of Christina W.*, 273 AD2d 918, 918; *see Matter of Jasmine J.*, 43 AD3d 1444, 1445; *Matter of Loretta Lynn W.*, 149 AD2d 928, 928). Contrary to their further contentions, respondents failed to meet their burden of demonstrating that "there were circumstances rendering contact with [petitioner] infeasible," or that petitioner discouraged them from having contact (*Matter of Regina A.*, 43 AD3d 725, 725; *see Matter of Drevonne G. [Darrell G.]*, 96 AD3d 1348, 1349).

We further conclude in both appeals, however, that the court erred in granting the petitions filed April 12, 2011, and we therefore modify the order in each appeal accordingly. The record establishes that respondents contacted petitioner about the children numerous times during October and November 2010, and petitioner therefore failed to establish that respondents evinced an intent to forego their parental rights and obligations during the six-month period immediately prior to the filing of the April 12, 2011 petitions (*cf. Christina W.*, 273 AD2d at 918).

Finally, we reject respondents' contentions that they received ineffective assistance of counsel. Respondents "failed to demonstrate that [they were] prejudiced by [their respective] attorney[s'] alleged ineffective assistance" (*Matter of Sarah A.*, 60 AD3d 1293, 1294-1295; *see Matter of Michael C.*, 82 AD3d 1651, 1652, *lv denied* 17 NY3d 704).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

686

CAF 12-01881

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

IN THE MATTER OF MIRANDA J., TREVOR J. AND DOMINICK J.

WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TRICIA J., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

CONVERSE & MORELL, LLP, PALMYRA (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT-APPELLANT.

GARY LEE BENNETT, LYONS, FOR PETITIONER-RESPONDENT.

SEAN D. LAIR, ATTORNEY FOR THE CHILDREN, SODUS.

Appeal from an order of the Family Court, Wayne County (John B. Nesbitt, J.), entered September 7, 2012 in proceedings pursuant to Social Services Law § 384-b. The order, among other things, transferred guardianship and custody of the subject children to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing the petition filed on April 12, 2011 and as modified the order is affirmed without costs in accordance with the same Memorandum as in *Matter of Miranda J.* (*Jeromy J.*) ([appeal No. 1] ___ AD3d ___ [June 20, 2014]).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

687

CAF 12-02055

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

IN THE MATTER OF AMI J. FRISBIE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS STONE, RESPONDENT-APPELLANT.

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO (P. ADAM MILITELLO OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOHN M. LOCKHART, GENESEO, FOR PETITIONER-RESPONDENT.

ANDREW F. EMBORSKY, ATTORNEY FOR THE CHILD, LIMA.

Appeal from an order of the Family Court, Livingston County (Dennis S. Cohen, J.), entered October 19, 2012 in a proceeding pursuant to Family Court Act article 6. The order terminated the respondent's visitation with the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order modifying the parties' existing custody arrangement by terminating the father's visitation rights with the subject child "until further order" of Family Court. We reject the father's contention that petitioner mother failed to establish a change of circumstances sufficient to justify modification of the prior custody order, which granted supervised visitation to the father. It is well established that "an existing visitation order will be modified only if the applicant demonstrates a change in circumstances that reflects a genuine need for the modification so as to ensure the best interests of the child" (*Matter of Taylor v Fry*, 63 AD3d 1217, 1218; *see Matter of Smith-Gilsey v Grisanti*, 111 AD3d 1424, 1424-1425). Here, the mother established, among other things, that the father allowed a man he met in jail to have sexual intercourse on multiple occasions with his older daughter, who was then 16 years old, in return for drugs. The man in question was convicted of rape in the third degree for having intercourse with the underage girl, and he testified at the custody hearing regarding the father's role in arranging the illegal sexual activity. The mother also established that the father, a two-time convicted felon, smoked crack cocaine in the presence of his older daughter.

Although the father correctly notes that his above-referenced conduct occurred before the prior custody order was entered, the mother asserted without contradiction that the father's conduct was not known by her or the court when the prior order was entered upon stipulation. We conclude that the mother's newfound awareness of the father's prior conduct constitutes a sufficient change in circumstances to modify the father's visitation rights. In any event, as the court properly determined, the mother established a change in circumstances that arose after entry of the prior order. For instance, the mother established that, since the prior order was entered, the father experienced visual and auditory hallucinations and paranoia. We thus conclude that there existed "compelling reasons and substantial evidence showing" that continued visitation with the father would be detrimental to the child (*Matter of Thaxton v Morro*, 222 AD2d 955, 956), and that the court's determination is in the child's best interests.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

688

CA 13-02022

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

JOSEPH OLSCAMP, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JANEANNE E. FASCIANO, DEFENDANT,
AND C.M. MENDETTA, JR., DEFENDANT-RESPONDENT.

WALSH, ROBERTS & GRACE, BUFFALO (JOSEPH H. EMMINGER, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NANCY A. LONG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 12, 2013. The order granted the motion of defendant C.M. Mendetta, Jr., to dismiss the complaint against him pursuant to CPLR 3211 (a) (8).

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

Memorandum: Plaintiff appeals from an order that granted the motion of C.M. Mendetta, Jr. (defendant) to dismiss the complaint against him pursuant to CPLR 3211 (a) (8) based on improper service of the summons and complaint. We affirm. We reject plaintiff's contention that the "nail and mail" service upon defendant's last known address was proper. That method of service "requires that the summons be affixed to the door of the defendant's 'actual place of business, dwelling place or usual place of abode' " (*Kalamadeen v Singh*, 63 AD3d 1007, 1008, quoting CPLR 308 [4]). "Although the required subsequent mailing to the defendant's last known residence will suffice for the second element of service under CPLR 308 (4), affixing process to the door of the defendant's last known residence will not be sufficient to meet the first element of [CPLR 308 (4)]" (*id.*; *see Feinstein v Bergner*, 48 NY2d 234, 239). We reject plaintiff's further contention that defendant should be estopped from raising defective service as a defense inasmuch as there is no evidence in the record that defendant "engage[d] in conduct calculated to prevent plaintiff from learning his new address" (*Seiler v Ricci's Towing Servs.*, 227 AD2d 920, 921; *see Marsh v Phillips*, 167 AD2d 905, 905-906).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

689

TP 13-02235

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

IN THE MATTER OF BEATRICE L. CORCORAN,
PETITIONER,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, M.D., M.P.H., COMMISSIONER,
NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

DESMARTEAU & BEALE, ROCHESTER (GEORGE DESMARTEAU OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE 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, Monroe County [John J. Ark, J.], entered December 18, 2013) to review a determination of respondent. The determination, among other things, imposed an 18-month delay in petitioner's Medicaid eligibility.

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 challenging the determination that an 18-month delay in her Medicaid eligibility was properly imposed as a penalty for transferring resources in order to qualify for Medicaid coverage. We confirm the determination. Where a petitioner has transferred assets for less than fair market value, he or she must "rebut the presumption that the transfer of funds was motivated, in part if not in whole, by . . . anticipation of future need to qualify for medical assistance" (*Matter of Mallery v Shah*, 93 AD3d 936, 937 [internal quotation marks omitted]; *see Matter of Donvito v Shah*, 108 AD3d 1196, 1198). Here, the New York State Department of Health determined that, during the 60-month look-back period, petitioner and her husband made uncompensated transfers of approximately $176,000 to their family members. The evidence presented at the hearing established that petitioner had mobility issues for several years prior to her hospitalization and application for Medicaid, and petitioner failed to submit any medical records to support the allegation that she was in good health. Furthermore, petitioner failed to establish that the transfers were "part of a long-standing pattern," inasmuch as she presented no evidence that substantial gifts such as the uncompensated

transfers at issue were made in prior years (*see Matter of Lipkin v New York State Dept. of Social Servs.*, 146 AD2d 964, 964-965). Thus, contrary to petitioner's contention, we conclude that substantial evidence supports the determination that petitioner failed to rebut the presumption that the transfers were motivated, at least in part, by a desire to qualify for Medicaid (*see Matter of Barbato v New York State Dept. of Health*, 65 AD3d 821, 822-823, *lv denied* 13 NY3d 712).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

691

CA 13-00568

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

IN THE MATTER OF SCOTT GEDDES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered February 4, 2013 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging the determination that denied his grievance concerning the limitations placed on his possession of personal property pursuant to Directive 4913 of the Department of Corrections and Community Supervision. Supreme Court properly dismissed the petition, inasmuch as the determination "was not irrational, arbitrary and capricious or affected by an error of law" (*Matter of Abreu v Fischer*, 97 AD3d 877, 879, *appeal dismissed and lv denied* 19 NY3d 1096).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

693

CA 13-01742

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

KANWALJEET SINGH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAUREEN D. REAGAN, DEFENDANT-RESPONDENT.

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

HAGELIN KENT LLC, BUFFALO (BENJAMIN R. WOLF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 11, 2012. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when, as a pedestrian, he was struck by a motor vehicle operated by defendant. Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint. Defendant established her prima facie entitlement to judgment as a matter of law by establishing that plaintiff stepped into the roadway from between stopped vehicles, two or three car lengths behind the crosswalk and directly into the path of defendant's vehicle, "leaving the defendant driver unable to avoid contact with" plaintiff (*Jahangir v Logan Bus Co., Inc.*, 89 AD3d 1064, 1064; *see Green v Hosley*, 117 AD3d 1437, ___; *Rodriguez v Catalano*, 96 AD3d 821, 822). In opposition, plaintiff failed to raise a material issue of fact with respect to defendant's alleged negligence (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff's contention that defendant failed to observe what she should have observed is merely an attempt "to ferret out speculative issues 'to get the case to the jury' " (*Andre v Pomeroy*, 35 NY2d 361, 364).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

694

CA 13-02008

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

SHARI GEORGE, AS MOTHER AND GUARDIAN OF JOSIAH GEORGE, A MINOR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GLENN P. CERAT, DEFENDANT-RESPONDENT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF DANIEL R. ARCHILLA, BUFFALO (DANIEL J. GUARASCI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered February 1, 2013. The order and judgment, among other things, granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff, as parent and natural guardian of her son, commenced this action seeking damages for injuries he sustained as a bicyclist when he collided with a vehicle owned and operated by defendant. Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint. In support of his motion, defendant established that he was traveling at a lawful rate of speed, had the right-of-way with respect to his vehicle and did not have an opportunity to avoid the accident (*see Lescenski v Williams*, 90 AD3d 1705, 1705-1706, *lv denied* 18 NY3d 811). Defendant established through the deposition testimony of several witnesses and the affidavit of an accident reconstruction specialist that the conduct of plaintiff's son was the sole proximate cause of the accident (*see id.*). In opposition, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). "While a driver is required to 'see that which through proper use of [his] . . . senses [he] . . . should have seen' . . . , a driver who has the right-of-way is entitled to anticipate that [a bicyclist] will obey the traffic law requiring him . . . to yield . . . '[A] driver with the right-of-way who has only seconds to react to a [bicycle] which has failed to yield is not . . . negligent for failing to avoid

the collision' " (*Vainer v DiSalvo*, 79 AD3d 1023, 1024).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

725

KA 13-02058

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES W. EVANS, DEFENDANT-APPELLANT.

JONES & MORRIS, VICTOR (MICHAEL A. JONES, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (ROBERT C. JEFFRIES OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (William F. Kocher, J.), dated February 28, 2013. The order granted the application of defendant for resentencing pursuant to CPL 440.46.

It is hereby ORDERED that the order so appealed from is unanimously affirmed and the matter is remitted to Ontario County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order granting his application for resentencing pursuant to CPL 440.46 and specifying and informing him of the term of the determinate sentence County Court would impose upon resentencing (*see* L 2004, ch 738, § 23). He contends that the court erred in refusing to recuse itself and that, as a result, the proposed new sentence of eight years of incarceration plus three years of postrelease supervision is an abuse of discretion and was improperly influenced by the court's personal animosity toward defendant. We affirm.

"Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal . . . [and a] court's decision in this respect may not be overturned unless it was an abuse of discretion" (*People v Moreno*, 70 NY2d 403, 405-406; *see People v Strohman*, 66 AD3d 1334, 1336, *lv dismissed* 13 NY3d 911). Although defendant had used profanity in addressing the court in an unrelated sentencing proceeding, the court stated that it could be fair and impartial and that defendant's prior comments would not impact the court's ability to be objective. We perceive no basis to conclude that the court's discretionary determination to deny recusal was an abuse of discretion, and we conclude that the proposed new sentence of eight years is not "harsh or excessive" in light of all the "facts or circumstances relevant to the imposition of a new sentence" (L 2004, ch 738, § 23).

We thus affirm the order, and we remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed (*see* CPL 440.46 [3]; L 2004, ch 738, § 23).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

726

KA 09-02535

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY O. FARRARE, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

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

TIMOTHY FARRARE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered November 9, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts) and manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]) and two counts of murder in the second degree (§ 125.25 [3] [felony murder]), defendant contends that Supreme Court erred in denying his application pursuant to *Batson v Kentucky* (476 US 79). Defendant failed to preserve for our review his procedural challenge to the court's disposition of his *Batson* application (*see People v Rodriguez*, 93 AD3d 595, 595, *lv denied* 19 NY3d 966; *People v Parker*, 304 AD2d 146, 156, *lv denied* 100 NY2d 585) and, in any event, that challenge lacks merit. The court at least implicitly concluded that the prosecutor's explanation was not pretextual (*see People v Dandridge*, 26 AD3d 779, 779-780; *People v Pena*, 251 AD2d 26, 34, *lv denied* 92 NY2d 929; *cf. People v Morgan*, 75 AD3d 1050, 1051-1052, *lv denied* 15 NY3d 894). We conclude with respect to defendant's challenge to the merits of the court's *Batson* ruling that the court did not abuse its discretion in determining that the prosecutor's explanation for her peremptory challenge with respect to the subject juror was not pretextual (*see People v Thompson*, 59 AD3d 1115, 1117, *lv denied* 12 NY3d 860; *see also People v Hodges*, 99 AD3d 629, 629, *lv denied* 20 NY3d 1062; *People v Johnson*, 74 AD3d 1912, 1913). Contrary to defendant's further contention, there was probable cause for the order

of an Ohio court authorizing the People herein to obtain a sample of defendant's blood while defendant was incarcerated in Ohio (*see People v Afrika*, 13 AD3d 1218, 1219-1220, *lv denied* 4 NY3d 827; *see also People v Smith*, 95 AD3d 21, 24; *see generally People v LeRow*, 70 AD3d 66, 70).

We reject defendant's contention in both his main and pro se supplemental briefs that the court abused its discretion in denying his request for additional DNA testing. The record establishes that defendant's request was made on the eve of trial and was merely a "dilatory tactic" (*People v Arroyave*, 49 NY2d 264, 272; *see People v Brandi E.*, 38 AD3d 1218, 1218, *lv denied* 9 NY3d 863). Even assuming, arguendo, that defendant preserved for our review his contention that the court's determination denied him due process of law and the ability to present a defense, we conclude that his contention lacks merit (*see generally Crane v Kentucky*, 476 US 683, 689-690).

We likewise reject defendant's further contention in his pro se supplemental brief that the verdict is inconsistent or repugnant inasmuch as he was acquitted of intentional murder (Penal Law § 125.25 [1]) but convicted of two counts of felony murder (§ 125.25 [3]; *cf. People v Sampson*, 145 AD2d 910, 910, *lv denied* 73 NY2d 982; *see generally People v Trappier*, 87 NY2d 55, 58). Finally, we reject the contention of defendant in his pro se supplemental brief that the court erred in admitting in evidence certain testimony of the police officer who responded to the scene of the crime (*see generally People v Cantave*, 21 NY3d 374, 381, *clarification denied* 21 NY3d 1070; *People v Miller*, 115 AD3d 1302, 1303-1304).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

727

KA 12-01776

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IRA WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 12, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree and conspiracy in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Defendant contends that the showup identification procedure was unduly suggestive because he was standing next to a codefendant known to the victim and the People failed to demonstrate that the showup identification procedure was conducted in temporal proximity to the crime. Although defendant failed to preserve the latter contention for our review (*see* CPL 470.05 [2]; *People v Lewis*, 97 AD3d 1097, 1097-1098, *lv denied* 19 NY3d 1103), we conclude in any event that both contentions lack merit. "Although showup identification procedures are generally disfavored . . . , such procedures are permitted 'where [they are] reasonable under the circumstances—that is, when conducted in close geographic and temporal proximity to the crime—and the procedure used was not unduly suggestive' " (*Lewis*, 97 AD3d at 1098). Although one suspect was known to the victim, the victim identified defendant independently, relying on his skin tone and distinctive hairstyle, such that there is no reason to disturb Supreme Court's suppression ruling on that ground (*see People v Brisco*, 99 NY2d 596, 597). Furthermore, with respect to defendant's contention concerning temporal proximity, the People established at the *Wade* hearing that the showup identification procedure was reasonable because it was conducted within 20 to 30 minutes from the initial report of the crime and suspects fleeing, and "in the course of a continuous, ongoing investigation" (*People v Bassett*, 112 AD3d 1321, 1322). Contrary to defendant's further

contention, the sentence is not unduly harsh or severe.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

728

CAF 13-00019

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF ZACHARY R.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DUANE R., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.) entered December 19, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent.

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

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to his son on the ground of mental illness. We conclude that petitioner met its burden of demonstrating by clear and convincing evidence that the father is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [the] child" (Social Services Law § 384-b [4] [c]; *see Matter of Christopher B., Jr. [Christopher B., Sr.]*, 104 AD3d 1188, 1188; *Matter of Alberto C. [Tibet H.]*, 96 AD3d 1487, 1488, *lv denied* 19 NY3d 813). Contrary to the father's contention, petitioner presented clear and convincing evidence establishing that he is presently suffering from a mental illness that "is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in . . . the custody of the [father], the child would be in danger of becoming a neglected child" (§ 384-b [6] [a]; *see Matter of Destiny V. [Lynette V.]*, 106 AD3d 1495, 1495).

The father's contention that petitioner undermined his relationship with the child by limiting his visitation time and thus failed to establish that it made diligent efforts to strengthen and encourage his relationship with his child is of no moment. "[U]nlike [a] case where parental rights are terminated due to permanent neglect

. . . , no such showing is required when the ground for termination is mental illness" (*Matter of Demetrius F.*, 176 AD2d 940, 941; *see Matter of Michael D.*, 306 AD2d 938, 938; *see generally Matter of Michael F.*, 16 AD3d 1116, 1116).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

730

CAF 13-00323

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF ANASTASIA I.

SVETLANA T. AND WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONERS-RESPONDENTS;

MEMORANDUM AND ORDER

AARON M.I., RESPONDENT-APPELLANT.

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

ELIZABETH A. SAMMONS, WILLIAMSON, FOR PETITIONER-RESPONDENT SVETLANA T.

GARY LEE BENNETT, LYONS, FOR PETITIONER-RESPONDENT WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES.

NANCY M. LORD, ATTORNEY FOR THE CHILD, LYONS.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered February 11, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, committed guardianship and custody of the subject child to petitioner Svetlana T. and authorized Svetlana T. to consent to the adoption of the subject child without the consent of or further notice to respondent.

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

Memorandum: Petitioner Svetlana T. (mother) commenced this proceeding seeking to terminate the parental rights of respondent father pursuant to Social Services Law § 384-b. Before answering, the father moved to dismiss the petition, contending, inter alia, that section 384-b did not apply because the child was neither a "destitute" nor a "dependent" child as those terms are defined by Social Services Law article 6. Subsequent to the father's motion, the Wayne County Department of Social Services (DSS) orally moved to intervene and to amend the petition to be added as a copetitioner. DSS also moved for an order determining that it was not required to engage in any reasonable efforts to reunite the father with the child. The mother opposed the father's motion to dismiss, and she requested that the motion of DSS be granted and that her petition terminating the father's parental rights be granted. Family Court granted the motion of DSS and granted "[p]etitioners [sic] . . . motion for summary judgment," thereby terminating the father's parental rights,

committing guardianship and custody of the child to the mother and ordering that the mother was authorized and empowered to consent to the adoption of the child without the consent of or further notice to the father. We now reverse.

Social Services Law § 384-b is entitled "Guardianship and custody of *destitute* or *dependent* children; commitment by court order; modification of commitment and restoration of parental rights" (emphasis added). A destitute child is defined as a child "who is in a state of want or suffering due to lack of sufficient food, clothing, shelter, or medical or surgical care," does not fit within the definition of an abused or neglected child and is without any parent or caretaker; "a child who is . . . absent from his or her legal residence without the consent of his or her parent, legal guardian or custodian"; "a child . . . who is without a place of shelter where supervision and care are available;" or "a person who is a former foster care youth under the age of twenty-one who was previously placed in the care and custody of [DSS] . . . and who was discharged from foster care . . . , [and] who has returned to foster care" (§ 371 [3] [a] - [d]). A dependent child is defined as "a child who is in the custody of, or wholly or partly maintained by an authorized agency or an institution, society or other organization of charitable, eleemosynary, correctional, or reformatory character" (§ 371 [7]). It is indisputable that the subject child is neither a destitute nor a dependent child. Social Services Law § 384-b is thus inapplicable to the child and may not be invoked by either the mother or DSS as a means to terminate the father's parental rights. We therefore reverse the order and grant the father's motion to dismiss the petition. We note, however, that our determination does not leave the mother without a remedy. She may seek to dispense with the father's consent to adoption pursuant to Domestic Relations Law § 111 (2) (a) (*see Matter of Julia P.*, 306 AD2d 937, 937-938; *see also Matter of Nathon O.*, 55 AD3d 995, 995-996, *lv denied* 11 NY3d 714; *Matter of Joshua II.*, 296 AD2d 646, 647-648, *lv denied* 98 NY2d 613).

Based on our resolution of this case, we see no need to address the father's remaining contentions.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

731

CAF 12-02293

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF SAVANNA G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

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

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 6, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that the subject child is a permanently neglected child and transferred respondent's guardianship and custody rights to petitioner.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order terminating her parental rights with respect to her daughter on the ground of permanent neglect. In appeal No. 2, the mother appeals from an order revoking a suspended judgment and terminating her parental rights with respect to her son.

Initially, we reject the contention of the Attorney for the Children that the appeals must be dismissed because the orders were entered upon the mother's default. " 'A party who is represented at a scheduled court appearance by an attorney has not failed to appear' " (*Matter of Erie County Dept. of Social Servs. v Thompson*, 91 AD3d 1327, 1328). The mother initially appeared at the fact-finding hearing, and her attorney participated in the hearing by presenting an opening statement and cross-examining the first witness. The mother's attorney chose not to participate in the remainder of the hearing when the mother left the courtroom after the first witness testified. Inasmuch as the mother's attorney "appeared at and participated in the hearing" until the mother left the courtroom, "there was no default" (*Matter of Danielle M.*, 26 AD3d 748, 748, *lv denied* 7 NY3d 703; *see*

Thompson, 91 AD3d at 1328; *Matter of Isaiah H.*, 61 AD3d 1372, 1373).

We conclude in appeal No. 1 that Family Court properly determined that the daughter is a permanently neglected child and properly terminated the mother's parental rights with respect to her. "Petitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and [the child] by providing services and other assistance aimed at ameliorating or resolving the problems preventing [the child's] return to [the mother's] care . . . , and that the mother failed substantially and continuously to plan for the future of the child although physically and financially able to do so . . . Although the mother participated in the services offered by petitioner, she did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Makayla S. [Alecia P.]*, 115 AD3d 1247, 1247-1248 [internal quotation marks omitted]; *see Matter of Tiosha J. [Kachoya H.]*, 96 AD3d 1498, 1498).

With respect to appeal No. 2, it is well settled that, "[i]f [petitioner] establishes by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Keyon M. [Kenyetta M.]*, 85 AD3d 1560, 1561, *lv denied* 17 NY3d 709 [internal quotation marks omitted]; *see* Family Ct Act § 633 [f]). Contrary to the mother's contention, the court properly determined that petitioner established by a preponderance of the evidence that she violated a condition of the suspended judgment by failing to attend scheduled visits with her son and that it was in her son's best interests to terminate her parental rights (*see Matter of Terrance M. [Terrance M., Sr.]*, 75 AD3d 1147, 1148).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

732

CAF 12-02294

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF EIGHT G.

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

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

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

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

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 6, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, revoked the suspended judgment and terminated respondent's parental rights with respect to the subject child.

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

Same Memorandum as in *Matter of Savanna G.* (___ AD3d ___ [June 20, 2014]).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

733

TP 13-02080

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF BRENDA HARWOOD, PETITIONER,

V MEMORANDUM AND ORDER

SHARON ADDISON, CITY MANAGER, CITY OF WATERTOWN, RESPONDENT.

STEVEN CRAIN AND DAREN RYLEWITZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., SYRACUSE (D. JEFFREY GOSCH OF COUNSEL), FOR PETITIONER.

SLYE & BURROWS, WATERTOWN (ROBERT J. SLYE 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, Onondaga County [Donald A. Greenwood, J.], entered November 12, 2013) to review a determination of respondent. The determination terminated the employment of petitioner.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding petitioner guilty of misconduct as alleged in charge 2, specification 2, and vacating the penalty of termination imposed, and as modified the determination is confirmed without costs and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination terminating her employment with the City of Watertown (City). Petitioner was charged with incompetence and misconduct in the performance of her duties as a senior account clerk typist in the City's Parks and Recreation Department (Department). Following a hearing pursuant to Civil Service Law § 75, the Hearing Officer sustained one of the three specifications of incompetence (charge 1, specification 3 - failure to deposit cash and checks in a timely manner), and one of the two specifications of misconduct (charge 2, specification 2 - willfully misleading the City's retained accountant). The Hearing Officer found that the remaining specifications at issue had "some basis in fact," but that "mitigating circumstances" precluded a finding of guilt. He further recommended that, instead of disciplining petitioner, the City place her on an employee improvement plan. Respondent adopted the Hearing Officer's determinations of guilt, and sustained an additional specification of incompetence (charge 1, specification 2 - failure to bill for services in a timely manner). Respondent terminated

petitioner's employment. We agree with petitioner that the determination of guilt on charge 2, specification 2, is not supported by substantial evidence, and we therefore modify the determination accordingly. We further agree with petitioner that, under the circumstances of this case, the penalty of termination is shocking to one's sense of fairness. We therefore further modify the determination accordingly, and we remit the matter to respondent for imposition of an appropriate penalty not to exceed a two-month period of suspension without pay, commencing February 5, 2013, "the maximum penalty supported by the record" (*Matter of Johnson v Town of Arcade*, 281 AD2d 894, 895).

Both the Hearing Officer and respondent found petitioner guilty of charge 2, specification 2 on the ground that she willfully misled the retained City accountant concerning the status of certain uncashed checks. The notice of charges and specifications, however, alleges that petitioner "purposely misled *the City Comptroller's office*," i.e., that petitioner was "specifically asked on May 13, 2011, by *[the] Accounting Supervisor of the City Comptroller's office*, whether you were then in possession of any . . . uncashed checks," that petitioner responded that she was not, and that petitioner "later acknowledged that there was such a check written by a member of the City of Watertown Council, and [she] later gave that individual's uncashed check to the City Comptroller's office" (emphasis added). That allegation is contradicted by respondent's own proof (*see generally Matter of Krossber v Jackson*, 263 AD2d 960, 961, *lv denied* 94 NY2d 756). The retained City accountant testified that, on May 13, 2011, she asked the accounting supervisor in the Comptroller's Office to call petitioner and ask her if she had returned the check in question. According to the accountant, petitioner replied that "she had not and she still had . . . the check." We thus conclude that the determination insofar as it found petitioner guilty of misconduct as alleged in charge 2, specification 2, is not supported by substantial evidence (*see generally Matter of Jordan v Daly*, 302 AD2d 862, 862).

We further conclude that the penalty of termination is " 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness' " (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233; *see Johnson*, 281 AD2d at 895). "[A] result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally" (*Pell*, 34 NY2d at 234; *see Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854). "Where, as here, there is no 'grave moral turpitude' and no 'grave injury to the agency involved or to the public weal,' courts may 'ameliorate harsh impositions of sanctions by administrative agencies . . . in order to accomplish what a sense of justice would dictate' " (*Matter of Grady v New York State Off. of Children & Family Servs.*, 39 AD3d 1157, 1158, quoting *Pell*, 34 NY2d at 235).

Having annulled the determination of guilt on charge 2, specification 2, we are left with two specifications of incompetence, i.e., failure to bill for services in a timely manner and failure to deposit cash and checks in a timely manner. Respondent acknowledged that petitioner did not misuse or misappropriate any of the funds at issue, and there is no evidence that the City lost revenue or otherwise suffered financial harm as a result of petitioner's delay in processing invoices or preparing funds for deposit. Moreover, the record establishes that there were several factors beyond petitioner's control that contributed to the delays. It is undisputed that petitioner was expected to perform a multitude of non-financial duties that consumed a significant portion of her work day. Petitioner was responsible for scheduling the use of the City's facilities, including its parks, fairgrounds, and numerous athletic fields. Petitioner's scheduling duties were not specifically included in her job description, but took in excess of 50% of her time. Petitioner was also tasked with responding to a large volume of in-person, phone, and email inquiries from the public, duties that likewise were not specifically included in her job description.

Notably, respondent acknowledges that there were no City or Departmental rules, regulations, or written policies with respect to the timing of invoices or deposits, and petitioner's direct supervisor testified that he never directed petitioner to send out invoices or prepare funds for deposit within a particular period of time. Indeed, the supervisor testified that he established petitioner's priorities, that invoicing was not a priority in the Department, and that petitioner completed her tasks in accordance with his priorities. As petitioner testified, the supervisor "gave [her] the duties that he wanted done for the day, and if invoices was one of them, then [she] would complete that. But if invoices was not one of them, [she] completed whatever he gave [her] for duties for the day." Although respondent emphasizes that there was a six-month period during which petitioner failed to prepare any invoices, the record reflects that petitioner was ill and intermittently absent from work during several of those months, that no one performed petitioner's duties during her absence, and that several of petitioner's completed invoices were inadvertently deleted by the City's informational technology department.

In our view, the penalty of termination is particularly unfair in light of petitioner's long service to the City and her previously unblemished work record. Prior to the charges at issue, petitioner had worked for the City for 29 years and had never been disciplined, threatened with discipline, or counseled with respect to her job performance (*see Matter of Rice v Hilton Cent. Sch. Dist. Bd. of Educ.*, 245 AD2d 1104, 1105). Petitioner's direct supervisor, who supervised her for most of her tenure with the City, testified that petitioner was a hard worker and that she did her best to complete all of her assigned duties. According to the supervisor, petitioner stayed late without compensation "a couple of times a week at least," and her lunch break was interrupted or shortened on a daily basis due to the demands of the job. Thus, as noted herein, we conclude that "the maximum penalty supported by the record" is a two-month period of

suspension without pay (*Johnson*, 281 AD2d at 894).

Finally, we have reviewed petitioner's remaining contentions and conclude that they are without merit.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

734

CA 13-00871

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, AND VALENTINO, JJ.

JUDITH DIXON AND DONALD DIXON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SUPERIOR DISCOUNTS AND CUSTOM MUFFLER, BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES, DAWN P. JONES, INDIVIDUALLY AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF SUPERIOR DISCOUNTS AND CUSTOM MUFFLER, SENECA AND WASHINGTON, L.L.C., BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES, AND JOHN DOE PROPERTY MANAGEMENT CORPORATION, BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES, DEFENDANTS-RESPONDENTS.

BOTTAR LEONE PLLC, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JOHN D. GOLDMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered January 24, 2013. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Judith Dixon (plaintiff) when she slipped and fell while leaving defendant Superior Discounts and Custom Muffler, a motor vehicle repair shop operated by defendant Dawn P. Jones. Defendants moved for summary judgment dismissing the complaint on the ground that, inter alia, plaintiff was unable to identify the cause of her fall. Supreme Court granted the motion, and we now reverse.

"In a slip and fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall" without engaging in speculation (*Altinel v John's Farms*, 113 AD3d 709, 709-710; *see Ash v City of New York*, 109 AD3d 854, 855; *Smart v Zambito*, 85 AD3d 1721, 1721). Here, we conclude that defendants failed to establish as a matter of law that the cause of

plaintiff's fall was speculative (*see Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364-1365; *Gafter v Buffalo Med. Group, P.C.*, 85 AD3d 1605, 1606; *Nolan v Onondaga County*, 61 AD3d 1431, 1432). "Although [mere] conclusions based upon surmise, conjecture, speculation or assertions are without probative value . . . , a case of negligence based wholly on circumstantial evidence may be established if the plaintiffs show[ ] facts and conditions from which the negligence of the defendant[s] and the causation of the accident by that negligence may be reasonably inferred" (*Seelinger v Town of Middletown*, 79 AD3d 1227, 1229 [internal quotation marks omitted]).

Defendants submitted plaintiff's deposition testimony in support of their motion for summary judgment. Although plaintiff was unable to identify the precise cause of her fall, she testified that she fell in the immediate vicinity of an elevation differential in the pavement, "thereby rendering any other potential cause of her fall 'sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence' " (*Nolan*, 61 AD3d at 1432; *see Seelinger*, 79 AD3d at 1230). Inasmuch as defendants failed to meet their initial burden on the motion, we need not consider the sufficiency of plaintiffs' opposing papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Finally, we agree with the court that there are issues of fact with respect to the existence of a dangerous condition and whether the three-inch defect is trivial in nature.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

737

CA 13-02054

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, VALENTINO, AND DEJOSEPH, JJ.

DIANE E. MARFONE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE S. MARFONE, DEFENDANT-APPELLANT.

KALIL & EISENHUT, LLC, UTICA (CLIFFORD C. EISENHUT OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an amended judgment of the Supreme Court, Oneida County (Joan E. Shkane, A.J.), entered June 19, 2013 in a divorce action. The amended judgment, among other things, dissolved the marriage between the parties and ordered defendant to pay spousal maintenance.

It is hereby ORDERED that the amended judgment so appealed from is unanimously modified on the law by reducing the amount of life insurance defendant is required to obtain to secure his child support obligation from $500,000 to $300,000, by providing that defendant may obtain a declining term life insurance policy, by striking the provision requiring defendant to "name each child as irrevocable beneficiary on life insurance available to him through his employer, as well as death benefits, until each child is emancipated," and by reducing the award of counsel fees to plaintiff from $18,000 to $9,000 and as modified the amended judgment is affirmed without costs in accordance with the following Memorandum: Defendant appeals from an amended judgment of divorce that, inter alia, directed him to pay maintenance and child support and awarded $18,000 in counsel fees to plaintiff. Contrary to defendant's contention, Supreme Court did not abuse its discretion with respect to the amount or duration of the maintenance award, and we decline to substitute our discretion for that of the court (*see Martin v Martin*, 115 AD3d 1315, 1316).

Contrary to defendant's further contention, the court properly required him to maintain policies of life insurance to secure his child support and maintenance obligations (*see* Domestic Relations Law § 236 [B] [8] [a]; *Martin*, 115 AD3d at 1316). We agree with defendant, however, that the amount of life insurance the court required defendant to maintain with respect to his child support obligations is excessive, and we therefore modify the amended judgment by reducing the amount of that life insurance from $500,000 to $300,000 (*see generally Florio v Florio*, 25 AD3d 947, 951; *Konigsberg v Konigsberg*, 3 AD3d 330, 331).

Inasmuch as defendant's continuing child support obligation will decline as each of the children of the marriage either becomes emancipated or reaches the age of 21 (*see* Domestic Relations Law § 240 [1-b] [b] [2]), we further modify the amended judgment by providing that the amount of life insurance defendant is required to obtain to secure his child support obligation may have a declining term that would permit defendant to reduce the amount of life insurance by the amount of child support actually paid, provided that at all times the amount of life insurance is not less than the amount of child support remaining unpaid (*see generally Florio*, 25 AD3d at 951). We also modify the amended judgment by striking therefrom the provision requiring defendant to name each child of the marriage as irrevocable beneficiary on life insurance and death benefits available to defendant through his employer until each child is emancipated.

Defendant further contends that the award of counsel fees to plaintiff was improper. We note that Domestic Relations Law § 237 (a) provides in relevant part that, "[i]n any action or proceeding brought . . . for a divorce, . . . the court may direct either spouse . . . to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. There shall be [a] rebuttable presumption that counsel fees shall be awarded to the less monied spouse." Under the circumstances of this case, we conclude that the court abused its discretion in awarding plaintiff $18,000 in counsel fees, and we therefore further modify the amended judgment by reducing the amount of that award to $9,000 (*cf. Johnson v Chapin*, 12 NY3d 461, 467, *rearg denied* 13 NY3d 888; *Gelia v Gelia*, 114 AD3d 1263, 1263-1264).

Finally, we have considered the remaining contentions of defendant, and we conclude that they are without merit.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

741

KA 13-00882

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS E. MCGREW, JR., 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. Farkas, J.), rendered April 25, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted 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: On appeal from a judgment convicting him upon his plea of guilty of attempted course of sexual conduct against a child in the second degree (Penal Law §§ 110.00, 130.80 [1] [a]), defendant contends that his waiver of the right to appeal was invalid because it was not knowing, voluntary and intelligent, and that County Court abused its discretion in denying his request to adjudicate him a youthful offender.

Initially, we reject the People's contention that defendant was required to preserve for our review his challenge to the voluntariness of his waiver of the right to appeal (*see People v Lopez*, 52 AD3d 852, 853; *People v Hoover*, 37 AD3d 298, 299-300). Contrary to defendant's contention, however, the record establishes that his waiver was valid. Defendant waived his right to appeal both orally and in writing before pleading guilty, and the court conducted " 'an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Glasper*, 46 AD3d 1401, 1401, *lv denied* 10 NY3d 863; *see People v Korber*, 89 AD3d 1543, 1543, *lv denied* 19 NY3d 864). Moreover, the record demonstrates that " 'defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Jones*, 96 AD3d 1637, 1637, *lv denied* 19 NY3d 1103). Defendant's valid waiver of the right to appeal encompasses his contention that the court abused its discretion in denying his request for youthful

offender status (*see People v Johnson*, 111 AD3d 1391, 1391; *People v Rush*, 94 AD3d 1449, 1449-1450, *lv denied* 19 NY3d 967; *People v Farewell*, 90 AD3d 1502, 1502, *lv denied* 18 NY3d 957).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

742

KA 13-00718

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH J. SCHMIDLI, 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 (Matthew J. Murphy, III, J.), rendered September 20, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [1]). Defendant contends that his plea was not knowingly, voluntarily, and intelligently entered because he did not admit a necessary element of the crime—that he knew that the property was stolen—during the plea allocution, and that County Court erred in denying his motion to withdraw the plea on that ground. Defendant's contention is actually a challenge to the factual sufficiency of the plea allocution that is encompassed by the valid waiver of the right to appeal (*see People v Topolski*, 106 AD3d 1532, 1533, *lv denied* 21 NY3d 1020; *People v Daniels*, 59 AD3d 943, 943, *lv denied* 12 NY3d 852; *see generally People v Villar*, 115 AD3d 1361, 1361).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

745

KA 12-02277

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAJAUN PAUL, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Onondaga County Court (Joseph E. Fahey, J.), rendered November 3, 2011. Defendant was resentenced upon his conviction of murder in the second degree (two counts), assault in the first degree, robbery in the first degree (eight counts), burglary in the second degree (two counts), criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the resentence so appealed from is unanimously modified on the law by directing that the sentence imposed on the count of criminal possession of a weapon in the second degree shall run concurrently with the sentences imposed on counts 10 through 13 of the indictment, as renumbered by County Court, and as modified the resentence is affirmed.

Memorandum: On appeal from a resentence that imposed various periods of postrelease supervision, defendant contends that County Court failed to comply with the prior order of this Court entered on defendant's appeal from the underlying judgment of conviction (*People v Paul*, 298 AD2d 849, *lv denied* 99 NY2d 562). We agree. Defendant was convicted upon a jury verdict of crimes arising from two separate robberies, and the court sentenced him to concurrent and consecutive terms of imprisonment. On defendant's prior appeal, this Court concluded that the sentence imposed on the count of criminal possession of a weapon in the second degree was illegal to the extent that it was directed to run consecutively to the sentences imposed on counts 10 through 13 of the indictment, as renumbered by the court, for robbery in the first degree, and we modified the judgment accordingly (*id.* at 850). Following the appeal, the court was alerted to its failure at sentencing to impose periods of postrelease supervision (*see* Correction Law § 601-d), as required by Penal Law § 70.45 (1). Upon resentencing, the court added the requisite periods of postrelease supervision, but erroneously imposed the same

concurrent and consecutive terms of imprisonment imposed in the original sentence. Contrary to defendant's contention, this Court has the authority to correct the resentence to the extent that it is illegal (*see People v Rodriguez*, 18 NY3d 667, 671; *People v LaSalle*, 95 NY2d 827, 829), and we therefore modify the resentence accordingly.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

747

KA 10-01486

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LABRADFORD SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 14, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that he received ineffective assistance of counsel. Defense counsel's failure to request a *Wade* hearing did not constitute ineffective assistance inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152; *see People v Sebring*, 111 AD3d 1346, 1346-1347, *lv denied* 22 NY3d 1159; *People v Hughes*, 148 AD2d 1002, 1002, *lv denied* 74 NY2d 741, *reconsideration denied* 74 NY2d 848). Defense counsel's failure to object to alleged *Molineux* evidence and to request a limiting instruction "was a tactical decision" and did not constitute ineffective assistance (*People v Taylor*, 2 AD3d 1306, 1308, *lv denied* 2 NY3d 746). Inasmuch as one of the eyewitnesses knew defendant, defense counsel was not ineffective in failing to call an expert witness to testify about the reliability of eyewitness identifications (*see People v Faison*, 113 AD3d 1135, 1136; *see also People v Stanley*, 108 AD3d 1129, 1130-1131, *lv denied* 22 NY3d 959; *People v McDonald*, 79 AD3d 771, 772, *lv denied* 16 NY3d 861). Defense counsel's failure to request a missing witness charge did not constitute ineffective assistance of counsel. There was no indication that the witness would have provided noncumulative testimony favorable to the People (*see People v Hicks*, 110 AD3d 1488, 1489, *lv denied* 22

NY3d 1156; *People v Myers*, 87 AD3d 826, 828, *lv denied* 17 NY3d 954; *see generally People v Savinon*, 100 NY2d 192, 197).

Contrary to defendant's contention, the verdict is not against the weight of the evidence. 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 jury was justified in finding the defendant guilty beyond a reasonable doubt" (*id.* at 348). We further conclude that Supreme Court did not abuse its discretion in determining that defendant was ineligible for youthful offender status inasmuch as there were no "mitigating circumstances that bear directly upon the manner in which the crime was committed" (CPL 720.10 [3] [i]; *see People v Parker*, 67 AD3d 1405, 1406, *lv denied* 15 NY3d 755; *see also People v Pulvino*, 115 AD3d 1220, 1223). Finally, the sentence is not unduly harsh or severe.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

750

CA 13-01410

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF PAUL KAIRIS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

PAUL KAIRIS, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered March 7, 2013 in a proceeding pursuant to CPLR article 78. The order denied petitioner's motion to vacate a judgment entered September 27, 2011 and an order entered May 7, 2012.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Memorandum: Petitioner was previously determined, following a tier II hearing, to be guilty of violating certain inmate rules and, according to petitioner, his administrative appeal of the determination was "lost." Petitioner thereafter commenced this CPLR article 78 proceeding contending, inter alia, that respondent had failed to decide his administrative appeal. Supreme Court dismissed the petition by judgment entered in September 2011 (judgment). Petitioner's appeal from the judgment was dismissed by this Court. Petitioner moved pursuant to CPLR 5015 for relief from the judgment based on, inter alia, newly discovered evidence and, by order entered in May 2012, the court denied that motion. Petitioner did not take an appeal from that order, but again moved to vacate the judgment, as well as the order, "upon the grounds of newly discovered evidence." The court treated petitioner's motion as one for leave to reargue and renew his prior motion (*see* CPLR 2221 [d], [e]), and the order denying that motion is the subject of this appeal.

As a preliminary matter, we note that it is "well settled that no appeal lies from an order denying a motion [for leave] to reargue" (*Hilliard v Highland Hosp.*, 88 AD3d 1291, 1292-1293), and we therefore dismiss the appeal from the order to that extent.

"[A] motion for leave to renew must be 'based upon new facts not offered on the prior motion that would change the prior 'determination' " (*Heltz v Barratt*, 115 AD3d 1298, 1299). "[A] motion for leave to renew 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation' " (*id.* at 1300). Here, petitioner failed to present any new facts sufficient to support a motion pursuant to CPLR 2221 (e). Contrary to petitioner's contention, he did not identify a new fact by noting that a copy of his affidavit submitted to the Hearing Officer at the tier II hearing was not appended to the answer to the petition. Indeed, the court specifically stated that it had received the "missing affidavit" prior to issuing its judgment. Contrary to petitioner's further contention, he did not identify a new fact by noting that a significant portion of testimony was missing from one of the transcripts. Petitioner had previously raised a mere variation of that point in his reply to the answer. We therefore agree with respondent that petitioner offered no basis for the court to "change [its] prior determination" (CPLR 2221 [e] [2]).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

755

CA 13-00007

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF MANUEL MOSLEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MALCOLM R. CULLY, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.

MANUEL MOSLEY, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered November 7, 2012 in a CPLR article 78 proceeding. The judgment granted the motion of respondents to dismiss the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II disciplinary hearing, that he violated an inmate rule. Supreme Court properly granted respondents' motion to dismiss the petition. The record establishes that the proceeding was untimely inasmuch as it was commenced more than four months after the final administrative determination (*see* CPLR 217 [1]; *Matter of Jackson v Fischer*, 78 AD3d 1335, 1335, *lv denied* 16 NY3d 705). Petitioner contends that the proceeding was timely insofar as it challenged the denial of his grievance related to the inmate rule violation, and that the court therefore erred in failing to rule on the merits of that challenge. That contention lacks merit. Even assuming, arguendo, that the proceeding was timely with respect to the denial of petitioner's grievance, we conclude that the allegations of the petition "were not 'sufficiently particular to give the court and parties notice' " that petitioner was also challenging the denial of his grievance, and thus the court had no reason to consider that purported challenge (*Matter of Abreu v Hogan*, 72 AD3d 1143, 1143, *appeal dismissed* 15 NY3d 836,

quoting CPLR 3013).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

757

CA 13-00402

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

DAVID M. REYNOLDS,
CLAIMANT-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK,
DEFENDANT-APPELLANT-RESPONDENT.
(CLAIM NO. 106738.)

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

BURKWIT LAW FIRM, PLLC, ROCHESTER (CHARLES F. BURKWIT OF COUNSEL), FOR CLAIMANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Court of Claims (Nicholas V. Midey, Jr., J.), entered November 5, 2012. The judgment awarded claimant money damages after a nonjury trial.

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

Memorandum: Claimant commenced this action seeking damages arising from injuries he allegedly sustained when New York State Troopers used excessive force against him during a traffic stop. The Court of Claims bifurcated the trial and found in favor of claimant on the issue of liability, i.e., that the use of force constituted an assault and battery against claimant. Defendant now appeals and claimant cross-appeals from a judgment awarding claimant money damages after the trial on damages.

Contrary to claimant's contention, the court's determination that the assault was not a proximate cause of claimant's lumbar spine injuries is supported by a fair interpretation of the evidence (*see Treat v Wegmans Food Mkts., Inc.*, 46 AD3d 1403, 1404-1405). The court determined that claimant suffered a closed head injury and herniated discs in his cervical spine as a result of the assault, and awarded claimant $225,000 for past pain and suffering and $475,000 for future pain and suffering. Contrary to the contentions of claimant and defendant, the award for past and future pain and suffering does not deviate materially from what would be reasonable compensation (*see* CPLR 5501 [c]; *Ellis v Emerson*, 57 AD3d 1435, 1437).

Claimant further contends that the award of $300,000 for future

medical expenses should be increased to cover treatment for his lumbar spine injuries, closed head injury and resulting symptoms, and emotional issues. Inasmuch as the court did not err in concluding that the lumbar spine injuries were not a proximate result of the assault, we conclude that the court did not err in failing to award future medical expenses for those injuries. With respect to the closed head injury and emotional issues, we conclude that claimant failed to establish with the requisite reasonable certainty that he would require future medical expenses to treat those injuries (*see Huff v Rodriguez*, 45 AD3d 1430, 1433; *Faas v State of New York*, 249 AD2d 731, 732).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

759

CA 13-02094

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

TEHAN'S CATALOG SHOWROOMS, INC.,
CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 117360.)
(APPEAL NO. 1.)

BIERSDORF & ASSOCIATES, P.A., MINNEAPOLIS, MINNESOTA (DAN BIERSDORF OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a decision of the Court of Claims (Christopher J. McCarthy, J.), entered September 6, 2012. The decision determined that claimant is entitled to an award of damages.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Pecora v Lawrence*, 28 AD3d 1136, 1137).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

760

CA 13-02096

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

TEHAN'S CATALOG SHOWROOMS, INC.,
CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 117360.)
(APPEAL NO. 2.)

BIERSDORF & ASSOCIATES, P.A., MINNEAPOLIS, MINNESOTA (DAN BIERSDORF OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Christopher J. McCarthy, J.), entered February 21, 2013. The judgment awarded damages to claimant.

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

Memorandum: Claimant commenced this action seeking damages for defendant's appropriation by condemnation of portions of two contiguous parcels of its property. Following a trial, the Court of Claims awarded damages to claimant in the amount of $43,314.53, plus interest. We affirm.

We reject claimant's contention that the court erred in denying its motion seeking an order "excluding [defendant's appraisal] from evidence" on the ground that it improperly valued the two parcels as a single economic unit without meeting the legal requirements therefor. "To establish the propriety of valuing two separate parcels of property as a single economic unit for the purpose of awarding condemnation damages, 'the [party] must show that the subject parcels are contiguous, and that there is a unity of use and of ownership' " (*90 Front St. Assoc., LLC v State of New York*, 79 AD3d 708, 709; *see Pedersen v State of New York*, 50 AD2d 1004, 1005, *lv denied* 39 NY2d 707; *Erly Realty Dev. v State of New York*, 43 AD2d 301, 303-304, *lv denied* 34 NY2d 515). Here, the record establishes that defendant "appraised each parcel separately, assigning a different highest and best use for each" (*Pedersen*, 50 AD2d at 1004). Thus, defendant did not treat the parcels as a single economic unit and, consequently, was not required to make a showing that the parcels were contiguous and

had a unity of use and of ownership (*cf. Matter of Village of Port Chester [Bologna]*, 95 AD3d 895, 896, *lv denied* 20 NY3d 852; *Pedersen*, 50 AD2d at 1004-1005).

Contrary to claimant's further contention, we conclude that it did not meet its "burden of proof . . . [of] establish[ing] indirect damages and [of] furnish[ing] a basis upon which a reasonable estimate of those damages [could] be made" (*Lerner Pavlick Realty v State of New York*, 98 AD3d 567, 568; *see generally Rose Park Place, Inc. v State of New York*, ___ AD3d ___, ___ [May 2, 2014]). Claimant attempted to establish that, before the appropriation, the highest and best use of one of the parcels was retail use, but that such use would be prohibited by a local zoning ordinance after the appropriation because the parcel's parking area would be reduced. At trial, however, claimant failed to prove that there was sufficient parking for retail use of the parcel before the appropriation. Thus, claimant "failed to establish that it was 'reasonably probable that the asserted highest and best use could or would have been made of the subject property in the near future' " (*Kupiec v State of New York*, 45 AD3d 1416, 1417, quoting *Matter of City of New York [Rudnick]*, 25 NY2d 146, 149, *mot to amend remittitur granted* 26 NY2d 748).

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

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

763

KA 13-00657

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MISTY L. PRIAL, DEFENDANT-APPELLANT.

DANIEL M. GRIEBEL, BUFFALO, FOR DEFENDANT-APPELLANT.

KEITH A. SLEP, DISTRICT ATTORNEY, BELMONT, FOR RESPONDENT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.) rendered December 19, 2012. 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 affirmed.

Memorandum: Defendant appeals from a judgment revoking the period of probation imposed upon her conviction of criminal sale of a controlled substance in the third degree and sentencing her to a determinate term of imprisonment. Contrary to defendant's contention, the sentence is not unduly harsh or severe. Although defendant had no prior felony convictions, she had numerous misdemeanor convictions, and indeed the instant probationary sentence was to run concurrently with another term of probation imposed on one such misdemeanor. Furthermore, following this conviction involving the sale of drugs, defendant repeatedly violated the terms of her probationary sentence by using opiates and other illegal drugs, failed to complete drug programs and to comport with her Drug Court contract, abandoned her children with a relative, and absconded from supervision. Contrary to the dissent, we conclude that "the fact that . . . the codefendant[] received [a] lesser sentence[is not germane because] the circumstances surrounding the sentencing of [the codefendant] were different" (*People v Purcell*, 8 AD3d 821, 822; *see People v Versaggi*, 296 AD2d 429, 430, *lv denied* 98 NY2d 714; *People v Davis*, 203 AD2d 818, 818, *lv denied* 84 NY2d 824).

All concur except FAHEY and SCONIERS, JJ., who dissent and vote to modify in accordance with the following Memorandum: We respectfully dissent inasmuch as we agree with defendant that the sentence of imprisonment imposed is unduly harsh and severe. Although defendant was convicted of a class B felony, her crime is a nonviolent one that arises from her sale of five morphine pills to a confidential

informant for a total of $50. Defendant has a criminal history that, albeit lengthy, includes no prior felony convictions. We note that the record reflects that defendant's former husband was a codefendant who was charged with the same crimes as defendant with respect to the drug transaction at issue but who received a much more lenient sentence than did defendant. Even considering defendant's multiple failures to complete drug court treatment, we cannot conclude that what amounts to a sentence of five years of incarceration for the sale of five morphine pills is just under the circumstances of this case. We would therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to a determinate term of two years of incarceration, to be followed by the two years of postrelease supervision imposed by County Court.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

764

KA 11-02494

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT M. COOK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered April 15, 2009. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of sexual abuse in the first degree (Penal Law § 130.65 [2]). Defendant contends that the order of protection issued at the time of sentencing is invalid because it exceeds the maximum permissible duration of such an order, and that County Court erred in failing to take into account his jail time credit in determining the duration of the order of protection. As defendant correctly concedes, his contentions are unpreserved for our review inasmuch as he did not object to the duration of the order of protection at sentencing (*see People v Hoyt*, 107 AD3d 1426, 1426, *lv denied* 21 NY3d 1042; *People v Decker*, 77 AD3d 675, 675, *lv denied* 15 NY3d 952), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

765

KA 10-00659

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODNEY L. SCALES, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (John J. Connell, J.), rendered March 19, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]). Defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution because he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Lopez*, 71 NY2d 662, 665). In any event, "no factual colloquy was required inasmuch as defendant pleaded guilty to a lesser included offense" (*People v Thelbert*, 17 AD3d 1049, 1049; *see People v Thousand*, 96 AD3d 1439, 1440, *lv denied* 19 NY3d 1002).

Defendant further contends that County Court should have afforded him the opportunity to withdraw his guilty plea because his postplea assertions of innocence cast doubt on whether the plea was knowingly, intelligently, and voluntarily entered. Defendant did not move to withdraw the plea or vacate the judgment on that ground and, thus, that contention is not preserved for our review (*see People v Eagle*, 105 AD3d 1453, 1453-1454, *lv denied* 21 NY3d 1073; *cf. People v Nelson*, 66 AD3d 1430, 1430, *lv denied* 14 NY3d 772). In any event, that contention lacks merit. " '[A] defendant is not entitled to withdraw his guilty plea based on a subsequent unsupported claim of innocence, where the guilty plea was voluntarily made with the advice of counsel following an appraisal of all the relevant factors' " (*People v Alexander*, 97 NY2d 482, 485; *see People v Gleen*, 73 AD3d 1443, 1444,

lv denied 15 NY3d 773).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

766

KA 10-01946

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY J. LAWRENCE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered June 4, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree, assault in the first degree, burglary in the first degree, criminal use of a firearm in the first degree, criminal possession of a weapon in the second degree and endangering the welfare of a child (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). Defendant contends that the factual allocution raised significant doubt with respect to his intent to kill and, therefore, his plea was not knowingly, voluntarily, and intelligently entered. Although that contention survives defendant's waiver of the right to appeal, defendant failed to preserve his contention for our review by failing to move to withdraw his guilty plea or to vacate the judgment of conviction on that ground (*see People v McKeon*, 78 AD3d 1617, 1618, *lv denied* 16 NY3d 799). "This is not one of those rare cases 'where the defendant's recitation of the facts underlying the crime[s] pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea[]' to obviate the preservation requirement" (*People v Rodriguez*, 17 AD3d 1127, 1129, *lv denied* 5 NY3d 768, quoting *People v Lopez*, 71 NY2d 662, 666). Here, although defendant's initial statements cast doubt on his intent to kill, Supreme Court engaged in the requisite additional inquiry, which established defendant's intent to kill (*see Lopez*, 71 NY2d at 666). In light of our decision, we do not address defendant's remaining contention premised upon reversal of

the conviction of attempted murder.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

768

KA 11-01588

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN G. JOHNSON, JR., DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON 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 (Thomas R. Morse, A.J.), rendered February 11, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that defense counsel was ineffective for failing to move to suppress the handgun and cell phone that defendant dropped when he was fleeing from the police and for failing to object to the police officers' testimony at trial that they were assigned to a robbery detail on the night in question. Defendant failed to demonstrate that the motion and objection, " 'if made, would have been successful and that defense counsel's failure to make that motion [and objection] deprived him of meaningful representation' " (*People v Bassett*, 55 AD3d 1434, 1437-1438, *lv denied* 11 NY3d 922; *see People v Bedell*, 114 AD3d 1153, 1153). Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Contrary to defendant's further contention, County Court did not err in failing to provide a moral certainty charge, inasmuch as there was both direct and circumstantial evidence of guilt (*see People v Allen*, 1 AD3d 947, 948, *lv denied* 1 NY3d 594; *People v Goncalves*, 283 AD2d 1005, 1005-1006, *lv denied* 96 NY2d 918). We reject defendant's contention that the court abused its discretion in denying his motion for a mistrial based on the hearsay testimony of a prosecution

witness. "[T]he decision to grant or deny a motion for a mistrial is within the trial court's discretion" (*People v Ortiz*, 54 NY2d 288, 292). Here, the court did not abuse its discretion in denying defendant's motion for a mistrial and instead providing the jury with a strong curative instruction directing them to disregard the improper testimony, which "the jury is presumed to have followed" (*People v DeJesus*, 110 AD3d 1480, 1482, *lv denied* 22 NY3d 1155).

Defendant failed to seek a ruling on that part of his omnibus motion seeking to suppress identification testimony on the ground that the police were required to obtain a warrant before searching the content of his cell phone, which content was used to obtain a photograph of defendant for inclusion in a photo array, and we further note that he did not object to the admission of the identification testimony at trial on that ground. Defendant therefore has abandoned any contention that the identification testimony should have been suppressed on that ground (*see People v Adams*, 90 AD3d 1508, 1509, *lv denied* 18 NY3d 954). We reject defendant's contention that his Confrontation Clause rights were violated by an officer's testimony regarding the photographs contained in the cell phone, inasmuch as those photographs were not " 'procured with a primary purpose of creating an out-of-court substitute for trial testimony' " (*People v Pealer*, 20 NY3d 447, 453, *cert denied* ___ US ___, 134 S Ct 105, quoting *Michigan v Bryant*, 562 US ___, ___, 131 S Ct 1143, 1155). Defendant failed to preserve for our review his further contentions that the court erred in failing to issue a limiting instruction with respect to the officers' testimony that they were assigned to a robbery detail on the night in question (*see People v Williams*, 107 AD3d 1516, 1516, *lv denied* 21 NY3d 1047), and that he was denied a fair trial based on prosecutorial misconduct on summation (*see People v Irvin*, 111 AD3d 1294, 1296). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, defendant's contention that the court misapprehended its sentencing discretion with respect to the period of postrelease supervision is unsupported by the record, and the sentence is not unduly harsh or severe.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

771

CAF 13-00652

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

IN THE MATTER OF TIMOTHY SEIFERT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NATALIE PASTWICK, RESPONDENT-APPELLANT.

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

JON STERN, ROCHESTER, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered April 1, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Erie County, for a new hearing in accordance with the following Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, among other things, awarded petitioner father sole custody of the parties' child. We agree with the mother that she was denied her right to counsel. The mother was entitled to representation based upon her status as a respondent in a Family Court Act article 6 proceeding and a person alleged to be in willful violation of a court order, and Family Court's inquiry concerning her decision to proceed pro se was insufficient to enable the court to determine whether she knowingly, intelligently and voluntarily waived her right to counsel (*see* § 262 [a]; *Matter of Hassig v Hassig*, 34 AD3d 1089, 1091; *see also Matter of Storelli v Storelli*, 101 AD3d 1787, 1788). We therefore reverse the order and remit the matter to Family Court for a new hearing (*see Storelli*, 101 AD3d at 1788). In light of our determination, we do not reach the mother's remaining contentions.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

772

CAF 13-01636

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

IN THE MATTER OF KATHLEEN G. ISLER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VICTOR C. JOHNSON, RESPONDENT-RESPONDENT.

EMILY A. VELLA, ESQ., ATTORNEY FOR THE CHILDREN,
APPELLANT.

EMILY A. VELLA, ATTORNEY FOR THE CHILDREN, SPRINGVILLE, APPELLANT PRO SE.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR PETITIONER-APPELLANT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., OLEAN (STEVEN A. LANZA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered August 20, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Cattaraugus County, for further proceedings in accordance with the following Memorandum: Petitioner mother commenced this proceeding pursuant to Family Court Act article 6, seeking to modify a prior custody agreement. The parties were divorced by a 2011 judgment of divorce, entered in Supreme Court, Erie County, that incorporated but did not merge their stipulation of settlement, pursuant to which the mother was granted custody of the subject children with visitation to respondent father. In May of 2013, the parties further stipulated in Family Court, Cattaraugus County, to an order that, inter alia, granted the parties joint custody of the children with primary physical residence with the father. The mother filed this petition in August 2013, alleging that the father had used excessive corporal punishment against one of the children after the entry of the Family Court order. The mother also alleged that the father had refused to permit her to exercise visitation pursuant to the prior arrangement. The mother and the Attorney for the Children appeal from an order dismissing the petition without a hearing.

It is well settled that a party seeking a change in an established custody arrangement must show "a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child[ren]" (*Matter of Irwin v Neyland*, 213 AD2d 773, 773; *see Matter of Moore v Moore*, 78 AD3d 1630, 1630, *lv denied* 16 NY3d 704; *Matter of Hight v Hight*, 19 AD3d 1159, 1160). Although a "hearing is not automatically required whenever a parent seeks modification of a custody order" (*Matter of Wurmlinger v Freer*, 256 AD2d 1069, 1069; *see Matter of Consilio v Terrigino*, 114 AD3d 1248, 1248), we conclude that the mother made a sufficient evidentiary showing of a change in circumstances to warrant a hearing (*cf. Matter of Warrior v Beatman*, 70 AD3d 1358, 1359, *lv denied* 14 NY3d 711). "[T]he mother's allegations that [the father] imposed excessive and inappropriate discipline on the subject children, including corporal punishment, [were] sufficient to warrant a hearing" (*Matter of Vasquez-Williams v Williams*, 32 AD3d 859, 860), as were the mother's allegations that the father had refused to permit her to exercise visitation with the subject children for four weeks (*see Brodsky v Brodsky*, 267 AD2d 897, 898-899). Consequently, we agree with the mother that the court erred in dismissing the petition without conducting a hearing. We therefore reverse the order, reinstate the petition and remit the matter to Family Court for a hearing.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

773

CAF 13-00736

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

IN THE MATTER OF MELERINA M.

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

ANDREW A., RESPONDENT-APPELLANT.

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

KRISTOPHER STEVENS, WATERTOWN, FOR PETITIONER-RESPONDENT.

KIMBERLY A. WOOD, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered April 18, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent had abandoned the subject child and transferred guardianship and custody of the subject child to petitioner.

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

Memorandum: Respondent father appeals from an order terminating his parental rights on the ground of abandonment. The father contends that, because Family Court noted in its decision that petitioner had performed due diligence, the court applied an incorrect standard in determining that he abandoned his daughter. We reject that contention. Although the father is correct that petitioner was not required to prove that it engaged in diligent efforts to encourage him to communicate with the child (*see* Social Services Law § 384-b [5] [b]; *Matter of Gabrielle HH.*, 1 NY3d 549, 550), we note that the court in fact applied the correct standard set forth in Social Services Law § 384-b (5) (a) in determining that petitioner proved abandonment. As the court properly determined, "[p]etitioner established by clear and convincing evidence that [the] father abandoned his child by failing to visit her or to communicate with her or petitioner, although able to do so, during the six-month period immediately preceding the filing of the petition" (*Matter of Tonasia K.*, 49 AD3d 1247, 1248; *see* § 384-b [4] [b]; [5] [a]; *Matter of Annette B.*, 4 NY3d 509, 513-514, *rearg denied* 5 NY3d 783). The father then failed to rebut the presumption of abandonment, inasmuch as he failed to establish "that he was unable to maintain contact with his daughter, or that he was prevented or discouraged from doing so by petitioner" (*Matter of Christina S.*, 251

AD2d 982, 982; *see Matter of Jackie B. [Dennis B.]*, 75 AD3d 692, 693; *Matter of Regina A.*, 43 AD3d 725, 725).

The father further contends that a finding of abandonment is precluded because money was deducted from his inmate account to pay for child support. We note that a court order, entered April 22, 2010, required the father to pay child support in the amount of $25 monthly, but the order suspended that obligation during the father's incarceration. Although the father testified at the hearing that "twenty percent" had been deducted from his inmate account since July 2012 to pay for child support, petitioner presented evidence that it had never received any payment of child support from the father or the correctional facility where he was incarcerated. Even assuming, arguendo, that the funds were deducted from the father's inmate account, we conclude under the circumstances of this case that the deduction of such funds does not constitute communication with the child or petitioner sufficient "to defeat an otherwise viable claim of abandonment" (*Matter of Angela N.S. [Joshua S.]*, 100 AD3d 1381, 1382 [internal quotation marks omitted]; *see* Social Services Law § 384-b [5] [a]).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

774

CA 13-01294

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

IN THE MATTER OF KHALAIRE ALLAH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered February 4, 2013 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination after a tier III hearing that he violated inmate rule 113.26 (7 NYCRR 270.2 [B] [14] [xvi]). On appeal from the judgment dismissing the petition, petitioner contends that the record is insufficient to permit judicial review because respondent failed to provide a copy of recorded conversations between petitioner and a third party. That contention is not properly before us inasmuch as it is raised for the first time on appeal (*see Zelnik v Bidermann Indus. U.S.A.*, 242 AD2d 227, 232) and, in any event, we conclude that it is without merit. Finally, petitioner's procedural objections, including his due process challenges, are not preserved for our review inasmuch as he did not raise those issues at the hearing (*see Matter of Jones v Fischer*, 111 AD3d 1362, 1363), and he failed to exhaust his administrative remedies with respect to them because he did not raise them on his administrative appeal (*see Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court

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

776

CA 13-02095

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

DARRYL GAITER AND HELEN GAITER, INDIVIDUALLY
AND AS HUSBAND AND WIFE, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO BOARD OF EDUCATION AND MARTIN
LUTHER KING SCHOOL #39, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF ERIC B. GROSSMAN, WILLIAMSVILLE (ERIC B. GROSSMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered February 4, 2013 in a personal injury action. The order awarded plaintiffs monetary damages.

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

Memorandum: On appeal from an order entered after a nonjury trial, plaintiffs contend that the verdict sheet failed to include an award for past medical expenses despite a stipulation of the parties to the inclusion of such an award in a specified amount. We are unable to determine the merits of plaintiffs' contention inasmuch as the 28-page record on appeal does not contain sufficient information to enable us to determine whether there was an enforceable stipulation and, if so, whether plaintiffs requested that the verdict sheet contain the alleged stipulated sum for past medical expenses. Plaintiffs, as the appellants, must suffer the consequences of having submitted an incomplete record (*see Matter of Rodriguez v Ward*, 43 AD3d 640, 641).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court