SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 11, 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

89/13

KA 12-00297

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NEIL GILLOTTI, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Niagara County Court (Matthew J. Murphy, III, J.), dated October 17, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act. The order was affirmed by order of this Court entered March 15, 2013 in a memorandum decision (104 AD3d 1155), and defendant on June 11, 2013 was granted leave to appeal to the Court of Appeals from the order of this Court (21 NY3d 858), and the Court of Appeals on June 10, 2014 reversed the order and remitted the case to this Court for further proceedings (___ NY3d ___ [June 10, 2014]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the order so appealed from is unanimously affirmed without costs.

Memorandum: This case is before us on remittal from the Court of Appeals (*People v Gillotti*, 104 AD3d 1155, *revd* ___ NY3d ___ [June 10, 2014]). We previously affirmed an order determining that defendant is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.) and concluded that, inter alia, defendant " 'failed to present clear and convincing evidence of special circumstances justifying a downward departure' of his risk level" (*Gillotti*, 104 AD3d at 1155). In resolving a split in authority between the departments of the Appellate Division with respect to the applicable standard of proof, the Court of Appeals determined that a defendant seeking a downward departure must prove the facts warranting such a departure only by a preponderance of the evidence and remitted the matter to this Court to apply that standard of proof (*Gillotti*, ___ NY3d at ___). Upon remittitur, we conclude that defendant, who submitted the testimony of friends and relatives and the report of an expert, failed to establish by a preponderance of

the evidence any ground for a downward departure from his risk level (*see People v Worrell*, 113 AD3d 742, 742-743).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

1026/13

KA 10-02281

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORNELIUS JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Erie County Court (Michael F. Pietruszka, J.), entered September 20, 2010. The order denied the motion of defendant pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL article 440 seeking to vacate the judgment convicting him of criminal possession of marihuana in the fourth degree (Penal Law § 221.15). We previously affirmed the order denying defendant's similar motion pursuant to CPL 440.10 (*People v Johnson*, 41 AD3d 1284, *lv denied* 9 NY3d 877). We rejected defendant's contention that he was deprived of effective assistance of counsel based on defense counsel's failure to advise him that deportation was an automatic consequence of a conviction (*id.* at 1285). After our decision was issued, the Supreme Court decided *Padilla v Kentucky* (559 US 356, 374) wherein it held that an attorney's failure to advise a defendant of the deportation consequences of a guilty plea constitutes ineffective assistance of counsel. Based on *Padilla*, defendant brought this current CPL 440.10 motion.

We reject defendant's contention that he was denied effective assistance of counsel. After *Padilla*, the Supreme Court held in *Chaidez v United States* (559 US ___, ___, 133 S Ct 1103, 1105) that *Padilla* "does not have retroactive effect," and the Court of Appeals has found no basis to depart from the Supreme Court's holding (*see People v Baret*, ___ NY3d ___, ___ [June 30, 2014]).

Defendant's further contention that his plea was not voluntary,

knowing, and intelligent because neither defense counsel nor County Court (Rogowski, J.) advised him that he could be deported based upon his conviction is not properly before us because defendant failed to raise that contention in his CPL 440.10 motion (*see People v Pennington*, 107 AD3d 1602, 1604, *lv denied* 22 NY3d 958). We have considered defendant's remaining contention and conclude that it is without merit.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

1046/13

KA 12-00969

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD E. HOYER, DEFENDANT-APPELLANT.

LAW OFFICE OF MARK A. YOUNG, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI 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, Monroe County (Francis A. Affronti, J.), entered April 12, 2012. The order denied the motion of defendant to vacate the judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL article 440 seeking to vacate the judgment convicting him of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). Supreme Court properly denied the motion. Defendant, a Canadian citizen who emigrated to the United States in 1960 and is a permanent legal resident, was convicted of that crime in 1991 and completed his sentence of probation in 1994. He was arrested by Homeland Security officers in 2011 on the ground that the 1991 conviction is an aggravated felony pursuant to 8 USC § 1101 (a) (43) (B) and thus, as an "alien who is convicted of an aggravated felony at any time after admission, [he] is deportable" (8 USC § 1227 [a] [2] [A] [iii]). In support of his motion pursuant to CPL 440.10 (1) (h), defendant contended that he was denied effective assistance of counsel based upon defense counsel's failure to advise him that the conviction could result in deportation. Although the Supreme Court concluded in *Padilla v Kentucky* (559 US 1473) that the failure of defense counsel to advise a noncitizen defendant about the potential for deportation constituted ineffective assistance of counsel, it clarified in *Chaidez v United States* (559 US ___, ___, 133 S Ct 1103, 1105) that *Padilla* "does not have retroactive effect." Inasmuch as the Court of Appeals has concluded that there is no basis to depart from the Supreme Court's holding in *Chaidez* (*see People v Baret*, ___ NY3d ___, ___ [June 30, 2014]), we reject defendant's

contention.

With respect to defendant's remaining contention that he also was denied effective assistance of counsel based on defense counsel's failure to seek dismissal of the indictment pursuant to CPL 30.30, we conclude that the court properly determined that defendant received meaningful representation inasmuch as he received "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404). We note that, in *People v Peque* (22 NY3d 168, 195-196), the Court of Appeals overruled "only so much of *Ford* as suggests that a trial court's failure to tell a defendant about potential deportation is irrelevant to the validity of the defendant's guilty plea," and did not otherwise disturb that part of *Ford* addressed to a defendant's constitutional right to effective assistance of counsel in the context of a guilty plea (*see People v Vargas*, 112 AD3d 979, 980).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

352

CA 13-01387

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

SPOLETA CONSTRUCTION, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ASPEN INSURANCE UK LIMITED, C/O ASPEN SPECIALTY INSURANCE MANAGEMENT COMPANY, DEFENDANT-RESPONDENT, 1255 PORTLAND, LLC, HUB-LANGIE PAVING, INC., AND SHANE VANDERWALL, DEFENDANTS.

WHITE FLEISCHNER & FINO, LLP, NEW YORK CITY (JANET P. FORD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LEWIS BRISBOIS BISGAARD & SMITH LLP, NEW YORK CITY (STEPHANIE A. NASHBAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered November 26, 2012 in a declaratory judgment action. The judgment granted the motion of defendant Aspen Insurance UK Limited, c/o Aspen Specialty Insurance Management Company to dismiss plaintiff's complaint against it.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendant Aspen Insurance UK Limited, c/o Aspen Specialty Insurance Management Company.

Memorandum: Defendant Shane VanDerwall commenced the underlying negligence action against plaintiff and others seeking damages for injuries he sustained on October 20, 2008, during the course of his employment on a construction project. Plaintiff, the general contractor on the project, subcontracted with VanDerwall's employer, defendant Hub-Langie Paving, Inc. (Hub-Langie), to perform paving work on the project. Pursuant to the subcontract, Hub-Langie agreed to defend and indemnify plaintiff for all claims arising out of Hub-Langie's work. Hub-Langie also agreed to name plaintiff as an additional insured on its commercial general liability insurance policy, which it did by an endorsement to its policy with Aspen Insurance UK Limited, c/o Aspen Specialty Insurance Management Company (defendant). The endorsement covered "any person or organization . . . when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy."

It is undisputed that plaintiff did not receive notice of the

accident until late December 2009 in a letter from VanDerwall's attorney. On January 27, 2010, plaintiff's liability carrier sent a letter to Hub-Langie notifying it of VanDerwall's "claim," noting Hub-Langie's contractual agreement to defend and indemnify plaintiff, and requesting that Hub-Langie put its own insurance carrier on notice to allow the carrier to conduct its own investigation. On February 9, 2010, Hub-Langie sent defendant a "General Liability Notice of Occurrence/Claim" form regarding VanDerwall's alleged injury, with the January 2010 letter attached. By February 22, 2010, defendant had requested and received a copy of the contract between Hub-Langie and plaintiff containing the defense, indemnification and additional insured requirements. After VanDerwall commenced the underlying action on April 15, 2010, plaintiff's counsel demanded that defendant defend and indemnify it in the underlying action by letter dated May 27, 2010. Defendant disclaimed coverage to plaintiff on the basis of untimely notice by letter dated June 2, 2010.

Plaintiff thereafter commenced this declaratory judgment action seeking a declaration that defendant is obligated to provide insurance coverage to plaintiff in the underlying action. Defendant moved to dismiss the complaint against it pursuant to CPLR 3211 (a) (1) and (7), and Supreme Court granted the motion. We reverse, deny the motion, and reinstate the complaint against defendant.

It is well settled that, "[i]n determining a dispute over insurance coverage, we first look to the language of the policy" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221). "As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . , and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267). "If the terms of a policy are ambiguous, however, any ambiguity must be construed in favor of the insured and against the insurer" (*id.*; *see Christodoulides v First Unum Life Ins. Co.*, 96 AD3d 1603, 1604-1605). Further, "[n]otice requirements are to be liberally construed in favor of the insured, with substantial, rather than strict, compliance being adequate" (*Greenburgh Eleven Union Free Sch. Dist. v National Union Fire Ins. Co. of Pittsburgh, PA*, 304 AD2d 334, 335-336).

Here, under the heading "**Duties in The Event Of Occurrence, Offense, Claim Or Suit**," the policy provides that the insured "must *see to it that we are notified as soon as practicable* of an *'occurrence'* or an offense which may result in a claim. To the extent possible, notice should include: (1) How, when and where the 'occurrence' or offense took place; (2) The names and addresses of any injured persons and witnesses; and (3) The nature and location of any injury or damage arising out of the 'occurrence' or offense" (emphasis added). The policy further provides that, "[i]f a *claim* is made or *'suit'* is brought against any insured, you must: (1) Immediately record the specifics of the claim or 'suit' and the date received; and (2) *notify [defendant] as soon as practicable. You must see to it that we receive written notice of the claim or 'suit' as soon as practicable*" (emphasis added).

Initially, we conclude that the December 2009 letter was a notice of an "occurrence . . . which may result in a claim" and not a "claim" under the policy. The terms "occurrence," "claim," and "suit" are separately used in the policy, and thus each term must be " 'deemed to have some meaning' " (*Bretton v Mutual of Omaha Ins. Co.*, 110 AD2d 46, 49, *affd* 66 NY2d 1020; *see generally American Ins. Co. v Fairchild Indus., Inc.*, 56 F3d 435, 439). The policy defines "[o]ccurrence" as "an accident." The term "[c]laim" is not defined in the policy, but such term has been interpreted to mean " 'an assertion of legally cognizable damage,' " i.e., " 'a type of demand that can be defended, settled and paid by the insurer' " (*Matter of Reliance Ins. Co.*, 55 AD3d 43, 47, *affd* 12 NY3d 725; *see generally American Ins. Co.*, 56 F3d at 439). Here, the December 2009 letter "neither makes any demand for payment nor advises that legal action will be forthcoming" (*Reliance Ins. Co.*, 55 AD3d at 44). Rather, the letter advised plaintiff that VanDerwall had retained an attorney in connection with personal injuries he had sustained during the course of his work on the construction project, requested that plaintiff forward the letter to its insurance carrier, and warned plaintiff that failure to notify its carrier could result in a denial of coverage and "personal responsibility for any obligations that may arise" from VanDerwall's accident.

We further conclude that the January 2010 letter and form that Hub-Langie sent to defendant at plaintiff's request satisfied the insured's duty under the policy to "see to it" that defendant was notified of the occurrence "as soon as practicable" (*see United States Underwriters Ins. Co. v Falcon Constr. Corp.*, ___ F Supp 2d ___, ___; 2003 WL 22019429, *5). Contrary to the court's conclusion, the policy did not require that written notice of an occurrence come directly from plaintiff; it simply required that plaintiff "see to it" that defendant was "notified" (*see id.*; *see also New York Tel. Co. v Travelers Cas. & Sur. Co. of Am.*, 280 AD2d 268, 268). Moreover, to the extent that the phrase "see to it that we are notified" is ambiguous, that ambiguity must be construed in plaintiff's favor (*see White*, 9 NY3d at 267). Inasmuch as the January 2010 letter constituted notice of an "occurrence," we conclude that the May 2010 letter constituted notice of a "claim" or "suit" based upon VanDerwall's April 15, 2010 commencement of the underlying action. We therefore agree with plaintiff that the court erred in dismissing the complaint against defendant inasmuch as the documentary evidence does not conclusively establish a defense to plaintiff's claim as a matter of law (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324; *Leon v Martinez*, 84 NY2d 83, 87-88).

All concur except LINDLEY and VALENTINO, JJ., who dissent and vote to modify in accordance with the following Memorandum: We respectfully dissent. In our view, plaintiff failed to provide timely notice of an occurrence to Aspen Insurance UK Limited, c/o Aspen Specialty Insurance Management Company (defendant) and, as a result of that failure, plaintiff is not entitled to coverage as an additional insured under the policy issued by defendant to the subcontractor, defendant Hub-Langie Paving, Inc. (Hub-Langie). We would therefore modify the judgment by denying that part of defendant's motion seeking

to dismiss the declaratory judgment cause of action, reinstating that cause of action, and granting judgment to defendant by declaring that defendant has no duty to defend or indemnify plaintiff, and otherwise affirm.

"As an additional insured under the policy issued by defendant, plaintiff had, in the absence of an express duty, an implied duty, independent of the named insured's obligation, to provide defendant with timely notice of the occurrence for which it seeks coverage" (*City of New York v Investors Ins. Co. of Am.*, 89 AD3d 489, 489; *see 23–08–18 Jackson Realty Assoc. v Nationwide Mut. Ins. Co.*, 53 AD3d 541, 542; *Structure Tone v Burgess Steel Prods. Corp.*, 249 AD2d 144, 145). Where, as here, a contract of primary insurance requires notice "as soon as practicable" after an occurrence, "the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract" (*Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339; *see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743; *Security Mut. Ins. Co. of N.Y. v Acker–Fitzsimons Corp.*, 31 NY2d 436, 440-443).

We agree with the majority that the December 2009 letter to plaintiff from the attorney of defendant Shane VanDerwall was, under the terms of the policy in question, "notice of an occurrence . . . which may result in a claim," and not notice of a claim, inasmuch as VanDerwall's attorney did not make a demand for payment or advise that legal action against plaintiff would be forthcoming (*see Matter of Reliance Ins. Co.*, 55 AD3d 43, 47, *affd* 12 NY3d 725). We further agree with the majority that, pursuant to the policy, notice of occurrence need not be provided directly from the insured to the insurer; rather, as the majority points out, the insured need only "see to it" that the insurer is notified of the occurrence. We do not agree with the majority, however, that the January 27, 2010 letter from plaintiff's liability carrier to Hub-Langie, which was subsequently sent to defendant by Hub-Langie, constituted notice of an occurrence under the terms of the policy.

As the majority points out, the policy provides that the insured "must see to it that we are notified as soon as practicable of an 'occurrence' or an offense that may result in a claim." In our view, however, the January 27, 2010 letter received by defendant via Hub-Langie did not notify defendant of an occurrence that may result in a claim under the policy. Instead, the letter merely stated that plaintiff was seeking defense and indemnification from Hub-Langie pursuant to the indemnification provision of the subcontract. The letter does not indicate that plaintiff is seeking coverage directly from defendant as an additional insured on the policy issued by defendant to Hub-Langie, nor does it ask Hub-Langie to provide notice of any kind to defendant on plaintiff's behalf. Moreover, there is no indication in the record that plaintiff knew that the January 27, 2010 letter had been forwarded to defendant by Hub-Langie.

It is clear from the record that, when the January 27, 2010 letter was sent to Hub-Langie, plaintiff and its liability carrier did not realize that plaintiff was an additional insured on the policy

issued by defendant to Hub-Langie. The letter repeatedly refers to "your insurance carrier," not *our* insurance carrier, and, as noted, sought indemnification coverage only. Upon receipt of the January 27, 2010 letter, defendant disclaimed coverage to Hub-Langie because of Hub-Langie's failure to comply with the notice provisions of the policy, and then notified plaintiff's liability carrier of such disclaimer. In the letter to plaintiff's liability carrier notifying it of the disclaimer to Hub-Langie, defendant stated that it had received the January 27, 2010 letter "making a claim of contractual indemnity" against Hub-Langie, and advised that plaintiff had not provided a copy of the contract containing the "claimed indemnity provision." Plaintiff's liability carrier did not respond to that letter or otherwise advise defendant that plaintiff was seeking coverage directly from defendant as an additional insured.

Further, there is no evidence in the record that defendant knew that plaintiff was an additional insured under the policy, which did not name plaintiff as an additional insured. Plaintiff was an additional insured simply by virtue of the blanket additional insured endorsement and its subcontract with Hub-Langie, a copy of which was not provided to defendant. We note that, in the accord form sent to defendant along with the January 27, 2010 letter by Hub-Langie, the insured party was identified as Hub-Langie only.

It was not until May 27, 2010—more than four months after plaintiff was informed of VanDerwall's injury, and a month after plaintiff had been sued by VanDerwall—that plaintiff, through its attorney, notified defendant that it was seeking coverage directly from defendant as an additional insured. Defendant promptly disclaimed coverage because of plaintiff's failure to comply with the notice provisions of the policy, among other reasons. We conclude that, inasmuch as plaintiff clearly did not intend for the January 27, 2010 letter to serve as notice of an occurrence under the policy, and in fact did not even then realize that it was an additional insured under the Hub-Langie policy, the January 27, 2010 letter cannot serve as sufficient notice to defendant of an occurrence that might result in a claim for coverage under the policy by plaintiff (*see Liberty Ins. Underwriters, Inc. v Great Am. Ins. Co.*, ___ F Supp 2d ___, ___, 2010 WL 3629470, *5-*8). We therefore agree with Supreme Court that defendant properly disclaimed coverage to plaintiff.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

391

CA 13-01762

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

IN THE MATTER OF ARBITRATION BETWEEN CITY
OF SYRACUSE, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

SYRACUSE POLICE BENEVOLENT ASSOCIATION, INC.,
RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DEPERNO & KHANZADIAN, P.C., SYLVAN BEACH (KAREN KHANZADIAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (COLIN M. LEONARD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered November 30, 2012 in a proceeding pursuant to CPLR article 75. The order granted the petition for a permanent stay of arbitration.

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

Memorandum: Petitioner, City of Syracuse (City), commenced the proceedings in appeal Nos. 1 and 2 pursuant to CPLR article 75, seeking permanent stays of arbitration of separate grievances filed by respondent. In both grievances, respondent alleged that the City violated the parties' collective bargaining agreement (CBA) by failing to pay overtime wages to its police officers who provide security during off-duty hours at the Syracuse International Airport, which is owned by the City but managed by the Syracuse Regional Airport Authority (Authority). We conclude that Supreme Court properly granted the petition in appeal No. 1, but erred in granting the petition in appeal No. 2.

It is well settled that, in deciding an application to stay or compel arbitration under CPLR 7503, we do not determine the merits of the grievance and instead determine only whether the subject matter of the grievance is arbitrable (*see* CPLR 7501; *Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 142-143). "Proceeding with a two-part test, we first ask whether the parties may arbitrate the dispute by inquiring if 'there is any statutory, constitutional or public policy prohibition against arbitration of the grievance' . . . If no prohibition exists, we then

ask whether the parties in fact agreed to arbitrate the particular dispute by examining their collective bargaining agreement. If there is a prohibition, our inquiry ends and an arbitrator cannot act" (*Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807*, 8 NY3d 513, 519; *see Matter of Mariano v Town of Orchard Park*, 92 AD3d 1232, 1233).

"Where, as here, the [CBA] contains a broad arbitration clause, our determination of arbitrability is limited to 'whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA' " (*Matter of Haessig [Oswego City Sch. Dist.]*, 90 AD3d 1657, 1657, quoting *Board of Educ. of Watertown City Sch. Dist.*, 93 NY2d at 143; *see Matter of Kenmore-Town of Tonawanda Union Free Sch. Dist. [Ken-Ton Sch. Empls. Assn.]*, 110 AD3d 1494, 1495). If such a "reasonable relationship" exists, it is the role of the arbitrator, and not the court, to "make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them" (*Board of Educ. of Watertown City Sch. Dist.*, 93 NY2d at 143; *see Matter of Ontario County [Ontario County Sheriff's Unit 7850-01, CSEA, Local 1000, AFSCME, AFL-CIO]*, 106 AD3d 1463, 1464-1465).

By the grievance in appeal No. 1, respondent alleged that the City violated section 8.5 of the CBA by refusing to pay overtime wages to police officers who, during their off-duty hours, provide security at the airport. Section 8.5 of the CBA provides that the City "shall pay for a minimum of four hours' work at overtime rates when an off-duty employee is called in to work ordered overtime for a period of time which is not contiguous to that employee's regular tour of duty." The officers who provide security at the airport are not hired to perform that work by the City; instead, they are hired by G4S Solutions, Inc. (G4S), a private security firm retained by the Authority. According to the grievance, off-duty officers working at the airport are entitled to four hours of overtime pay, over and above the hourly rate paid by G4S, each time they perform a "police function," such as "being directed to conduct traffic roadblocks . . . , collect and turn in evidence, investigate suspicious activity and perform other vehicle and traffic duties that only on-duty police officers can perform."

Although we agree with respondent that there is no statutory, constitutional or public policy prohibition against arbitration of the grievance (*see generally Matter of Board of Educ. of Schenectady City Sch. Dist. [Schenectady Fedn. of Teachers]*, 61 AD3d 1175, 1176), we conclude that the court properly granted the petition seeking a permanent stay of arbitration because the grievance is not reasonably related to the subject matter of the parties' CBA (*see generally Matter of City of Binghamton [Binghamton Firefighters, Local 729, AFL–CIO]*, 20 AD3d 859, 860). As noted, the grievance is based on an alleged violation of section 8.5 of the CBA, which relates to compensation for officers who are "called in" to perform "ordered" overtime. The off-duty officers who work for G4S at the airport are

not ordered to work overtime; rather, they volunteer to work for G4S during their off-duty hours. Moreover, they are not "called in" by the City when they make an arrest at the airport or otherwise engage in police functions. Indeed, respondent concedes that off-duty officers who provide private security at other venues, such as the Carrier Dome or the Destiny Mall, are not entitled under the CBA to overtime pay each time they engage in police functions, and we perceive no reason to reach a different result with respect to the airport.

We conclude with respect to appeal No. 2, however, that the court erred in granting the petition. Although the grievance in appeal No. 2 is also based on an alleged violation of section 8.5 of the CBA, respondent does not merely assert in general terms that off-duty officers working at the airport for G4S are entitled to overtime pay every time they engage in police functions. Instead, the grievance in appeal No. 2 is based specifically on the claims of two identified officers who, while working at the airport, were "dispatched" to the Best Western Hotel adjacent to the airport to "investigate a domestic dispute," and those officers prepared a police report. According to the grievance, the investigation of domestic violence calls has "historically been bargaining unit work." In a supporting affidavit, respondent's president stated that the officers in question were ordered to respond to the hotel by an on-duty police officer. We conclude that the grievance in appeal No. 2 is reasonably related to the CBA, and that it should be left for the arbitrator to "make a more exacting interpretation of the precise scope of the substantive provisions of the [CBA]" and determine "whether the subject matter of the dispute fits within them" (*Matter of Niagara Frontier Transp. Auth. v Niagara Frontier Transp. Auth. Superior Officers Assn.*, 71 AD3d 1389, 1390, *lv denied* 14 NY3d 712 [internal quotation marks omitted]; *see generally Board of Educ. of Watertown City Sch. Dist.*, 93 NY2d at 143; *Matter of Town of Cheektowaga [Cheektowaga Police Club, Inc.]*, 59 AD3d 993, 994).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

396

CA 13-01955

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

IN THE MATTER OF ARBITRATION BETWEEN CITY
OF SYRACUSE, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

SYRACUSE POLICE BENEVOLENT ASSOCIATION, INC.,
RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DEPERNO & KHANZADIAN, P.C., SYLVAN BEACH (KAREN KHANZADIAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (COLIN M. LEONARD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 18, 2013 in a proceeding pursuant to CPLR article 75. The order granted the petition for a permanent stay of arbitration.

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

Same Memorandum as in *Matter of City of Syracuse* (*Syracuse Police Benevolent Association, Inc.*) ([appeal No. 1] ___ AD3d ___ [July 11, 2014]).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

453

KA 12-00656

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. COOKE, DEFENDANT-APPELLANT.

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

ROBERT J. COOKE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered December 7, 2011. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree, sexual abuse in the first degree and endangering the welfare of a child (two counts).

It is hereby ORDERED that the judgment so appealed from is modified on the law and as a matter of discretion in the interest of justice by reversing that part convicting defendant of endangering the welfare of a child under count eight of the indictment, dismissing that count, and vacating the sentence imposed on that count, and by vacating that part of the order of protection in favor of defendant's elder daughter, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of criminal sexual act in the first degree (Penal Law § 130.50 [3]), sexual abuse in the first degree (§ 130.65 [3]), and two counts of endangering the welfare of a child (§ 260.10 [1]), for crimes committed against his two daughters. Defendant contends that he was denied a fair trial because he was restrained by a stun belt throughout the trial, and County Court made no finding of facts warranting the use of such restraint (*see People v Buchanan*, 13 NY3d 1, 3). We note, however, that defendant expressly consented to wearing the stun belt without the court inquiring into the necessity for its use, and thus he has waived his contention concerning the stun belt (*see generally People v Shrock*, 108 AD3d 1221, 1224-1225, *lv denied* 22 NY3d 998; *People v Johnson*, 38 AD3d 1327, 1328, *lv denied* 9 NY3d 866).

We reject defendant's contention that the evidence at trial

rendered duplicitous the charge of sexual abuse in the first degree under count five of the indictment. Although the victim of that crime testified to separate acts, each of which could constitute that crime, we conclude that the verdict sheet, along with "the court's charge to the jury eliminated any danger that the jury convicted defendant of an unindicted act" (*People v Bradford*, 61 AD3d 1419, 1421, *affd* 15 NY3d 329 [internal quotation marks omitted]). Contrary to defendant's contention, the court properly admitted in evidence the recording of a telephone conversation between defendant and his estranged wife, despite brief inaudible portions therein, inasmuch as the recording as a whole is "sufficiently audible and intelligible" (*People v Martino*, 244 AD2d 875, 875, *lv denied* 92 NY2d 1035, *reconsideration denied* 93 NY2d 855). Contrary to defendant's further contention, the court properly exercised its discretion in permitting the jury, after appropriate instructions, to use a transcript of the recording as an aid while listening to it (*see id.*).

We agree with defendant that the evidence is legally insufficient to support the conviction of endangering the welfare of a child under count eight of the indictment, which concerns only his elder daughter (*see generally People v Danielson*, 9 NY3d 342, 349), and we therefore modify the judgment accordingly. We note that, although defendant failed to preserve for our review his challenge to the order of protection concerning the inclusion of the elder daughter, in light of our determination with respect to count eight of the indictment, we exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Inasmuch as defendant's elder daughter was an alleged victim of only the crime charged in count eight of the indictment, that part of the order of protection issued in favor of that daughter must be vacated (*see* CPL 530.12 [5]; *People v Raduns*, 70 AD3d 1355, 1355, *lv denied* 14 NY3d 891, *reconsideration denied* 15 NY3d 808), and we therefore further modify the judgment accordingly. With respect to that part of the order of protection in favor of defendant's younger daughter, defendant failed to preserve for our review his contention that the expiration date was improperly calculated and must be amended. In any event, that contention is without merit. The court properly included the period of postrelease supervision when calculating the maximum expiration date of the "determinate sentence of imprisonment actually imposed" (CPL 530.12 [5] [A] [ii]; *see People v Williams*, 19 NY3d 100, 101-102).

We have examined defendant's contention in his pro se supplemental brief and conclude that it does not require reversal or modification of the judgment.

Finally, the sentence is not unduly harsh or severe.

All concur except FAHEY, J., who concurs in the result in the following Memorandum: I concur in the result on the constraint of *People v Schrock* (108 AD3d 1221, *lv denied* 22 NY3d 998). Although this Court has ruled to the contrary, I continue to maintain that the application of a stun belt to a defendant without knowledge or input of the trial court is a mode of proceedings error, i.e., an unwaivable

flaw (*see id.* at 1226-1227 [Fahey, J., dissenting]; *see also People v Patterson*, 39 NY2d 288, 295, *affd* 432 US 197), and that we must not countenance the usurpation of a court's fundamental obligation to determine whether a stun belt is necessary (*see People v Buchanan*, 13 NY3d 1, 4). Here, the decision to apply the stun belt to defendant at the outset of the trial was not made by County Court, and I reemphasize my view that *courts*, not non-judicial personnel, are to control the courtroom and thus must determine whether to apply a stun belt to a defendant. Given my continuing view that the application of a stun belt to a defendant—in the absence of judicial findings on the record that such is necessary—is a mode of proceedings error and thus unwaivable (*see Patterson*, 39 NY2d at 295; *see also Buchanan*, 13 NY3d at 4), and given the fact that defendant herein wore a stun belt from the beginning of the trial, I see no need to review defendant's contention that he did not knowingly, intelligently and voluntarily waive inquiry by the court during the middle of the trial as to the necessity of the stun belt.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

515

KA 11-01085

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREL WALKER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered January 11, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, grand larceny in the fourth degree (two counts), petit larceny and criminal possession of stolen property in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the fourth count of the indictment is dismissed without prejudice to the People to file or re-present to another grand jury any appropriate charge under that count, the sixth count of the indictment is dismissed, and a new trial is granted on the third, ninth and 10th counts of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count each of burglary in the second degree (Penal Law § 140.25 [2]), petit larceny (§ 155.25) and criminal possession of stolen property in the fifth degree (§ 165.40) and two counts of grand larceny in the fourth degree (§ 155.30 [1], [4]). We agree with defendant that the evidence is legally insufficient to support his conviction of grand larceny in the fourth degree under the fourth count of the indictment because the People failed to establish that the value of the stolen property exceeded $1,000. The evidence with respect to the value of the jar of coins and the television set consisted of "[c]onclusory statements and rough estimates of value[, which] are not sufficient" to satisfy that element of the crime (*People v Loomis*, 56 AD3d 1046, 1047). "Consequently, we cannot on this record conclude 'that the jury ha[d] a reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold' of $1,000" (*People v Brink*, 78 AD3d 1483, 1484, *lv denied* 16 NY3d 742, *reconsideration denied* 16 NY3d 828). Nevertheless, because we further conclude that the evidence is

legally sufficient to support a conviction of petit larceny, we reverse the conviction of grand larceny in the fourth degree under Penal Law § 155.30 (1) and dismiss the fourth count of the indictment without prejudice to the People to file or re-present to another grand jury any appropriate charge under that count (*see People v Jean-Philippe*, 101 AD3d 1582, 1583; *People v Pallagi*, 91 AD3d 1266, 1268).

Although defendant failed to preserve for our review his further contention that the evidence is legally insufficient to support his conviction of grand larceny in the fourth degree under the sixth count of the indictment, we exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we conclude that the conviction of that count is not supported by legally sufficient evidence (*see generally People v Danielson*, 9 NY3d 342, 349). The sixth count of the indictment alleged that defendant stole a debit card issued by Bank of America to a specified person, but the People failed to establish that such card was stolen by defendant. We therefore reverse the remaining conviction of grand larceny in the fourth degree and dismiss the sixth count of the indictment.

With respect to the remaining counts of the indictment, we agree with defendant that County Court erred in allowing the People to introduce evidence concerning an uncharged burglary to prove his identity as the perpetrator of the burglary and petit larceny charged in the indictment. The instant crime is "not so unique as to allow admission of evidence of the [uncharged burglary] on the theory of the similarity of the *modus operandi*" (*People v Condon*, 26 NY2d 139, 144; *see People v Mateo*, 93 NY2d 327, 332). The court further erred in admitting the testimony of a witness who identified defendant in an out-of-court photo array procedure and thereafter identified him in court. The People failed to satisfy their obligation pursuant to CPL 710.30 inasmuch as no statutory notice was given by the People with respect to their intent to offer "testimony regarding an observation of the defendant at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such" (CPL 710.30 [1]; *see People v Nolasco*, 70 AD3d 972, 973-974). The errors in admitting evidence of the uncharged burglary and the identification of defendant are not harmless, considered singularly or in combination, inasmuch as the proof of defendant's guilt is not overwhelming, and there is a significant probability that the jury would have acquitted defendant had it not been for either of the errors (*see generally People v Arafet*, 13 NY3d 460, 467; *People v Crimmins*, 36 NY2d 230, 241-242). We therefore reverse the conviction of burglary in the second degree, criminal possession of stolen property in the fifth degree and petit larceny, and we grant defendant a new trial under counts three, nine and 10 of the indictment.

In light of our decision, we need not address defendant's contention that he was denied a fair trial by prosecutorial misconduct. We nevertheless note our disapproval of the prosecutor's pervasive misconduct during summation. The prosecutor inappropriately and repeatedly vouched for the credibility of prosecution witnesses

(*see People v Moye*, 12 NY3d 743, 744), suggested that defendant was a liar (*see People v Fiori*, 262 AD2d 1081, 1081), characterized defendant's testimony as "smoke and mirrors" (*see People v Spann*, 82 AD3d 1013, 1015), and otherwise improperly denigrated the defense (*see People v Grady*, 40 AD3d 1368, 1374, *lv denied* 9 NY3d 923).

Finally, in view of our determination, we do not address defendant's remaining contentions.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

528

CA 13-01300

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

LAURA LANKENAU, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PATRICK K. BOLES, M & S LEASING CO., LLC,
DEENA LANKENAU AND DOUGLAS LANKENAU,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MELISSA L. VINCTON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS PATRICK K. BOLES AND M & S LEASING CO., LLC.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, ALBANY (MARK G. MITCHELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DEENA LANKENAU AND DOUGLAS LANKENAU.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered April 2, 2013. The order denied the motion of plaintiff to dismiss certain affirmative defenses of defendants.

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

Memorandum: Plaintiff, a New York resident, commenced this negligence action in New York seeking damages for injuries she sustained in a motor vehicle accident that occurred in Pennsylvania. At the time of the accident, plaintiff was a backseat passenger in a vehicle operated by her mother, defendant Deena Lankenau, and owned by her father, defendant Douglas Lankenau, both of whom are also domiciled in New York. The accident occurred when the Lankenau vehicle collided with a tractor-trailer operated by defendant Patrick K. Boles, an employee of defendant M & S Leasing Co., LLC. Both of those defendants are domiciled in New Jersey. In their answers, defendants asserted as an affirmative defense that plaintiff failed to mitigate her damages because she was not wearing an available seat belt. Plaintiff moved to dismiss the affirmative defense, and we conclude that Supreme Court properly denied the motion.

Plaintiff contends that the court erred in denying her motion

because New York's seat belt affirmative defense regulates conduct, and thus does not apply in a tort dispute arising from an accident that occurred in Pennsylvania. We reject that contention. "Conduct-regulating rules have the prophylactic effect of governing conduct to prevent injuries from occurring" (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 522; *see generally Schultz v Boy Scouts of Am.*, 65 NY2d 189, 198). " 'If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders' " (*Padula*, 84 NY2d at 522, quoting *Cooney v Osgood Mach.*, 81 NY2d 66, 72). Conversely, where the conflicting laws serve only to allocate losses between the parties, such as vicarious liability or comparative negligence rules, the jurisdiction where the tort occurred has only a minimal interest in applying its own law (*see Schultz*, 65 NY2d at 198; *Burnett v Columbus McKinnon Corp.*, 69 AD3d 58, 60-62).

Here, the conflicting laws relate to whether there is a valid affirmative defense of seat belt nonuse. Pennsylvania law prohibits the presentation of evidence of seat belt nonuse (*see* 75 Pa CSA § 4581 [e]; *Gaudio v Ford Motor Co.*, 976 A2d 524, 536 [PA Super], *appeal denied* 605 Pa 686, 989 A2d 917), while New York law allows the trier of fact to consider a plaintiff's failure to wear an available seat belt only in assessing damages and the plaintiff's mitigation thereof (*see Spier v Barker*, 35 NY2d 444, 449-450; *Ruiz v Rochester Tel. Co.*, 195 AD2d 981, 981). We therefore conclude that the court properly determined that the seat belt defense "allocate[s] losses after the tort occurs" (*Cooney*, 81 NY2d at 72).

We further conclude that Pennsylvania has at best a minimal interest in applying its own law in this case (*see Schultz*, 65 NY2d at 198; *Burnett*, 69 AD3d at 60-62). The plaintiff and her defendant parents are residents of New York, where the seat belt defense is available. The other defendants are domiciled in New Jersey, which also permits the seat belt defense (*see Waterson v General Motors Corp.*, 111 NJ 238, 269-270, 544 A2d 357, 373-374). None of the parties is domiciled in Pennsylvania and, the situs of the tort notwithstanding, we perceive no basis for applying Pennsylvania law to deny a potential affirmative defense (*see generally Neumeier v Kuehner*, 31 NY2d 121, 128).

We recognize that New York has adopted a statutory seat belt defense subsequent to *Spier*, which is largely conduct-regulating (*see* Vehicle and Traffic Law § 1229-c [8]). Nevertheless, section 1229-c (8) did not supersede *Spier* and, therefore, the common-law seat belt defense remains valid, as employed here (*see Hamilton v Purser*, 162 AD2d 91, 93; 1A NY PJI3d 2:87 at 495 [2014]; PJI 2:87.1, 2:87.2). "The fact that [Pennsylvania] law did not require plaintiff to wear [her] seat belt at the time of the accident is of no moment" (*Gardner v Honda Motor Co.*, 145 AD2d 41, 47, *lv dismissed* 74 NY2d 715; *see Ruiz*, 195 AD2d at 981).

We have reviewed plaintiff's remaining contentions and conclude

that they lack merit.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

529

CA 13-01301

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

LAURA LANKENAU, PLAINTIFF-APPELLANT,

V ORDER

PATRICK K. BOLES, M & S LEASING CO., LLC,
DEENA LANKENAU AND DOUGLAS LANKENAU,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

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

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MELISSA L. VINCTON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS PATRICK K. BOLES AND M & S LEASING CO., LLC.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, ALBANY (MARK G. MITCHELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DEENA LANKENAU AND DOUGLAS LANKENAU.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered June 25, 2013. The order denied the motion of plaintiff for leave to reargue her motion to dismiss certain affirmative defenses of defendants.

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

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

586

KA 12-00930

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATHEW J. ANGONA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (William D. Walsh, A.J.), rendered March 8, 2010. The judgment convicted defendant, upon a jury verdict, of sodomy in the first degree (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of four counts of sodomy in the first degree (Penal Law former § 130.50 [3]). Contrary to defendant's contention, the People were not required to charge the defense of infancy to the grand jury, and the grand jury proceedings therefore were not rendered defective by the failure to charge that defense (*see generally* CPL 210.20 [1] [c]; 210.35 [5]; *People v Huston*, 88 NY2d 400, 411). There is no requirement "that the [g]rand [j]ury must be charged with every potential defense suggested by the evidence" (*People v Valles*, 62 NY2d 36, 38). Rather, the People must charge "only those defenses that the evidence will reasonably support," and here the evidence did not reasonably support such a defense (*People v Coleman*, 4 AD3d 677, 678; *cf. People v Calkins*, 85 AD3d 1676, 1677). Contrary to defendant's further contention, we conclude that County Court did not abuse its discretion in denying defendant's request to file a late notice of alibi (*see generally People v Brock*, 277 AD2d 1008, 1008). Defendant's request was substantively inadequate because it failed to identify the place or places where defendant claims to have been at the time in question, and the names, the residential addresses, the places of employment and the addresses thereof of every alibi witness upon whom he intended to rely (*see* CPL 250.20 [1]). Defendant failed to preserve for our review his contention that the indictment was fatally defective because it lacked sufficient specificity to enable him to prepare a defense (*see People v Erle*, 83 AD3d 1442, 1443, *lv*

denied 17 NY3d 794). In any event, defendant's contention lacks merit. The time frame set forth in the indictment, i.e., "during the months of September or October 2001," was sufficiently specific in view of the nature of the offenses and the age of the victim at the time of the indicted acts (*see People v Roman*, 43 AD3d 1282, 1283, *lv denied* 9 NY3d 1009; *cf. People v Sedlock*, 8 NY3d 535, 540).

Defendant failed to preserve for our review his further contentions that the court violated CPL 270.15 (2) in conducting the jury selection (*see People v Davis*, 106 AD3d 1510, 1511, *lv denied* 21 NY3d 1073), and that the court erred in failing sua sponte to reopen the suppression hearing (*see People v Clark*, 28 AD3d 1231, 1232; *People v Freeman*, 253 AD2d 692, 692, *lv denied* 92 NY2d 982). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant's contention that the evidence is legally insufficient to support the conviction is also not preserved for our review because defendant failed to renew his motion for a trial order of dismissal after presenting proof (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, defendant's contention, based upon the victim's alleged lack of credibility, is without merit (*see generally People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that he was deprived of effective assistance of counsel based on, inter alia, defense counsel's failure to challenge a prospective juror who expressed a concern that, because she had grandchildren, she might sympathize with the victim. The prospective juror further stated without equivocation that she could follow the court's instructions to render a verdict free from sympathy to anyone (*see generally People v Noguel*, 93 AD3d 1319, 1320, *lv denied* 19 NY3d 965). We also reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to renew the motion for a trial order of dismissal (*see People v Pytlak*, 99 AD3d 1242, 1243, *lv denied* 20 NY3d 988). It is well settled that defense counsel cannot be deemed ineffective for failing to "make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *see People v Caban*, 5 NY3d 143, 152). Contrary to defendant's further contention, defense counsel's failure to object to the brief reference to defendant's prior incarceration did not deprive him of effective assistance of counsel (*see People v Joseph*, 68 AD3d 1534, 1537, *lv denied* 14 NY3d 889, *cert denied* ___ US ___, 131 S Ct 797).

We reject the further contention of defendant that he was deprived of his right to a fair trial by prosecutorial misconduct. The prosecutor's description of the defense theory as a "ruse" was within the wide rhetorical bounds afforded the prosecutor (*cf. People v Walker*, ___ AD3d ___, ___ [July 11, 2014]; *see generally People v*

Ashwal, 39 NY2d 105, 109-110). Even assuming, arguendo, that during opening or closing statements the prosecutor's use of the phrase "little boy" or "young boy" to describe the victim was improper, we conclude that such conduct was not so egregious as to deprive defendant of a fair trial (*see People v Cordero*, 110 AD3d 1468, 1470, *lv denied* 22 NY3d 1137). Defendant contends that the prosecutor improperly suggested to the jury during summation that it was "plausible" that the victim became a sex offender later in life based on defendant's perpetration of the indicted acts. The court sustained defense counsel's objections to the prosecutor's remarks and instructed the jury to disregard them. Defendant did not thereafter request further curative instructions or move for a mistrial, and thus failed to preserve for our review his present contention that the prosecutor's conduct deprived him of a fair trial (*see* CPL 470.05 [2]; *People v Norman*, 1 AD3d 884, 884, *lv denied* 1 NY3d 599). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We likewise reject defendant's contention that he was penalized for exercising his right to a jury trial. There is no indication that the sentence imposed was the product of vindictiveness or that the court placed undue weight upon defendant's decision to reject a favorable plea bargain and proceed to trial (*see People v Smith*, 21 AD3d 1277, 1278, *lv denied* 7 NY3d 763).

Finally, defendant's sentence is not unduly harsh or severe. In reaching that conclusion, we note that, inasmuch as each of defendant's four crimes was a separate and distinct act, defendant faced the possibility of consecutive sentences aggregating 100 years, albeit reduced pursuant to Penal Law § 70.30 (*see People v Arroyo*, 93 NY2d 990, 992; *People v Cruz*, 41 AD3d 893, 897, *lv denied* 10 NY3d 933). The court properly exercised its discretion in sentencing defendant to concurrent sentences aggregating 25 years. That sentence appropriately takes into account the heinous nature of defendant's conduct (*see Cruz*, 41 AD3d at 897). As the dissent correctly notes, defendant "self-reported" the crimes. However, when he testified at trial, defendant recanted, denying that the crimes ever occurred and asserting that his inculpatory statements were fabricated by the police and that he was subjected to beatings at the police station. These claims were rejected by the jury. It is well settled that a sentencing court may consider a defendant's prior offenses—including those resulting in a youthful offender adjudication (*see People v Brunner*, 182 AD2d 1123, 1123, *lv denied* 80 NY2d 828; *People v Sapp*, 169 AD2d 659, 660, *lv denied* 77 NY2d 966). In this case, defendant had a prior youthful offender adjudication for the sexual abuse of an eight-year-old male. Although the dissent correctly observes the disparity between the plea offer and the sentence, it is well established that "[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" (*People v Simon*, 180 AD2d 866, 867, *lv denied* 80 NY2d 838). We also note that new facts and circumstances defendant presented to the court through his trial testimony, after the original plea offer, such

as his perjurious testimony and lack of genuine remorse, rebutted any presumption of vindictiveness arising from the imposition of the increased sentence after trial (*see People v Ocampo*, 52 AD3d 741, 742, *lv denied* 11 NY3d 792).

All concur except CENTRA and LINDLEY, JJ., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part. Although we agree with the majority that defendant's conviction of four counts of sodomy in the first degree should stand, we conclude that the sentence imposed by County Court is unduly harsh and severe. We would therefore exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), and we would modify the judgment by reducing the four concurrent terms of incarceration imposed from 25 years to 15 years, to be followed by the five-year period of postrelease supervision (PRS) imposed by the court.

Defendant committed the crimes when he was 16 years old. If the crimes had been committed six months earlier, defendant, due to his infancy, could not have been charged criminally and would thus have faced no prison time. Defendant self-reported his crimes to the police approximately eight years after they were committed, stating that he wanted to get something off his chest and clear his conscience. If defendant had not gone to the police himself, he likely would never have been charged, inasmuch as the victim had not disclosed the abuse to anyone. This may explain why, prior to indictment, the People offered defendant the opportunity to plead guilty to a reduced sex offense with a sentence promise of four months in jail and 10 years of probation. On the eve of trial, the People offered a plea deal involving a two-year sentence. After trial, he was sentenced to an aggregate term of imprisonment of 25 years plus five years of PRS.

We understand that a defendant who rejects a plea offer with a specific sentence promise cannot expect to receive that same sentence after trial. We also recognize that defendant's conduct in this case was reprehensible and that he is a danger to the community if he is at large. Nevertheless, "the considerable disparity between the sentence offered prior to trial and that ultimately imposed after trial strikes us as too extreme a penalty for defendant's exercise of his constitutional right to a jury trial" (*People v Morton*, 288 AD2d 557, 559, *lv denied* 97 NY2d 758, *cert denied* 537 US 860; *see People v Riback*, 57 AD3d 1209, 1218, *revd on other grounds* 13 NY3d 416; *see also People v Cruz*, 41 AD3d 893, 896-897, *lv denied* 10 NY3d 933).

We note that the People do not assert that the trial revealed any facts that were unknown to them when the plea offers were extended to defendant. We also note that, although defendant's rejection of the plea offers resulted in the victim having to testify at trial, the victim was 18 years old when the last offer was extended and was himself a convicted felon serving time in state prison. Thus, unlike in many sexual assault cases involving child victims, there was not a compelling need to shield the victim from testifying at trial. While we are mindful that defendant deserves a lengthy sentence due to the

heinous nature of his conduct and his refusal to accept responsibility, we nevertheless conclude that concurrent determinate terms of imprisonment of 15 years plus five years of PRS is more appropriate than the 25-year concurrent sentences imposed by the court.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

587

KA 11-00147

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEPOLIA J. SPENCER, DEFENDANT-APPELLANT.

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

LEPOLIA J. SPENCER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 21, 2010. The judgment convicted defendant, upon a jury verdict, of rape in the second degree (three counts), criminal sexual act in the second degree (five counts), course of sexual conduct against a child in the first degree, rape in the third degree (two counts), criminal sexual act in the third degree (two counts) and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing that part convicting defendant of endangering the welfare of a child under count 15 of the indictment and dismissing that count of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of one count each of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and endangering the welfare of a child (§ 260.10 [1]), three counts of rape in the second degree (§ 130.30 [1]; former § 130.30), five counts of criminal sexual act in the second degree (§ 130.45 [1]; former § 130.45), and two counts each of rape in the third degree (§ 130.25 [2]) and criminal sexual act in the third degree (§ 130.40 [2]). As the People correctly concede, the count charging endangering the welfare of a child should be dismissed as time-barred "inasmuch as the acts charged therein occurred more than two years prior to the filing of the indictment" (*People v Wildrick*, 83 AD3d 1455, 1456, *lv denied* 17 NY3d 803; *see* CPL 30.10 [2] [c]; Penal Law § 260.10). Although defendant failed to preserve that contention for our review, we nevertheless exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a];

Wildrick, 83 AD3d at 1456), and we modify the judgment accordingly.

We reject defendant's further contention that the counts of the indictment charging sexual offenses, with the exception of course of sexual conduct against a child in the first degree, were rendered duplicitous by the victim's trial testimony. The first six counts of the indictment charged defendant with various sex offenses arising from two incidents that occurred during the summer of 2000 at defendant's then residence, located in Utica. The victim testified in detail about those two incidents, during which defendant sodomized and raped her, and she then testified that the abuse "became a regular thing," happening several times a week until she left home at age 17, in 2006. The victim's testimony about the abuse continuing regularly until 2006 was relevant to the charge of course of sexual conduct against a child in the first degree, and we conclude that, in light of the victim's specific and detailed testimony about the first two incidents, there is no reasonable possibility that the jurors may have convicted defendant of any of the first six counts based on the general and vague testimony that followed (*see People v Tomlinson*, 53 AD3d 798, 799, *lv denied* 11 NY3d 835; *People v Weber*, 25 AD3d 919, 922, *lv denied* 6 NY3d 839; *cf. People v Bracewell*, 34 AD3d 1197, 1198). We note that it was clear from the prosecutor's summation that the first six counts related to the victim's detailed testimony about the two incidents that occurred in the summer of 2000 (*see People v Ramirez*, 99 AD3d 1241, 1242, *lv denied* 20 NY3d 988). For similar reasons, we conclude that counts eight, nine and 11 through 14 were not rendered duplicitous by the victim's testimony that certain previously described sexual acts recurred on a weekly basis.

We reject defendant's contention that the time periods specified for counts one through six, eight, nine, and 11 through 14 were too broad to permit him to prepare a defense. CPL 200.50 (6) requires that an indictment contain an allegation "that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time." As long as the period of time is not an essential element of the charged crime, a "reasonable approximation" is sufficient to comply with the statute (*People v Morris*, 61 NY2d 290, 292), especially where the crime was committed against a young victim, and was not immediately reported (*see id.* at 295-297; *People v Case*, 29 AD3d 706, 706-707, *lv denied* 7 NY3d 786; *People v Oglesby*, 12 AD3d 857, 858-859, *lv denied* 5 NY3d 792). Here, time is not an essential element of the crimes charged, and considering that the victim was a minor at the time that the crimes were committed and defendant was not arrested or indicted until several years later, we conclude that the use of a three-month "seasonal" period in the indictment was sufficiently specific (*see e.g. People v LaPage*, 53 AD3d 693, 694-695; *People v Dickens*, 48 AD3d 1034, 1035, *lv denied* 10 NY3d 958; *People v Furlong*, 4 AD3d 839, 840-841, *lv denied* 2 NY3d 739).

Defendant further contends that the court erred in allowing several prosecution witnesses, including the victim, to testify regarding his use of marihuana and crack cocaine. Because defendant did not object to such testimony, however, his contention is

unpreserved for our review (*see* CPL 470.05 [2]; *People v Marmulstein*, 6 AD3d 879, 881, *lv denied* 3 NY3d 660; *People v Mediak*, 217 AD2d 961, 962, *lv denied* 87 NY2d 848), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of counts seven through nine, and 11 through 14. In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences to support the jury's finding that defendant committed the crimes of which he was convicted based on the evidence presented at trial (*see generally People v Bleakley*, 69 NY2d 490, 495). With respect to the counts in question, the victim testified that defendant had "sexual intercourse" and "oral sex" with her. Although defendant is correct that the victim did not specify what she meant by those terms, we note that she previously defined those terms during her testimony regarding counts one through six. We thus conclude that the victim's initial description of what she meant by the terms "oral sex" and "sexual intercourse" (*see* Penal Law § 130.00 [1], [2] [a]), combined with the ordinary meanings of those terms, provided sufficient evidence to support defendant's conviction of the counts in question (*see People v Wyre*, 97 AD3d 976, 977, *lv denied* 19 NY3d 1030; *People v Workman*, 56 AD3d 1155, 1155-1156, *lv denied* 12 NY3d 789; *cf. People v Carroll*, 95 NY2d 375, 383-384).

Contrary to defendant's further contention, County Court did not err in admitting in evidence an undated letter written by defendant to the victim. In the letter, which contains graphic sexual language, defendant berated the victim for having sexual relations with other men and stated that, as punishment, he "might as well prostitute your ass out." The letter was admissible as an admission with respect to the count of endangering the welfare of a child, which was based, at least in part, on the victim's testimony that defendant agreed to allow a friend of his to have sex with her in return for drugs (*see People v Swart*, 273 AD2d 503, 505, *lv denied* 95 NY2d 908). Moreover, the People laid a proper foundation for the admission of the letter inasmuch as the victim and her mother testified that they are familiar with defendant's handwriting and that the letter appeared to have been written by him (*see People v Clark*, 122 AD2d 389, 390, *lv denied* 68 NY2d 913).

We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs and conclude that they lack merit.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

646

CA 13-01679

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

DANIEL G. GRISTWOOD, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 114040.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Court of Claims (Nicholas V. Midey, Jr., J.), entered May 7, 2013. The judgment awarded claimant money damages after a trial for unjust conviction and imprisonment.

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

Memorandum: In this action for damages for wrongful conviction and imprisonment pursuant to Court of Claims Act § 8-b, defendant, State of New York (State), appeals from a judgment that, after a bifurcated trial, awarded claimant damages in the sum of $5,485,394. In 1996, claimant was convicted of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]) following an assault upon his wife that occurred on January 12, 1996. The only evidence linking claimant to the crime was an inculpatory statement he made to the police, and claimant otherwise maintained his innocence throughout the criminal proceeding.

Claimant was sentenced to concurrent terms of incarceration of 12½ to 25 years on the attempted murder count and one year on the criminal possession of a weapon count. However, in 2003, an individual came forward and gave statements to the New York State Police in which he confessed to the attack on claimant's wife and provided extensive details that accurately described the crime scene and the attack. Claimant moved pursuant to CPL 440.10 (1) (g) to vacate the judgment of conviction on the ground that the individual's statements constituted "newly discovered evidence." Following a hearing, County Court granted the motion, and the indictment was dismissed on July 20, 2006. As a result, claimant was released from prison after being incarcerated for more than nine years, and he

thereafter brought this claim.

We reject the State's contention that the Court of Claims erred in excluding the transcripts of claimant's criminal trial. Whether evidence should be excluded as cumulative is a determination that rests within the sound discretion of the court, and we conclude that the exclusion of the transcripts was not an abuse of discretion in this case (*see generally Cor Can. Rd. Co., LLC v Dunn & Sgromo Engrs., PLLC*, 34 AD3d 1364). The State failed to offer the transcripts of the CPL 440.10 hearing in evidence and thus has failed to preserve for our review its contention that those transcripts should have been admitted in evidence (*see Goncalves v State of New York*, 1 AD3d 914, 914).

We reject the State's further contention that claimant failed to establish by the requisite clear and convincing evidence that he "did not commit any of the acts charged in the accusatory instrument" (Court of Claims Act § 8-b [5] [c]). A determination of the Court of Claims will not be set aside unless the court's conclusions could not have been reached upon any fair interpretation of the evidence (*see Supensky v State of New York*, 2 AD3d 1436, 1437). We conclude that the court properly determined that the statements of the individual who came forward in 2003, which were amply corroborated by other evidence, and the absence of any other evidence linking claimant to the crime, established by the appropriate quality of proof that claimant did not commit the acts alleged in the accusatory instrument (*see* § 8-b [5] [c]).

We reject the State's further contention that, because claimant made an inculpatory statement, the record does not support the determination that claimant established by clear and convincing evidence that he did not "by his own conduct cause or bring about his conviction" (Court of Claims Act § 8-b [5] [d]). Claimant consistently maintained his innocence and contended that his inculpatory statement was coerced. "[A] coerced false confession does not bar recovery under section 8-b because it is not the claimant's 'own conduct' within the meaning of the statute" (*Warney v State of New York*, 16 NY3d 428, 436). It is well settled that "[t]he voluntariness of a confession can only be determined through an examination of the totality of the circumstances surrounding the confession" (*People v Leonard*, 59 AD2d 1, 12; *see Clewis v Texas*, 386 US 707, 708-711). "Relevant criteria include the duration and conditions of detention, the manifest attitude of the police toward the detainee, the existence of threat or inducement, and the age, physical state and mental state of the detainee" (*Leonard*, 59 AD2d at 13; *see also Brown v United States*, 356 F2d 230, 232). The use or misuse of a polygraph examination is also a factor to be considered in determining whether there was impermissible coercion (*see Leonard*, 59 AD2d at 14-15).

Here, we conclude that the record fully supports the court's determination that claimant's inculpatory statement was the product of police misconduct (*see Warney*, 16 NY3d at 436). Claimant was awake for 34 hours before making his only inculpatory statement, which was

the second statement he made. He had been interrogated for 15 hours in a six- by eight-foot windowless room. He ate nothing and drank only one can of soda and, although he was a heavy smoker, he had no cigarettes in the prior four or five hours. He remained under the severe emotional trauma of having seen his wife in a horrible bloodied and battered condition. Claimant was advised that, if he took a polygraph exam and passed, he would be permitted to go home.

Notably, the polygraph operator expressed significant concern to fellow officers about the reliability of the polygraph exam because claimant was "somewhat physiologically unresponsive to the polygraph." The operator acknowledged that claimant was trying not to fall asleep during the exam. Claimant experienced severe chest pains during the exam. Nevertheless, after the polygraph exam, the interrogation took on an increasingly aggressive and hostile tone, and claimant was told by the police that he was "lying." Claimant's inculpatory statement was made after he was threatened that he would never see his family again if he did not cooperate. Thus, in view of the totality of circumstances surrounding claimant's statement, and giving due deference to the findings of the court (*see Goncalves*, 1 AD3d at 914), we conclude that the court properly determined that claimant's statement was not voluntarily made and that claimant therefore did "not by his own conduct cause or bring about his conviction" (Court of Claims Act § 8-b [5] [d]).

The State also contends that the nonpecuniary damages awarded claimant are excessive because they deviate materially from what would be reasonable compensation (*see* CPLR 5501 [c]). Pursuant to Court of Claims Act § 8-b (6), upon finding that the claimant is entitled to a judgment, the court "shall award damages in such sum of money as the court determines will fairly and reasonably compensate him." A claimant must prove his entitlement to an award for future damages "by a reasonable certainty" (*Baba-Ali v State of New York*, 19 NY3d 627, 641). Although the statute provides little in the way of specifics, we note that the amount of any such award should be determined in accordance with "traditional tort and other common-law principles" (*Carter v State of New York*, 139 Misc 2d 423, *affd* 154 AD2d 642). We decline to adopt any formulaic standard for the assessment of nonpecuniary damages (*see id.* at 430). "Guiding this Court in its determination of the elements of and amount for non-pecuniary damages is the body of case law that eloquently addresses the grievous suffering, mental anguish, loss of liberty, degradation, loss of reputation, humiliation and other injuries of those unjustly convicted and imprison[ed]" (*Gonzalez v State*, 26 Misc 3d 1212[A], 2009 Slip Op 52714[U], *12; *see Campbell v State of New York*, 186 Misc 586, 590-591). The relevant period for awarding damages is the date of conviction to the end of imprisonment, and damages also may be awarded for "any subsequent or continuing damages shown to have proximately resulted" from the conviction and imprisonment (*Carter*, 139 Misc 2d at 429).

At the time of the crime, claimant lived with his wife and five young children. Claimant established that his conviction and incarceration had a catastrophic impact on his personal and family

life during the period of incarceration and continuing thereafter. Claimant also established that he suffers from chronic posttraumatic stress disorder, chronic depressive disorder, and chronic anxiety disorder and prominent avoidant and paranoid traits, all as the result of his unjust conviction and incarceration. At the time of trial, claimant had a life expectancy of an additional 32.7 years (*see* PJI 2:281). The court awarded claimant $2,700,000 for loss of liberty, mental anguish and loss of family relationships while incarcerated and $1,920,000 for continuing pain and suffering, including post-incarceration psychological injuries. Under the circumstances established by claimant and presented by this record, we conclude that the nonpecuniary damages awarded do not deviate materially from what would be reasonable compensation (*see generally* CPLR 5501 [c]).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

648.1

CA 13-00560

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

DAWN STEFANIAK, PLAINTIFF,

V MEMORANDUM AND ORDER

NFN ZULKHARNAIN, DEFENDANT-RESPONDENT.

ROBERTA L. REEDY, AS ADMINISTRATOR OF THE ESTATE OF KEVIN M. REEDY, DECEASED, APPELLANT.

JENNIFER M. LORENZ, LANCASTER, FOR APPELLANT.

HOGAN WILLIG, PLLC, GETZVILLE (DIANE R. TIVERON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered June 18, 2012. The order, among other things, denied the motion of Kevin M. Reedy, Esq. for an award of attorney's fees from defendant.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion in part, appointing Kevin M. Reedy, Esq. nunc pro tunc as the Attorney for the Children pursuant to 22 NYCRR part 36, directing defendant to pay attorney's fees to appellant and remitting the matter to Supreme Court, Erie County, to determine the amount of those fees, and as modified the order is affirmed without costs in accordance with the following Memorandum: Under the circumstances of this case, we conclude that there was good cause to appoint Kevin M. Reedy, Esq. (Reedy) as the Attorney for the Children pursuant to 22 NYCRR part 36, which governs the appointments of attorneys for children "who are not paid from public funds" (22 NYCRR 36.1 [a] [3]), and that Supreme Court erred in failing to do so. The court described this case as "one of the most contentious and protracted proceedings [it] has ever presided over," and we note that it included what the attorney for appellant notes was two years of litigation, 32 court appearances, a lengthy trial, and two significant motions before this Court. Given the unusual and complex nature of this litigation, we conclude that it was essential that Reedy continue his work on behalf of the children and thus that Reedy should have been appointed as the Attorney for the Children pursuant to 22 NYCRR part 36 nunc pro tunc. In addition, we conclude that the court should have ordered defendant, the monied spouse, to pay Reedy's fees (*see Matter of Plovnick v Klinger*, 10 AD3d 84, 89-90; *cf. Redder v Redder*, 17 AD3d 10, 14-15; *see also Jain v Garg*, 303 AD2d 985, 985-986). We therefore modify the order accordingly, and we remit the matter to

Supreme Court to determine the amount of Reedy's fees following a hearing, if necessary.

All concur except SMITH, J.P., and LINDLEY, J., who dissent and vote to affirm in the following Memorandum: We respectfully disagree with the majority's conclusion that Supreme Court should have determined that there was good cause to appoint Kevin M. Reedy, Esq. (Reedy) as the attorney for the children (AFC) nunc pro tunc pursuant to 22 NYCRR part 36. We therefore dissent, and would affirm the order. The majority concludes that, due to the contentious and protracted nature of the litigation, "it was essential that Reedy continue his work on behalf of the children." That conclusion is inaccurate. Reedy originally represented these children in Family Court. Consequently, Supreme Court appointed him as a "state pay" AFC pursuant to section 243 of the Family Court Act when the case first appeared there in 2009, and he continued to represent the children's interests throughout this litigation. Thus, when Reedy moved, by his purported "Order to Show Cause" dated January 3, 2012, to be appointed as a "private pay" AFC pursuant to 22 NYCRR part 36, the only issue before Supreme Court was whether he would continue to represent the subject children as a state pay AFC, or whether he should be appointed as a private pay AFC. In other words, the only issue was by whom Reedy would be paid for the work he had already performed and whether his compensation would be subject to the cap on attorney's fees for state pay AFCs contained in section 35 (3) of the Judiciary Law.

Initially, we note that "Supreme Court has the same power as that of Family Court to appoint [an AFC] in connection with custody proceedings arising from a divorce action" (*Davis v Davis*, 269 AD2d 82, 84), and thus the parties correctly agree that Supreme Court properly appointed Reedy as an AFC. When appointing a private pay AFC, however, the court was required to comply with 22 NYCRR article 36, which states in pertinent part that "[a]ll appointments pursuant to this Part shall be made by the appointing judge from the appropriate list of applicants established by the Chief Administrator of the Courts pursuant to section 36.3 of this Part . . . An appointing judge may appoint a person or entity not on the appropriate list of applicants upon a finding of good cause" (22 NYCRR 36.2 [b] [1], [2]). It is undisputed that Reedy was not on the appropriate list of applicants, and thus the court could only appoint him pursuant to the regulation upon a finding of good cause.

Contrary to the majority, we conclude that Reedy failed to establish good cause to change his appointment to that of a private pay AFC. As noted, he had been appointed as AFC for the subject children in Supreme Court two years before his application and there was no request that he be replaced. Thus, his contention and that of his estate that continuity of representation constituted good cause to change the appointment is belied by the record. Contrary to Reedy's further contention, he was not limited to the statutory maximum compensation of $4,400 (*see* Judiciary Law § 35 [3]), if he was indeed required to put forth extraordinary efforts in this case. The Judiciary Law permits the court to exceed the statutory maximum "[i]n extraordinary circumstances" (*id.*). Consequently, the statutory

maximum was not a basis for a finding of good cause to change his assignment. Furthermore, Reedy did not submit the motion seeking to change his appointment to private pay AFC until more than two years had passed after his initial appointment as a state pay AFC. Thus, Reedy's failure to seek that order before performing the work created a situation in which defendant would be subjected to two years' worth of attorney's fees for Reedy without having had any notice that such fees were accumulating. Inasmuch as Reedy failed to establish that there was good cause to appoint him as a private pay AFC instead of permitting him to continue representing the subject children as a state pay AFC, and further failed to submit any reason why such an order should be entered nunc pro tunc despite defendant's lack of record notice that he would be required to pay for Reedy's services, we conclude that the court properly denied Reedy's motion.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

660

CA 13-02044

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

WELLS FARGO BANK, N.A., SUCCESSOR BY MERGER
TO WACHOVIA BANK, N.A., PLAINTIFF-RESPONDENT,

V ORDER

MARY L. GROSE, DEFENDANT-APPELLANT,
FIRST AMERICAN INVESTMENT COMPANY, LLC, AS
ASSIGNEE OF WACHOVIA NATIONAL BANK, ET AL.,
DEFENDANTS.

LEGAL SERVICES FOR THE ELDERLY, DISABLED OR DISADVANTAGED OF WESTERN NEW YORK, INC., BUFFALO (DANIEL WEBSTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (FRANCES M. KABAT OF COUNSEL), AND HOGAN LOVELLS US LLP, NEW YORK CITY, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered December 14, 2012. The order denied the motion of defendant Mary L. Grose to dismiss the action.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on March 14 and May 29, 2014, and filed in the Orleans County Clerk’s Office on June 6, 2014,

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

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

677

KA 12-00822

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REYNALDO D. MIRANDA, DEFENDANT-APPELLANT.

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

REYNALDO D. MIRANDA, DEFENDANT-APPELLANT PRO SE.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (LAURIE M. BECKERINK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered March 19, 2012. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the third degree (two counts), criminal mischief in the fourth degree, resisting arrest and unlawful fleeing a police officer in a motor vehicle in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of criminal mischief in the third degree (Penal Law § 145.05 [2]). The charges arose from an incident in which defendant led officers of the Fredonia and Dunkirk Police Departments on a highspeed car chase and then crashed his vehicle into a utility pole. Defendant was apprehended after fleeing the scene of the crash on foot, and he then damaged the windows of two police cars by kicking them after he was arrested and placed in one police vehicle and then in another. Defendant contends that the evidence is legally insufficient to support the conviction of both counts of criminal mischief because the People failed to establish with respect to each count that the property damage exceeded $250. We reject that contention. The People presented the testimony of a witness who repaired the damage to the Fredonia police car at a cost of $1,178.09, and who testified that his estimate was based on his 25 years of experience in auto collision work (*see People v Butler*, 70 AD3d 1509, 1509, *lv denied* 14 NY3d 886; *People v Detwiler*, 187 AD2d 973, 974, *lv denied* 81 NY2d 787). The People also presented the testimony of a mechanic employed by the city of Dunkirk, who repaired the damage to the Dunkirk police car with an existing part, and who

testified that he had previously purchased the part in his capacity as a city mechanic at a cost of $612.45 (*see Butler*, 70 AD3d at 1509; *see also People v Mu-Min*, 172 AD2d 1022, 1022, *lv denied* 78 NY2d 924). Moreover, viewing the evidence in light of the elements of the crime of criminal mischief in the third degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We likewise reject defendant's challenge to the severity of the sentence.

Defendant's remaining contentions are raised in his pro se supplemental brief. Because, as we have determined, the conviction is supported by legally sufficient evidence at trial, defendant's contention concerning the alleged insufficiency of the evidence before the grand jury is not reviewable on appeal (*see* CPL 210.30 [6]; *People v Freeman*, 38 AD3d 1253, 1254, *lv denied* 9 NY3d 875, *reconsideration denied* 10 NY3d 811). Defendant's further contention that the grand jury proceeding was defective is unpreserved for our review (*see People v Shol*, 100 AD3d 1461, 1462, *lv denied* 20 NY3d 1103), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention that County Court erred in denying defendant's CPL 30.30 motion inasmuch as "the People declared their readiness for trial . . . well within the six-month limit" (*People v Sweet*, 98 AD3d 1252, 1253, *lv denied* 20 NY3d 1015). Also contrary to defendant's contention, he was not prejudiced by the People's failure to preserve his car or its broken taillight as evidence that the initial stop of his vehicle by the police was lawful (*see generally People v Bernard*, 100 AD3d 916, 917, *lv denied* 20 NY3d 1096). "Assuming, arguendo, that the police illegally attempted to stop defendant's vehicle in the first instance, any taint resulting from such a stop was dissipated by defendant's independent and calculated act of speeding away from the police, causing an accident and fleeing on foot" (*People v Dennis*, 31 AD3d 810, 811; *see People ex rel. Gonzalez v Warden of Anna M. Cross Ctr.*, 79 NY2d 892, 894-895).

We have considered defendant's remaining contentions in his pro se supplemental brief and conclude that none requires reversal or modification of the judgment.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

692

CA 13-01699

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

CANANDAIGUA NATIONAL BANK AND TRUST COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MATTHEW PALMER, ALSO KNOWN AS MATTHEW J. PALMER,
DEFENDANT-RESPONDENT,
PALMER AUTOMOTIVE, INC., ET AL., DEFENDANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (JESSICA A. MYERS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WHITCOMB LAW FIRM P.C., CANANDAIGUA (DAVID J. WHITCOMB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered April 10, 2013. The order denied the motion of plaintiff for summary judgment.

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

Memorandum: In this mortgage foreclosure action, plaintiff contends that Supreme Court erred in denying its motion for summary judgment. We reject that contention. In August 1997, Matthew Palmer, also known as Matthew J. Palmer (defendant) purchased real property located in Canandaigua. Defendant used the property to operate an automobile repair shop and to sell used cars. To finance the purchase, he obtained a $127,000 loan from plaintiff and, as security for the promissory note, plaintiff obtained a mortgage on the subject property. Approximately six years later, defendant formed defendant Palmer Automotive, Inc. (corporation), but title to the subject property remained with defendant. The corporation thereafter borrowed $125,000 from plaintiff. The promissory note, signed by defendant as president of the corporation, was secured by a second mortgage on the subject property in the amount of $85,000. As noted, however, the corporation did not own the subject property. Plaintiff thus mistakenly took a mortgage on property that the mortgagor did not own.

The corporation eventually defaulted on the promissory note, and plaintiff commenced this action to foreclose on the second mortgage. Recognizing that the corporation did not own the mortgaged property, plaintiff, in its second cause of action, alleges that it has an equitable mortgage on the subject property. Although the complaint

also seeks foreclosure on the first mortgage issued to defendant, plaintiff now acknowledges that defendant is current on the promissory note issued to him, and this action is thus limited to the second mortgage issued to the corporation. According to plaintiff, it is entitled to an equitable mortgage because the parties clearly intended that the promissory note issued to the corporation was to be secured by the subject property.

"Equity generally 'will keep an encumbrance alive, or consider it extinguished, as will best serve the purposes of justice' " (*Federal Deposit Ins. Corp. v Five Star Mgt.*, 258 AD2d 15, 21). "The whole doctrine of equitable mortgages is founded upon [the] cardinal maxim of equity which regards that as done which has been agreed to be done, and ought to have been done" (*Sprague v Cochran*, 144 NY 104, 114; *see New York TRW Tit. Ins. v Wade's Can. Inn & Cocktail Lounge*, 199 AD2d 661, 664).

" '[A]n equitable mortgage may be constituted by any writing from which the intention so to do may be gathered, and an attempt to make a legal mortgage, which fails for the want of some solemnity, is valid in equity' " (*Hamilton Trust Co. v Clemes*, 163 NY 423, 428; *see Federal Deposit Ins. Corp.*, 258 AD2d at 21). "While '[a] court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation' . . . , 'it is necessary that an intention to create such a charge clearly appear from the language and the attendant circumstances' " (*Tornatore v Bruno*, 12 AD3d 1115, 1118; *see J.P. Morgan Chase Bank, N.A. v Cortes*, 96 AD3d 803, 803-804, *lv denied* 20 NY3d 853).

Here, the court determined that plaintiff is not entitled to an equitable mortgage because the corporation, as mortgagor, did not own the property secured by the mortgage, and an equitable mortgage is available only where there is an "erroneous description" of the secured property. Contrary to the court's determination, however, the availability of an equitable mortgage "is not dependent upon the nature . . . of the error, but rather upon the existence of a 'clear intent between the parties that [certain] property be held, given or transferred as security for an obligation' " (*New York TRW Tit. Ins.*, 199 AD2d at 664).

We nevertheless conclude that the court properly denied plaintiff's motion for summary judgment because plaintiff failed to establish as a matter of law that both parties clearly intended to secure the promissory note with the subject property. In support of the motion, plaintiff relied on an affidavit from one of its employees who identifies herself as a "Resource Recovery Officer." Although the employee states that she is "fully familiar with all of the facts and proceedings heretofore had herein" and is "duly authorized" to give the affidavit, she does not explain how she knows that "it was expressly and impliedly agreed" between the parties to secure the note with the subject property. For instance, the employee does not state that she was the loan officer involved in approving the loan to the corporation, or that she was otherwise involved in the transaction.

It is not even clear from the affidavit that the employee worked for plaintiff when the loan was issued. Because plaintiff failed to meet its initial burden of establishing its entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), the court properly denied the motion "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Finally, defendant's contention that plaintiff is not entitled to equitable relief because it has an adequate remedy at law is raised for the first time on appeal and thus is unpreserved for our review (*see Powers v Faxton Hosp.*, 23 AD3d 1105, 1106).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

714

TP 13-02183

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

IN THE MATTER OF LYNN KORDASIEWICZ, PETITIONER,

V MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, CPS UNIT, AND NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT, RESPONDENTS.

TRONOLONE & SURGALLA, P.C., BUFFALO (DAVID C. CROWTHER OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [John M. Curran, J.], entered October 1, 2013) to review a determination of the New York State Office of Children and Family Services. The determination denied petitioner's application to amend the indicated report of maltreatment to an unfounded report.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination denying her request to amend to unfounded an indicated report of maltreatment with respect to her two children, and seeking to seal that amended report. Contrary to petitioner's contention, respondent Erie County Department of Social Services (DSS) established by a fair preponderance of the evidence that petitioner committed maltreatment. DSS presented the testimony of a caseworker who investigated a report, made to respondent New York State Central Register of Child Abuse and Maltreatment (SCR) by a mandated reporter, that petitioner had been arrested for, inter alia, driving while intoxicated with a blood alcohol content (BAC) of .18% based upon a Datamaster test and that petitioner's two children, ages six and seven, were in the car when she drove 1½ hours from Cuba, New York to Elma, New York, where she was arrested in her driveway. The redacted report to SCR also was admitted in evidence, and it contained a narrative stating that the police were notified by a citizen that petitioner had been observed swerving on a particular road. Petitioner had advised the caseworker that her driver's licence had

been revoked as a result of her arrest. Petitioner testified on her own behalf that she had drunk three six-ounce glasses of wine during a four-hour period from 3:00 p.m. to 7:00 p.m., and she denied that her ability to drive was impaired thereby. She admitted that the Datamaster test indicated a BAC of .18%, but she disputed the accuracy of that test. In addition, petitioner established that all criminal charges against her were dismissed.

It is well established that our review is limited to whether the determination to deny the request to amend and seal the SCR report is supported by substantial evidence in the record (*see Matter of Fechter v New York State Off. of Children & Family Servs.*, 107 AD3d 1583, 1584; *Matter of Mangus v Niagara County Dept. of Social Servs.*, 68 AD3d 1774, 1774, *lv denied* 15 NY3d 705). Substantial evidence in the record is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180). Although hearsay evidence alone, if it is sufficiently reliable and probative, may constitute sufficient evidence to support a determination (*see Matter of Saporito v Carrion*, 66 AD3d 912, 912; *Matter of Hattie G. v Monroe County Dept. of Social Servs.*, 48 AD3d 1292, 1293), we note that, contrary to petitioner's further contention, the determination herein was not based solely on the hearsay contained in the SCR report. Instead, after acknowledging that the criminal charges had been dismissed, the Hearing Officer based his determination on petitioner's admission that she had drunk three glasses of wine and that she knew that the Datamaster test results indicated a BAC of .18%, together with "the evidence in its entirety." We therefore conclude that the determination is supported by substantial evidence (*see Fechter*, 107 AD3d at 1584; *cf. Hattie G.*, 48 AD3d at 1293).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

723

KA 09-01038

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EFRAIN L. LOPEZ, ALSO KNOWN AS EFFRAIN LOPEZ,
DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Dennis M. Kehoe, A.J.), rendered February 20, 2009. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a second trial, upon a jury verdict of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). The first trial ended in a mistrial based on a deadlocked jury. Defendant failed to preserve for our review his contention that the evidence established only that he was a "mere bystander" to the subject sale of heroin and thus that the evidence is legally insufficient to establish that he was an accessory to the crimes, as charged (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, the evidence regarding his involvement in the subject sale did not establish that such involvement was merely "brief and incidental" (*People v Marshall*, 72 AD2d 922, 922). Rather, the evidence established that defendant shared the requisite intent to commit the charged crimes, and a rational trier of fact " 'could have found the elements of the crime[s] proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), we reject defendant's contention that the verdict is against the weight of the evidence. It is well settled that credibility issues are

"within the province of the jury, and its judgment should not be lightly disturbed" (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831), and we perceive no reason to disturb the jury's resolution of those issues in this case.

Defendant further contends that the double jeopardy clause prohibited defendant's retrial because the evidence at the first trial was legally insufficient. We reject that contention. Retrial is not barred by double jeopardy unless "the evidence from the first trial is determined by the reviewing court to be legally insufficient" (*People v Scerbo*, 74 AD3d 1730, 1731, *lv denied* 15 NY3d 757). Defendant concedes that "[t]he witnesses, testimony and evidence presented at the first trial were substantially similar to that presented at the second trial," and we previously rejected herein defendant's challenge to the legal sufficiency of the evidence at the second trial. In any event, viewing the facts in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence in the first trial was legally sufficient (*see generally Bleakley*, 69 NY2d at 495).

Defendant's further contention that prosecutorial misconduct on summation deprived him of a fair trial is preserved for our review only in part, inasmuch as he failed to object to several of the allegedly improper statements (*see People v Jones*, 114 AD3d 1239, 1241). In any event, defendant's contention lacks merit. We conclude that " '[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*id.*; *see People v Stanley*, 108 AD3d 1129, 1131, *lv denied* 22 NY3d 959; *People v Ward*, 107 AD3d 1605, 1606-1607, *lv denied* 21 NY3d 1078).

Also contrary to defendant's contention, Supreme Court properly admitted an audiotape of the subject heroin transaction in evidence and allowed the jury to use a transcript to assist it in understanding the audiotape (*see People v Cleveland*, 273 AD2d 787, 788, *lv denied* 95 NY2d 864). "A tape recording must be excluded from evidence only if it is so inaudible and indistinct that the jury would have to speculate concerning its contents" (*id.*). Moreover, "it is also within [the] court's discretion to allow the use of transcripts as an assistance once audibility [is] established . . . [The fact] [t]hat the transcripts were not made by an independent third party does not affect the tapes' admissibility once they are found to be audible . . . This is particularly so [where, as, here,] the transcripts themselves are not admitted [in] evidence" (*People v Watson*, 172 AD2d 882, 883).

We further reject defendant's contention that he received ineffective assistance of counsel based on defense counsel's failure to renew his motion for a trial order of dismissal after presenting evidence. As we determined herein, the evidence is legally sufficient, and it is well settled that 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" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

735

CA 13-02043

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

MICHELE FRIDMANN-HARKIEWICZ, ALSO KNOWN AS MICHELE HARKIEWICZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GARY ARTHUR HARKIEWICZ, ALSO KNOWN AS GARY HARKIEWICZ, DEFENDANT-APPELLANT.

CHARLES A. MESSINA, BLASDELL, FOR DEFENDANT-APPELLANT.

SHAW & SHAW, P.C., HAMBURG (JAMES M. SHAW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

DONNA L. HASLINGER, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from a judgment of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 1, 2013 in a divorce action. The judgment, among other things, distributed the marital assets and ordered defendant to pay spousal maintenance and child support.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sum set forth in the sixth decretal paragraph and substituting therefor the sum of $8,320, directing that the Prudential IRA and Vision Group IRA be distributed to defendant as separate property, and by adding thereto a provision pursuant to Domestic Relations Law § 236 (B) (7) (d) notifying the parties of their right to seek a modification of the child support and as modified the judgment is affirmed without costs.

Memorandum: Defendant appeals from a judgment of divorce that, insofar as appealed from, distributed the marital assets and ordered him to pay maintenance and child support to plaintiff. We note at the outset that, while Supreme Court properly considered the appreciation in the value of the marital residence, the court made a mathematical error when it calculated the value of the distributive award. Plaintiff's distributive award should have been $8,320, not $8,350, and we therefore modify the judgment accordingly. In addition, we agree with defendant that the IRAs are defendant's separate property and should be distributed to him accordingly (*see Hoadley v Hoadley*, 212 AD2d 1036, 1036-1037). We therefore further modify the judgment accordingly. We reject defendant's contention concerning child support and maintenance. Finally, although defendant is correct that the court failed to include the required notice pursuant to Domestic Relations Law § 236 (B) (7) (d) in the judgment, we conclude that the

court's failure does not require reversal (*see Mejia v Mejia*, 106 AD3d 786, 789). Rather, we further modify the judgment by including that notice.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

744

KA 13-00713

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND L. LEACH, JR., ALSO KNOWN AS RAYMOND L. LEACH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 11, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [vi]), defendant contends that his plea was not knowingly, intelligently, and voluntarily entered and, thus, that County Court erred in denying his motion to withdraw his plea. We reject that contention. "Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Robertson*, 255 AD2d 968, 968, *lv denied* 92 NY2d 1053; *see People v Zimmerman*, 100 AD3d 1360, 1361, *lv denied* 20 NY3d 1015). Here, we perceive no abuse of discretion.

We conclude that "[d]efendant's contention that he was pressured into accepting the plea is belied by his statements during the plea proceedings" (*People v Garner*, 86 AD3d 955, 955; *see generally Zimmerman*, 100 AD3d at 1361-1362). We further conclude that, "[t]o the extent that defendant contends that defense counsel was ineffective because he coerced defendant into pleading guilty, that contention is [also] belied by defendant's statement during the plea colloquy that the plea was not the result of any . . . coercion" (*People v Campbell*, 62 AD3d 1265, 1266, *lv denied* 13 NY3d 795).

Defendant contends that his guilty plea was not knowing, intelligent and voluntary because the court failed to advise him of the potential periods of incarceration for an enhanced sentence based upon a postplea arrest, but he failed to preserve that contention for our review inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Halsey*, 108 AD3d 1123, 1124). 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]).

Contrary to defendant's contention, "[a]lthough . . . [his] initial statements . . . during the factual allocution may have negated [an] essential element of [the crime of criminal contempt in the first degree], his further statements removed any doubt" that he had committed that crime (*People v Trinidad*, 23 AD3d 1060, 1061, *lv denied* 6 NY3d 760; *see People v Thomas*, 56 AD3d 1240, 1240, *lv denied* 12 NY3d 763).

We agree with defendant that his valid waiver of the right to appeal does not encompass the challenge to the severity of the sentence inasmuch as the court " 'failed to advise defendant of the potential periods of incarceration that could be imposed, including the potential periods of incarceration for an enhanced sentence . . . , before he waived his right to appeal' " (*People v Scott*, 101 AD3d 1773, 1774, *lv denied* 21 NY3d 1019; *see People v Huggins*, 45 AD3d 1380, 1380-1381, *lv denied* 9 NY3d 1006; *cf. People v Jackson*, 34 AD3d 1318, 1319, *lv denied* 8 NY3d 923). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

754

CA 13-00565

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

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

V MEMORANDUM AND ORDER

BRANDON ARMSTRONG, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (MARGOT S. BENNETT OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 14, 2013 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility. In response to respondent's motion in limine seeking to preclude petitioner from calling two experts to testify on the ground that it would be cumulative, Supreme Court held that only one of the experts could give an opinion. During the ensuing nonjury trial, two psychologists testified on petitioner's behalf. The record establishes that the first psychologist's testimony included hearsay statements made by an official from the Department of Corrections and Community Supervision, respondent's probation officer, and respondent's parents concerning, inter alia, respondent's commission of uncharged sex offenses, violations of probation, and violations of prison rules while incarcerated, all of which respondent admitted during his interviews with the first and second psychologist. After the first psychologist concluded his testimony without giving an opinion, respondent moved to strike the testimony on the ground that the first psychologist should not have been allowed to recite hearsay testimony without offering an opinion thereon. Under the circumstances of this case, we conclude that any error was harmless inasmuch as the court's determination was supported by the testimony and opinion of the second psychologist (*cf. Matter of State of New York v Floyd Y.*, 22 NY3d 95, 109-110; *see generally Matter of State of*

New York v Charada T., ___ NY3d ___ [May 8, 2014]).

To the extent that respondent contends that the hearsay statements to which the first psychologist testified were improperly used as an evidentiary basis for the second psychologist's opinion, that contention is belied by the record. The second psychologist never testified that, in formulating his own opinion, he relied on the first psychologist's testimony. Although the second psychologist may have used the report of the first psychologist, in part, to formulate his opinions, the record is devoid of any specific objection to the use of the report or any of the other documentary evidence utilized by the second psychologist. We note, too, that the first psychologist's report was already before the court pursuant to the procedure set forth in Mental Hygiene Law § 10.06 (d), and that the court is presumed to have properly given any hearsay statements therein their limited legal significance in making its factual findings (*see Matter of State of New York v Mark S.*, 87 AD3d 73, 80). We have considered respondent's remaining contention regarding hearsay testimony of the first psychologist and conclude that it is without merit (*see Charada T.*, ___ NY3d at ___; *Matter of State of New York v John S.*, ___ NY3d ___ [May 8, 2014]).

Contrary to respondent's contention, we conclude that petitioner met its burden of establishing by clear and convincing evidence that respondent suffers from a "[m]ental abnormality" as that term is defined in Mental Hygiene Law § 10.03 (i) (*see Matter of State of New York v Pierce*, 79 AD3d 1779, 1779-1780, *lv denied* 16 NY3d 712; *Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1140), and that he is a dangerous sex offender requiring confinement (*see* § 10.07 [f]; *Matter of State of New York v Blair*, 87 AD3d 1327, 1327; *Matter of State of New York v Boutelle*, 85 AD3d 1607, 1607). Contrary to respondent's further contention, the court was not "required to specifically address the issue of a less restrictive alternative" to civil confinement when it rendered its disposition (*Matter of State of New York v Gooding*, 104 AD3d 1282, 1282, *lv denied* 21 NY3d 862; *see Matter of Enrique T.*, 93 AD3d 158, 166-167, *lv dismissed* 18 NY3d 976).

Finally, we conclude that the court properly denied respondent's motion to dismiss the petition. The petition contained sufficient "statements alleging facts of an evidentiary character tending to support the allegation that the respondent is a sex offender requiring civil management" (Mental Hygiene Law § 10.06 [a]).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

756

CA 13-02098

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

AMANDA MCDONALD AND IAN POWER, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF MADELINE POWER, MINOR, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

LOU FARINA, DEFENDANT-APPELLANT.

MUSCATO, DIMILLO & VONA, L.L.P., LOCKPORT (A. ANGELO DIMILLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

MUSCATO & SHATKIN, LLP, BUFFALO (MARC SHATKIN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered July 16, 2013. The order denied the motion of defendant for 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 allegedly sustained by their daughter as a result of her ingestion of lead paint in an apartment owned by defendant. Defendant appeals from an order denying his motion for summary judgment dismissing the complaint. Contrary to defendant's contention, he failed to meet his initial burden on the motion, and we therefore conclude that Supreme Court properly denied it.

The complaint, insofar as relevant here, alleged that defendant was negligent in his ownership and maintenance of the premises by allowing the dangerous lead paint condition to exist, and that defendant knew, or should have known, that the dangerous condition existed. Defendant, as the party seeking summary judgment, bore the initial burden of establishing that he did not have actual or constructive notice of the dangerous condition, or a reasonable opportunity to remedy it, prior to the time that plaintiffs' daughter allegedly ingested the lead paint (*see generally Pagan v Rafter*, 107 AD3d 1505, 1507; *Hines v Double D & S Realty Mgt. Corp.*, 106 AD3d 1171, 1172-1174, *lv denied* 22 NY3d 852; *Williamson v Ringuett*, 85 AD3d 1427, 1428-1429). Defendant contends that he met his initial burden of demonstrating that he had no actual or constructive notice of the peeling lead-based paint before plaintiffs' daughter exhibited elevated lead levels in her blood and, therefore, he did not have a

reasonable opportunity to remedy the condition. We reject that contention. With respect to actual and constructive notice, "[t]he [five] factors set forth in *Chapman v Silber* (97 NY2d 9, 20-21 [2001]) remain the bases for determining whether a landlord knew or should have known of the existence of a hazardous lead[-]paint condition and thus may be held liable in a lead[-]paint case" (*Watson v Priore*, 104 AD3d 1304, 1305, *lv dismissed in part and denied in part* 21 NY3d 1052). Inasmuch as the evidence that defendant submitted in support of his motion failed to eliminate all triable issues of fact with respect to the five *Chapman* factors, we conclude that the court properly denied the motion, "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

770

CAF 12-01974

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

IN THE MATTER OF ROBERT JONES,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

THERESA LAIRD, RESPONDENT-PETITIONER-RESPONDENT.

KATHLEEN P. REARDON, ROCHESTER, FOR PETITIONER-RESPONDENT-APPELLANT.

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

ROBERT L. GOSPER, ATTORNEY FOR THE CHILDREN, CANANDAIGUA.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered October 9, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that respondent-petitioner shall have sole legal and physical custody of the parties' minor children.

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

Memorandum: Petitioner-respondent father contends in this proceeding pursuant to Family Court Act article 6 that Family Court erred in refusing to modify the existing custody arrangement by awarding him sole legal and physical custody of the parties' minor children in place of respondent-petitioner mother and in reducing his weekend access to the children. We reject the father's contention that the court erred in determining that he failed to demonstrate a change in circumstances sufficient to modify the existing custody order by awarding him custody. "It is well settled that, in seeking to modify an existing order of custody, '[t]he petitioner must make a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody order should be modified' " (*Matter of Hughes v Davis*, 68 AD3d 1674, 1675). Although the parties' existing custody arrangement is based on a stipulation that was reduced to an order and thus "is entitled to less weight than a disposition after a plenary trial" (*Matter of Alexandra H. v Raymond B.H.*, 37 AD3d 1125, 1126 [internal quotation marks omitted]; *see Matter of Brown v Marr*, 23 AD3d 1029, 1030), "a court cannot modify that order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the children" (*Matter*

of Hight v Hight, 19 AD3d 1159, 1160 [internal quotation marks omitted]). Here, the father failed to demonstrate a sufficient change in circumstances.

We reject the father's further contention that the court erred in granting the mother's petition seeking to modify the pickup and drop-off times of his weekend visitation schedule with the children. The mother made a sufficient showing of changed circumstances for purposes of adjusting the visitation schedule based on, inter alia, the parties' inability to reach an agreement regarding certain aspects of the children's visitation schedule, the mother's work schedule, the fact that the mother's former boyfriend was no longer providing childcare for the children in her home where the Friday afternoon exchanges occurred, and the extra time required to get the children prepared for an upcoming week of school on Sunday evening (*see Matter of Stilson v Stilson*, 93 AD3d 1222, 1223). Finally, we conclude that the adjusted visitation schedule is in the best interests of the children (*see generally Matter of Vasquez v Barfield*, 81 AD3d 1398, 1399).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

778

CA 13-02155

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

IN THE MATTER OF ROBERT PUCHALSKI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DEPEW UNION FREE SCHOOL DISTRICT AND BOARD
OF EDUCATION OF DEPEW UNION FREE SCHOOL
DISTRICT, RESPONDENTS-RESPONDENTS.

ARTHUR P. SCHEUERMANN, GENERAL COUNSEL, SCHOOL ADMINISTRATORS ASSOCIATION OF NEW YORK STATE, LATHAM (A. ANDRE DALBEC OF COUNSEL), FOR PETITIONER-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (TRACIE L. LOPARDI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered May 9, 2013 in a proceeding pursuant to CPLR article 75. The order, among other things, granted respondents' motion to dismiss the petition.

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

Memorandum: In this proceeding pursuant to CPLR article 75, petitioner appeals from an order that granted respondents' pre-answer motion to dismiss the petition. Although we agree with petitioner that Supreme Court erred in dismissing the petition as time-barred, we conclude that the court properly granted the motion on the alternative ground that petitioner's service of the petition was defective. We therefore affirm.

Petitioner was employed by respondents as an administrator for over 17 years and as the elementary school principal since 2003. Petitioner was granted tenure effective September 2003. On February 28, 2012, respondents served petitioner with 21 charges of, inter alia, "misconduct, immoral character and/or conduct unbecoming a principal," such as improperly using district finances, stealing services by using business hours to make lengthy personal telephone calls to two former female employees, and being frequently absent from school without an excuse and without notifying the proper people. Petitioner requested a hearing pursuant to Education Law § 3020-a and a hearing was held over six days, concluding on October 23, 2012.

On January 15, 2013, the Hearing Officer (HO) issued a decision that, inter alia, imposed a penalty of termination. The HO emailed that decision to the attorneys for the parties on January 15, 2013, and the State Education Department (SED) received the HO's decision from the HO on January 16, 2013. The SED then mailed the HO's decision to the parties on January 22, 2013. Petitioner received that mailing the following day, and he filed a petition seeking an order vacating the decision of the HO pursuant to CPLR 7511 on February 1, 2013.

In lieu of answering, respondents filed a pre-answer motion to dismiss the petition on the grounds that the proceeding was not timely commenced under Education Law § 3020-a (5) and that the court lacked personal jurisdiction over respondents because the notice of petition and petition were not properly served. In support of the motion, respondents submitted the affidavit of a payroll clerk employed by respondent Depew Union Free School District (District), who was assigned to work at the District's business office. The payroll clerk averred that she was responsible for gathering payroll information from "all non-instructive employees," calculating their salaries, and processing payroll through the District's computer system. The payroll clerk further averred that she was not authorized to accept service of legal papers on behalf of respondents, and that on February 5, 2013 at approximately 3:15 p.m. she was at her desk in the District's business office when a man carrying a large box with notes labeled "district clerk" told the payroll clerk that he had a box for the "district clerk or the superintendent." The payroll clerk told the man that the District's administrative offices were at a different location, but the man indicated that he did not have to give the box to the District's Superintendent or to the District Clerk, and that he would leave the box with her. The payroll clerk averred that she told the man her name and that she was responsible for payroll services, and that the man who delivered the papers never asked her whether she was authorized to accept service of the papers.

There is no dispute that the man at issue was petitioner's process server, or that the box contained the petition. Indeed, petitioner opposed the motion through a cross motion in which he, inter alia, sought a "judgment dismissing the motion . . . and granting the relief demanded in the . . . [p]etition." In support of the cross motion, petitioner submitted an affidavit of his process server, who indicated that he served the petition on the payroll clerk. According to the process server, at the time he served the petition, he informed the payroll clerk that he had papers for the District Clerk or the Superintendent. The payroll clerk indicated that neither the District Clerk nor the Superintendent was available, and she advised the process server that she was the payroll clerk. The process server nevertheless served the petition on the payroll clerk given his belief that "she was the clerk for the [S]chool [D]istrict."

As noted, the court granted the motion on both the filing and service grounds. The court determined that the petition was not timely filed pursuant to Education Law § 3020-a (5) inasmuch as the

petition was not filed within 10 days of petitioner's receipt of the HO's decision from the HO via email. The court further determined that petitioner's service of the petition was defective inasmuch as there was no evidence that the "payroll clerk was a designated school officer of the [District]."

The propriety of the court's determination that the petition was not timely filed turns on the interpretation of Education Law § 3020-a (4) and (5). Pursuant to section 3020-a (4) (a), "[t]he hearing officer shall render a written decision within [30] days of the last day of the final hearing, or in the case of an expedited hearing within [10] days of such expedited hearing, and shall forward a copy thereof to the commissioner who shall immediately forward copies of the decision to the employee and to the clerk or secretary of the employing board." Section 3020-a (4) (b) provides that "[w]ithin [15] days of receipt of the hearing officer's decision the employing board shall implement the decision. If the employee is acquitted he or she shall be restored to his or her position with full pay for any period of suspension without pay and the charges expunged from the employment record." Finally, section 3020-a (5) (a) provides that, "[n]ot later than [10] days after receipt of the hearing officer's decision, the employee or the employing board may make an application to the New York state supreme court to vacate or modify the decision of the hearing officer pursuant to [CPLR 7511]."

" 'The primary consideration of courts in interpreting a statute is to "ascertain and give effect to the intention of the Legislature" ' (*Riley v County of Broome*, 95 NY2d 455, 463 [2000], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 92 [a] at 177; *see Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]), and ' "we turn first to the plain language of the statute[] as the best evidence of legislative intent" ' (*Matter of Stateway Plaza Shopping Ctr. v Assessor of City of Watertown*, 87 AD3d 1359, 1361 [2011], quoting *Matter of Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563, 568 [2004])" (*New Yorkers for Constitutional Freedoms v New York State Senate*, 98 AD3d 285, 291-292, *lv denied* 19 NY3d 814). Moreover, "[i]t is well settled that '[a] statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent' . . . Furthermore, '[e]ach section of a legislative act must be considered and applied in connection with every other section of the act, so that all will have their due, and conjoint effect' . . . To determine the intent of a statute, 'inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision' " (*New York State Psychiatric Assn., Inc. v New York State Dept. of Health*, 19 NY3d 17, 23-24).

Against that background, we conclude that the phrase "receipt of the hearing officer's decision" in Education Law § 3020-a (5) (a) refers to the receipt of such decision from the SED. We thus reject respondents' contention that section 3020-a provides that the 10-day period in which to appeal runs from the receipt of the HO's decision by email, not the receipt of the HO's decision through mail sent by

the SED. Rather, we agree with petitioner that, by concluding that the 10-day period to appeal commenced upon petitioner's receipt of the HO's decision by email, the court rendered the notification process contained in Education Law § 3020-a (4) superfluous. Section 3020-a (4) (a) addresses posthearing procedures, requiring that an HO forward his or her decision following a hearing to the Commissioner of Education, who in turn is charged with immediately forwarding copies of the decision to the affected employee and to the clerk or secretary of the employing board. Section 3020-a (5) (a) then addresses the issue of an appeal from an HO decision, establishing the 10-day appellate window that is at issue here. We cannot conclude that the legislature would structure the distribution of the notice of an HO decision such that the Commissioner of Education (and, by natural extension, the SED) is to notify an educator of such determination and then create a period in which to challenge an HO decision that could begin to run before the entity charged with providing notice to an affected educator of an HO decision has actually given such notice. We thus conclude that the court erred to the extent it determined that the petition is time-barred (*cf. Matter of Awaraka v Board of Educ. of City of N.Y.*, 59 AD3d 442, 443).

We nevertheless affirm the order, however, because we agree with the court that petitioner's service of the petition was defective. The decision of the Second Department in *Matter of Franz v Board of Educ. of Elwood Union Free Sch. Dist.* (112 AD2d 934, *lv denied* 67 NY2d 603) is instructive. There, "[t]he notice of petition was personally delivered to [the] respondent [Board of Education]'s secretary," whom the Second Department concluded was "not a 'school officer' as set forth in . . . Education Law [§ 2 (13)]" (*id.* at 935). In support of that conclusion, the Second Department noted that "[t]he courts of this State have consistently required strict compliance with the statutory procedures for the institution of claims against the State and its governmental subdivisions, and where the Legislature has designated a particular public officer for the receipt of service of process, we are without authority to substitute another" (*id.* at 934-935; *see Matter of CL & F Dev., LLC v Jaros*, 57 AD3d 1468, 1469). We likewise conclude here that the payroll clerk employed in the District's business office was not a "school officer" under the Education Law.

Pursuant to CPLR 311 (a) (7), "[p]ersonal service upon a corporation or governmental subdivision shall be made by delivering the summons . . . upon a school district, to a school officer, as defined in the education law." Education Law § 2 (13) defines the term school officer as "a clerk, collector, or treasurer of any school district; a trustee; a member of a board of education or other body in control of the schools by whatever name known in a union free school district, central school district, central high school district, or in a city school district; a superintendent of schools; a district superintendent; a supervisor of attendance or attendance officer; or other elective or appointive officer in a school district whose duties generally relate to the administration of affairs connected with the public school system."

Although Education Law § 2 (13) refers to "a clerk," we conclude that the payroll clerk at issue here is not "a clerk" within the meaning of that section. We note that Education Law § 2130 is entitled "Clerk, treasurer and collector in union free school district," and it provides, inter alia, for the appointment of an "individual as clerk of the board of education of such district" (§ 2130 [1]). Sections 2 and 2130 of the Education Law were enacted at the same time (*see* L 1947, ch 820) and, in reading those sections together (*see generally* McKinney's Cons Laws of NY, Book 1, Statutes § 97, Comment), we conclude that the reference to a singular clerk in section 2130 (1) must apply to section 2 (13), such that there cannot be more than one person who is "a clerk" of the school district. We thus conclude that the payroll clerk was not eligible to be served with process as "a clerk" under section 2 (13).

All concur except SMITH, J.P. and PERADOTTO, J., who concur in the result in the following Memorandum: We concur in the result reached by the majority, i.e., that Supreme Court properly dismissed the petition in this CPLR article 75 proceeding. We write separately, however, because we respectfully disagree with the majority's conclusion that the petition was timely filed. We instead agree with the trial court that the petition was untimely inasmuch as it was not filed within "ten days after receipt of the hearing officer's decision" (Education Law § 3020-a [5] [a]).

As the majority notes, petitioner was employed by respondents as an administrator for over 17 years and as the elementary school principal since 2003, when he was granted tenure. On February 28, 2012, respondents filed formal disciplinary charges against petitioner, and petitioner requested a hearing pursuant to Education Law § 3020-a. Following the hearing, the Hearing Officer (HO) sustained the charges against petitioner and determined that termination was the appropriate penalty. The HO issued his decision on January 15, 2013, and emailed it to the parties on the same date. That evening, respondent Board of Education of Depew Union Free School District adopted a resolution to terminate petitioner's employment. By letter dated January 16, 2013, respondent Depew Union Free School District (District) notified petitioner that it was implementing the penalty imposed by the HO and that petitioner's employment with the District was terminated effective January 15, 2013. Petitioner received the District's letter on January 17, 2013. The HO also mailed a copy of his decision to the State Education Department (SED), which received the decision on January 16, 2013. The SED then mailed a copy of the decision to the parties on January 22, 2013. Petitioner's attorney received the mailing from the SED on January 23, 2013.

On February 1, 2013, petitioner commenced this CPLR article 75 proceeding seeking to vacate the HO's decision and, on February 5, 2013, a process server hired by petitioner served the notice of petition and petition upon a payroll clerk employed by the District in its business office. In lieu of answering, respondents filed a pre-answer motion to dismiss the petition on the grounds that the court lacked personal jurisdiction over respondents based upon improper

service of process and that the proceeding was not timely commenced under Education Law § 3020-a. The court granted the motion, concluding both that the petition was not timely filed pursuant to Education Law § 3020-a (5) and that petitioner's service of the petition was defective because there was no evidence that the "payroll clerk was a designated school officer of the [District]."

We agree with the majority's conclusion that the court properly dismissed the petition for lack of personal jurisdiction based on improper service of process, and thus concur in the result. We disagree with the further conclusion of the majority, however, that the court erred in determining that the proceeding is time-barred.

Education Law § 3020-a sets forth disciplinary procedures for, inter alia, tenured teachers and administrators. As relevant here, subdivision (4) of section 3020-a governs post-hearing procedures, and subdivision (5) governs appeals from a hearing officer's determination. With respect to post-hearing procedures, Education Law § 3020-a (4) (a) provides that "[t]he hearing officer shall render a written decision within [30] days of the last day of the final hearing, . . . and shall forward a copy thereof to the commissioner [of education of the State of New York] who shall immediately forward copies of the decision to the employee and to the clerk or secretary of the employing board" (*see* § 2 [5]). Section 3020-a (4) (b) provides that "[w]ithin [15] days of receipt of the hearing officer's decision the employing board shall implement the decision." With respect to appeals, section 3020-a (5) (a) states that, "[n]ot later than [10] days after receipt of the hearing officer's decision, the employee or the employing board may make an application to the New York state supreme court to vacate or modify the decision of the hearing officer pursuant to [CPLR 7511]."

The issue here is whether "receipt" as used in Education Law § 3020-a (5) (a), which governs the timeliness of appeals, is limited to receipt of the decision from the commissioner via the procedure set forth in section 3020-a (4) (a), or whether "receipt" encompasses other means of delivery, such as the HO's email transmission to the parties in this case. Petitioner asserts, and the majority agrees, that the language "receipt of the hearing officer's decision" in section 3020-a (5) refers to the receipt of the decision *from the SED* as set forth in section 3020-a (4). We disagree.

It is well settled that "[t]he primary consideration of courts in interpreting a statute is to 'ascertain and give effect to the intention of the Legislature' " (*Riley v County of Broome*, 95 NY2d 455, 463, quoting McKinney's Cons Laws of NY, Book 1, Statutes § 92 [a], at 177), and that "the words of the statute are the best evidence of the Legislature's intent" (*id*.). " '[A] court cannot amend a statute by inserting words that are not there,' . . . [and] 'an inference must be drawn that what is omitted or not included was intended to be omitted and excluded' " (*Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394, *rearg denied* 85 NY2d 1033). Thus, "[w]here . . . a statute is clear, a court should not attempt to cure an omission in the statute by supplying what it believes should

have been put there by the Legislature" (*Matter of Daniel C.*, 99 AD2d 35, 41, *affd* 63 NY2d 927; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 363, Comment).

Here, although section 3020-a (4) (a) of the Education Law provides that a hearing officer "shall forward" a copy of his or her decision to the SED, which in turn "shall immediately forward" copies of the decision to the employee and the employing board, the statute does not state that such procedure is the *only* method of notifying the parties of a hearing officer's decision. In order to accept the restrictive definition of "receipt" advanced by petitioner and adopted by the majority, we would have to insert language into the statute by construction. Specifically, we would have to read the statute as stating that "[n]ot later than [10] days after receipt of the hearing officer's decision [*from the commissioner*], the employee or the employing board may make an application to the New York state supreme court to vacate or modify the decision of the hearing officer" (§ 3020-a [5] [a]). In our view, had the legislature intended to limit receipt of the decision for purposes of measuring the time to appeal in subdivision (5) (a) to receipt from the SED as required in subdivision (4) (a), it could easily have done so by inserting the above italicized language.

Contrary to the assertion of petitioner, we conclude that allowing receipt of the decision from someone other than the commissioner does not render the notice provisions in section 3020-a (4) (a) of the Education Law superfluous. Those provisions ensure that there is a procedure by which the parties are certain to receive the HO's decision, but such procedure is not the only permissible method of providing notice of the decision. We further note that the SED has an independent interest in receiving notice of disciplinary determinations involving school personnel inasmuch as it is "charged with the general management and supervision of all public schools and all of the educational work of the state" (§ 101; *see* § 305 [2] [commissioner of education "shall have general supervision over all schools and institutions which are subject to the provisions of this chapter"]).

Finally, although not necessary to our analysis, we note that the legislative history of the statute supports our conclusion (*see generally Riley*, 95 NY2d at 463; *New Yorkers for Constitutional Freedoms v New York State Senate*, 98 AD3d 285, 294-295, *lv denied* 19 NY3d 814). Prior to 1994, Education Law § 3020-a hearings were conducted by a three-member hearing panel (*see* former § 3020-a [3] [a]; Governor's Program Bill Mem, Bill Jacket, L 1994, ch 691 at 8). After the hearing, the commissioner was required to forward a report of the hearing, including the hearing panel's findings and recommendations, to the parties (*see* former § 3020-a [4]), who could appeal those recommendations to the commissioner or bring a special proceeding pursuant to CPLR article 78 (*see* former § 3020-a [5]). After 1994, section 3020-a was amended to provide that hearings were, in most cases, to be conducted by a single hearing officer, and that the hearing officer's decision was a final determination appealable only pursuant to CPLR article 75 (*see* § 3020-a [3] [a], [b]; [5], as

amended by L 1994, ch 691, § 3; Governor's Program Bill Mem, Bill Jacket, L 1994, ch 691 at 7; Letter from State Educ Dept, Aug. 2, 1994 at 18, L 1994, ch 691). In lieu of requiring the commissioner to send the parties a copy of the panel's recommendation, the amendment directed the commissioner to send the parties a copy of the hearing officer's decision (*see* § 3020-a [4], as amended by L 1994, ch 691, § 3). We thus submit that the requirement that the decision be sent first to the commissioner and thereafter sent by the commissioner to the parties is a vestige of the former statute, which gave the commissioner the authority to review section 3020-a decisions, and does not suggest that the only proper method of notice to the parties of a hearing officer's decision is from the commissioner.

It is undisputed that petitioner received the HO's decision via email on January 15, 2013, and that he did not commence this CPLR article 75 proceeding until February 1, 2013, more than 10 days after receipt of the HO's decision. We therefore conclude that the court properly dismissed the petition on the additional ground that the proceeding was not timely commenced pursuant to Education Law § 3020-a.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

789

KA 11-02153

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL HASSETT, 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 (Joseph E. Fahey, J.), rendered March 14, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]). We agree with defendant that the waiver of the right to appeal is invalid because " 'the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Jones*, 107 AD3d 1589, 1589-1590, *lv denied* 21 NY3d 1075; *see People v Amir W.*, 107 AD3d 1639, 1640*; People v Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024), and because "there is no basis upon which to conclude that the court ensured 'that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*id.*, quoting *People v Lopez*, 6 NY3d 248, 256). In any event, we further agree with defendant that his contention regarding the court's imposition of an enhanced sentence based on his alleged violation of a condition of the plea agreement would survive even a valid waiver of the right to appeal, inasmuch as "the court failed to advise defendant of . . . the conduct that could result in the imposition of an enhanced sentence before defendant waived his right to appeal" (*People v Sundown*, 305 AD2d 1075, 1075-1076).

Defendant failed to preserve for our review his contention that the condition of the plea agreement concerning the imposition of an

enhanced sentence is invalid because it was imposed after he entered his guilty plea but before the conclusion of the plea proceeding (*see* CPL 470.05 [2]). He likewise failed to preserve for our review his further contention that the court erred in imposing an enhanced sentence without conducting a sufficient inquiry into his alleged violation of the conditions of the plea agreement and without holding an evidentiary hearing, inasmuch as he failed to object to the sufficiency of the court's inquiry or to request a hearing, and he did not move to withdraw his plea on that ground (*see People v Ali O.*, 115 AD3d 1353, 1353-1354, *lv denied* ___ NY3d ___ [May 28, 2014]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Finally, we reject defendant's contention that the enhanced sentence is unduly harsh and severe.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

791

CA 13-01044

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

IN THE MATTER OF MELVIN MOORE,
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 (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered May 6, 2013 in a CPLR article 78 proceeding. The judgment confirmed the determination of respondent and dismissed the petition.

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

Memorandum: Petitioner, an inmate at Attica Correctional Facility, commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II disciplinary hearing, that he violated inmate rules 102.10 (7 NYCRR 270.2 [B] [3] [i]) and 104.11 (7 NYCRR 270.2 [B] [5] [ii]) by threatening another inmate with violence. Petitioner failed to preserve for our review his contention that the hearing officer engaged in an off-the-record conversation with a witness for respondent (*see Matter of Jones v Fischer*, 111 AD3d 1362, 1363; *Matter of Martinez v Johnson*, 255 AD2d 967, 967). In any event, petitioner has not established that any such off-the-record conversation took place. Petitioner also failed to preserve his further contention that the hearing officer deprived him of his right to call witnesses at the disciplinary hearing, and we note, moreover, that petitioner did not exhaust his administrative remedies with respect to that contention (*see Peek v Dennison*, 39 AD3d 1239, 1240, *appeal dismissed* 9 NY3d 860). In any event, that contention is belied by the record. Finally, we note that petitioner has abandoned his contention, raised in the petition, that the determination is not supported by substantial evidence (*see generally Ciesinski v Town of*

Aurora, 202 AD2d 984, 984).

Entered: July 11, 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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TP 13-00546

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

IN THE MATTER OF CEDRIC REID, PETITIONER,

V MEMORANDUM AND ORDER

GREGORY SAJ, DEPUTY SUPERINTENDENT, LIVINGSTON CORRECTIONAL FACILITY, RESPONDENT.

CEDRIC REID, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Livingston County [Robert B. Wiggins, A.J.], entered March 11, 2013) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling those parts of the determination finding that petitioner violated inmate rules 113.11 (7 NYCRR 270.2 [B] [14] [ii]), 113.14 (7 NYCRR 270.2 [B] [14] [iv]) and 118.31 (7 NYCRR 270.2 [B] [19] [ix]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of those inmate rules.

Memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul the determination, following a tier II hearing, that he violated inmate rules 113.11 (7 NYCRR 270.2 [B] [14] [ii] [possession of altered item]), 113.14 (7 NYCRR 270.2 [B] [14] [iv] [possession of unauthorized medication]), 116.10 (7 NYCRR 270.2 [B] [17] [i] [stealing]), 116.13 (7 NYCRR 270.2 [B] [17] [iv] [possession of stolen property]), and 118.31 (7 NYCRR 270.2 [B] [19] [ix] [tampering with electricity]). Respondent concedes that those parts of the determination finding that petitioner violated inmate rules 113.11, 113.14 and 118.31, as alleged in the misbehavior report, are not supported by substantial evidence. We therefore modify the determination by granting the petition in part and annulling those parts of the determination finding that petitioner violated the stated rules, and we direct respondent to expunge from petitioner's institutional record all references thereto. Because the penalty has

already been served and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty.

Contrary to petitioner's contention, the remaining parts of the determination, finding that he violated inmate rules 116.10 and 116.13, are supported by substantial evidence (*see People ex rel. Vega v Smith*, 66 NY2d 130, 139). Petitioner's contention that he owned the object that he was alleged to have stolen created, at most, a credibility issue for the Hearing Officer to resolve (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966).

Petitioner's further contention that he was entitled to employee assistance in preparing his defense in this tier II hearing is without merit (*see Matter of Vann v Costello*, 285 AD2d 924, 924-925; *Matter of Booker v Rivera*, 276 AD2d 985, 985; *see generally* 7 NYCRR 251-4.1 [b]). We reject petitioner's contention that the Hearing Officer abused his discretion in denying petitioner's request for assistance in light of the complexity of this matter (*see generally* 7 NYCRR 251-4.1 [b]), particularly in the absence of any evidence of prejudice to petitioner from the lack of assistance (*see Matter of Cliff v De Celle*, 260 AD2d 812, 813-814, *lv denied* 93 NY2d 814). We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

796

KA 13-01805

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS W. JEWELL, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CARL J. ROSENKRANZ OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), entered June 14, 2013. The order, among other things, determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). As a preliminary matter, we note that defendant did not preserve for our review his contention that County Court improperly considered the grand jury testimony of the victim and the presentence report because he failed to object at the hearing to the court's consideration of those materials, despite the court's explicit reliance thereon. In any event, it is well settled that a court may consider reliable hearsay, including grand jury testimony and presentence reports (*see People v Mingo*, 12 NY3d 563, 572-573; *People v Perrah*, 99 AD3d 1257, 1257-1258, *lv denied* 20 NY3d 854). Moreover, no foundation testimony or evidence is required with respect to a presentence report or grand jury minutes (*see Mingo*, 12 NY3d at 573). We further conclude that the victim's grand jury testimony was the type of "victim[] statement" that the court is required to consider in making its determination whether offered by either of the parties or not (Correction Law § 168-n [3]; *People v Law*, 94 AD3d 1561, 1563, *lv denied* 19 NY3d 809). We also conclude that, inasmuch as the court presided over defendant's criminal proceeding, the presentence report and the grand jury minutes were part of the court's official file, and the court "was empowered to contemplate facts" elicited during that previous proceeding (*People v Fredenberg*, 27 AD3d 970, 970; *see* § 168-n [3]).

We reject defendant's contention that the court failed to make

adequate written findings of fact supporting its determination that defendant is a level three risk. Here, "the court's 'oral findings are supported by the record and sufficiently detailed to permit intelligent review; thus, remittal is not required despite defendant's accurate assertion regarding the court's failure to render a[written] order setting forth the findings of fact . . . upon which its determination is based' " (*People v Gosek*, 98 AD3d 1309, 1310).

Contrary to defendant's contention, the court did not err in assessing 25 points under risk factor 2 in the risk assessment instrument, for sexual contact with the victim, despite the fact that defendant pleaded guilty to two counts of attempted criminal sexual act in the second degree (Penal Law §§ 110.00, 130.45). "In assessing defendant's risk level . . . the court is 'not limited to the crime of conviction' " (*People v Hubel*, 70 AD3d 1492, 1493; *see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 5 [2006]). Here, the People met their burden of establishing by clear and convincing evidence, including reliable hearsay evidence such as the victim's grand jury testimony, the case summary, and the presentence investigation report, that defendant engaged in oral sexual conduct with the victim (*see Hubel*, 70 AD3d at 1493; *see generally Mingo*, 12 NY3d at 572-573). We also reject defendant's contention that the court erred in assessing 20 points under risk factor 4, for continuing course of sexual misconduct. Again, contrary to defendant's contention, "[t]he court is 'not limited to the crime of conviction' in assessing points for that risk factor" (*People v Slotman*, 112 AD3d 1332, 1333; *see* Risk Assessment Guidelines and Commentary, at 5). The reliable hearsay evidence presented by the People established that defendant engaged in two or more acts of sexual contact with the victim, at least one of which was an act of oral sexual contact, which were separated in time by at least 24 hours (*see* Risk Assessment Guidelines and Commentary, at 10). Contrary to defendant's further contention, the court properly assessed 10 points under risk factor 12, for failing to genuinely accept responsibility. The People established that defendant blamed the victim, " 'minimized the underlying sexual offense[,] and . . . denied that he performed the criminal sexual act [that] formed the basis for the conviction' during an interview with the Probation Department" (*People v Wilson*, 117 AD3d 1557, 1557; *see People v Baker*, 57 AD3d 1472, 1473, *lv denied* 12 NY3d 706). We thus conclude that "the People established by clear and convincing evidence that defendant 'fail[ed] to genuinely accept responsibility for his conduct as required by the risk assessment guidelines' " (*Wilson*, 117 AD3d at 1557).

Defendant's constitutional challenge to the court's assessment of 15 points under risk factor 14, for being released without official supervision, is not properly before us because there is no indication in the record that the Attorney General was given the requisite notice (*see* Executive Law § 71). In any event, it is well established that "a SORA risk-level determination is not part of a defendant's sentence . . . Rather, it is a collateral consequence of a conviction for a sex offense designed not to punish, but . . . to protect the public" (*People v Windham*, 10 NY3d 801, 802).

Finally, contrary to defendant's contention, the remoteness of his prior felony conviction is adequately taken into account by the risk assessment instrument and therefore is not, as a matter of law, a mitigating factor to be considered by the court in departing from the presumptive risk level (*see People v Wyatt*, 89 AD3d 112, 130-131, *lv denied* 18 NY3d 803).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

798

KA 12-01110

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM MCCLURE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 20, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence imposed "inasmuch as there is no indication in the record of the plea allocution that defendant was waiving his right to appeal the severity of the sentence[]" (*People v Doblinger,* 117 AD3d 1484, 1485; *see People v Maracle*, 19 NY3d 925, 928). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

805

KA 12-01948

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW AVELLINO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 9, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree and 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 burglary in the third degree (Penal Law § 140.20) and criminal possession of stolen property in the fourth degree (§ 165.45 [1]). We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence. Although "it is evident that defendant waived [his] right to appeal [his] *conviction*, there is no indication in the record that defendant waived the right to appeal the harshness of [his] *sentence*" (*People v Maracle*, 19 NY3d 925, 928; *see People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076). Furthermore, "[a]lthough the record establishes that defendant executed a written waiver of the right to appeal, there was no colloquy between [Supreme] Court and defendant regarding the waiver of the right to appeal to ensure that" defendant was aware that it encompassed his challenge to the severity of the sentence (*People v Carno*, 101 AD3d 1663, 1664, *lv denied* 20 NY3d 1060; *see generally People v Bradshaw*, 18 NY3d 257, 264-266). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

806

KA 11-01821

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK A. LORENZ, DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered September 22, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]). We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction" that he was also waiving his right to appeal any issue concerning the severity of the sentence (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see People v Maracle*, 19 NY3d 925, 928). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

807

KA 13-01342

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH M. DILAURA, DEFENDANT-APPELLANT.

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

JOSEPH M. DILAURA, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered October 18, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that the valid waiver of the right to appeal does not encompass the challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the harshness of his sentence" (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see People v Peterson*, 111 AD3d 1412, 1412). Nevertheless, we reject defendant's challenge to the severity of the sentence.

Defendant's further contention in his pro se supplemental brief that he was denied effective assistance of counsel does not survive his plea and valid waiver of the right to appeal his conviction inasmuch as "defendant failed to demonstrate that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney[']s] allegedly poor

performance' " (*People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912; *see People v Hodge*, 85 AD3d 1680, 1681, *lv denied* 18 NY3d 883; *People v Kearns*, 50 AD3d 1514, 1515, *lv denied* 11 NY3d 790). Finally, we reject defendant's request that this direct appeal from the judgment of conviction be decided in conjunction with a CPL article 440 motion that defendant has allegedly made in County Court. A direct appeal cannot be consolidated with a motion pending in a trial court.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

811

KAH 14-00170

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JUSTICE GREEN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRANDON SMITH, SUPERINTENDENT, MID-STATE
CORRECTIONAL FACILITY AND BRIAN FISCHER,
COMMISSIONER, NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.

GETNICK LIVINGSTON ATKINSON & PRIORE, LLP, UTICA (PATRICK G. RADEL OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PAUL GROENWEGEN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Erin P. Gall, J.), entered April 9, 2013 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: Petitioner's appeal from the judgment dismissing his petition for a writ of habeas corpus has been rendered moot by his release to parole supervision (*see People ex rel. Baron v New York State Dept. of Corrections*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807; *People ex rel. Graham v Fischer*, 70 AD3d 1381, 1381-1382), and the exception to the mootness doctrine does not apply herein (*see Baron*, 94 AD3d at 1410; *Graham*, 70 AD3d at 1381-1382; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). While this Court has the power to convert the habeas corpus proceeding into a CPLR article 78 proceeding, we decline to do so under the circumstances of this case (*see People ex rel. Keyes v Khahaifa*, 101 AD3d 1665, 1665, *lv denied* 20 NY3d 862).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

818

KA 13-00865

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MELISSA COTTON, DEFENDANT-APPELLANT.

NANCY J. BIZUB, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered January 10, 2013. The judgment convicted defendant, upon her plea of guilty, of robbery 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 upon her plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]), defendant contends that her waiver of the right to appeal is invalid because it was not knowingly, voluntarily, and intelligently entered. The record demonstrates, however, that County Court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Burt*, 101 AD3d 1729, 1730, *lv denied* 20 NY3d 1060 [internal quotation marks omitted]), and that, during the plea colloquy, the court properly described " 'the nature of the right being waived without lumping that right into the panoply of trial rights automatically forfeited upon pleading guilty' " (*People v Tabb*, 81 AD3d 1322, 1322, *lv denied* 16 NY3d 900, quoting *People v Lopez*, 6 NY3d 248, 257; *see People v Harris*, 94 AD3d 1484, 1485, *lv denied* 19 NY3d 961). Defendant also signed a written waiver of the right to appeal (*see People v Pulley*, 107 AD3d 1560, 1561, *lv denied* 21 NY3d 1076). We conclude that defendant's "responses during the plea colloquy and [her] execution of a written waiver of the right to appeal establish that [s]he intelligently, knowingly, and voluntarily waived [her] right to appeal" (*People v Rumsey*, 105 AD3d 1448, 1449, *lv denied* 21 NY3d 1019; *see generally Lopez*, 6 NY3d at 256), and that valid waiver forecloses any challenge by defendant to the severity of her sentence (*see Lopez*, 6 NY3d at 256; *People v Hidalgo*, 91 NY2d 733, 737; *People v Washington*, 117 AD3d 1416, 1416).

Finally, defendant's contention that she was denied effective

assistance of counsel does not survive her plea or her valid waiver of the right to appeal inasmuch as defendant "failed to demonstrate that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [her] attorney['s] allegedly poor performance' " (*People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912; *see People v Rizek* [appeal No. 1], 64 AD3d 1180, 1180, *lv denied* 13 NY3d 862).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

822

CAF 13-01441

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

IN THE MATTER OF CHERYL L. GROSS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

WADE R. GROSS, RESPONDENT-RESPONDENT.

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

MELISSA A. CAVAGNARO, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered July 24, 2013 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, dismissed the amended petition for a modification of custody.

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

Memorandum: On appeal from an order that, inter alia, dismissed her amended petition seeking to modify a prior custody order, petitioner mother contends that the Family Court Judge presiding over the case should have recused himself. We reject that contention. Here, the Judge informed the parties that he and respondent father had a mutual friend and that he had met the father one or two times prior to the instant proceeding. The Judge further stated that he was not a friend of the father and that he did not believe there was any reason to recuse himself. The mother was given the opportunity to discuss the matter with her attorney, and "[the mother's attorney], after conferring with h[er] client, waived any objection. [The mother therefore] may not raise the issue now after consenting that the [Judge] hear the case" (*Matter of Arcarese v Monachino*, 58 AD2d 1030, 1031, *lv denied* 42 NY2d 810; *see Matter of Shepard v Roll*, 278 AD2d 755, 757).

We further conclude that the court properly dismissed the amended petition. "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' " (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417; *see Matter of Carey v Windover*, 85 AD3d 1574, 1574, *lv denied* 17 NY3d 710) and, here, the mother failed to meet that burden. The mother contends that she made a showing of the requisite change in circumstances with evidence of a

change in her work schedule. At the hearing on the amended petition, however, the mother admitted that her new work hours did not reduce the amount of time she could spend with the children during her scheduled visitation period. Thus, "[t]here was no showing at the hearing that the mother's work schedule had changed substantially since the entry of the prior custody order" (*Matter of Porter v Nesbitt*, 74 AD3d 1786, 1787; *cf. Matter of Amy L.M. v Kevin M.M.*, 31 AD3d 1224, 1225).

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

823

TP 14-00205

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

IN THE MATTER OF JOY ARBOGAST, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, SPECIAL HEARING BUREAU, RESPONDENT.

MURPHY MEYERS LLP, ORCHARD PARK (MARGARET A. MURPHY OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Christopher J. Burns, J.], entered January 29, 2014) to review a determination of respondent. The determination denied petitioner's application to amend the indicated report of maltreatment to an unfounded report.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding to review a determination, made after a fair hearing, denying her request to amend an indicated report of maltreatment with respect to her four-year-old granddaughter to an unfounded report, and to seal it (*see* Social Services Law § 422 [8] [a] [v]; [c] [ii]). "At an administrative expungement hearing, a report of child . . . maltreatment must be established by a fair preponderance of the evidence" (*Matter of Reynolds v New York State Off. of Children & Family Servs.*, 101 AD3d 1738, 1738 [internal quotation marks omitted]), and "[o]ur review . . . is limited to whether the determination was supported by substantial evidence in the record on the petitioner['s] application for expungement" (*Matter of Mangus v Niagara County Dept. of Social Servs.*, 68 AD3d 1774, 1774, *lv denied* 15 NY3d 705 [internal quotation marks omitted]; *see Matter of Hattie G. v Monroe County Dept. of Social Servs., Children's Servs. Unit*, 48 AD3d 1292, 1293). Here, we conclude that, contrary to petitioner's contention, the hearsay evidence of maltreatment—including but not limited to testimony that the subject child told a nurse and a child protective services caseworker that petitioner caused her injury, i.e., a ripped right earlobe—constituted substantial evidence supporting the determination (*see Matter of Jeannette LL. v Johnson*, 2

AD3d 1261, 1263-1264; *see generally Matter of Draman v New York State Off. of Children & Family Servs.*, 78 AD3d 1603, 1603-1604). Although the testimony of petitioner and her sister conflicted with the evidence presented by respondent, "it is not within this Court's discretion to weigh conflicting testimony or substitute its own judgment for that of the administrative finder of fact" (*Matter of Ribya BB. v Wing*, 243 AD2d 1013, 1014; *see Matter of Crandall v New York State Off. of Children & Family Servs., Special Hearings Bur.*, 104 AD3d 1199, 1199). We therefore confirm the determination.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

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

832

KA 11-01321

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILSON STEWART, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 9, 2010. The appeal was held by this Court by order entered November 15, 2013, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (111 AD3d 1395). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of assault in the second degree and dismissing count two of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of assault in the first degree (Penal Law § 120.10 [1]), assault in the second degree (§ 120.05 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We previously held the case, reserved decision and remitted the matter to County Court to rule on that part of defendant's pretrial motion seeking inspection of the grand jury minutes to determine whether the grand jury proceedings were defective (*People v Stewart*, 111 AD3d 1395). Upon remittal, the court concluded that the grand jury proceedings were not defective, and defendant does not challenge that ruling upon resubmission of this appeal. We agree with defendant that assault in the second degree (§ 120.05 [2]) under count two of the indictment is a lesser included offense of assault in the first degree (§ 120.10 [1]) "and therefore should have been considered only in the alternative as an inclusory concurrent count of assault in the first degree" (*People v Flecha*, 43 AD3d 1385, 1386, *lv denied* 9 NY3d 990; *see* CPL 300.30 [4]; 300.40 [3] [b]). We thus modify the judgment accordingly. Finally, the sentence is not unduly harsh or severe.

Entered: July 11, 2014

Frances E. Cafarell
Clerk of the Court

MOTION NO. (368/14) CA 13-01136. -- RYAN NICASTRO, PLAINTIFF-RESPONDENT, V NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed July 11, 2014.)

KA 11-02611. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AMIR KITHCART, DEFENDANT-APPELLANT. Motion to dismiss granted. Memorandum: The matter is remitted to Onondaga County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed July 11, 2014.)